No. 98-1167

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD CHRISTENSEN, et al.,
Petitioners,

v.

HARRIS COUNTY, TEXAS, et al.,
Respondents.

BRIEF OF SPOKANE VALLEY FIRE PROTECTION DISTRICT NO. 1 AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Filed January 12, 2000

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INTEREST OF AMICUS CURIAE

This brief amicus curiae is filed by the Spokane Valley Fire Protection District No. 1, a public employer and political subdivision of the State of Washington. Spokane Valley Fire Protection District No. 1 is also the employer in *Collins v. Lobdell*, 188 F.3d 1124 (9th Cir. 1999), *petition for cert. filed and pending* (October 5, 1999). The parties to this case have consented to the filing of this brief as provided in the rules of this Court.[1]

SUMMARY OF THE ARGUMENT

The issue before the Court is the meaning of 29 U.S.C. § 207(o)(2)(A)(ii), part of the 1985 Amendments to the Fair Labor Standards Act of 1938: Must a public employer – to implement and maintain a lawful compensatory time program – have a pre-existing agreement or understanding with respect to every term and detail of the program? Specifically, must there be an agreement on the precise point whether the employer can direct the use of compensatory time to keep accrued liability for such time below a pre-determined level?

The Court should note several key points at the outset. First, Petitioners (and three of their four amici) now concede that the FLSA, as amended, permits public employers to direct the use of compensatory time. Their

[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.

sole remaining contention at this point is that a detailed agreement expressly preserving this particular right must pre-exist such a direction.

Second, there is nothing special about the power to direct the use of compensatory time; it is not a unique type of discretionary act. Petitioners thus urge on the Court an interpretation which would arguably apply equally to nearly ***any*** term, policy or detail of a public employer's compensatory time program. Taken to its logical conclusion, Petitioners' argument is necessarily that Subsection 7(o)(2)(A)(ii) of the FLSA requires public employers to obtain prior, express, employee agreement to each and every term and provision of a compensatory time plan.

This argument is inconsistent with the purpose and language of the FLSA, which Petitioners misconceive. The Act at its core contains mandatory minimum wage and overtime provisions, invariable by agreement. To provide relief to the states and their subdivisions from the burden of these requirements, Congress enacted the 1985 amendments precisely to permit flexible compensatory time plans in the public sector. Aside from the requirement that compensatory time be calculated at time and one-half and subject to an upper limit, Congress left the details of the plans to employer discretion, subject only to notice and to "agreement" as that term is understood in the Act. The FLSA contains no other restrictions on employer discretion in the operation of comp time plans and none were intended.

Having now conceded that public employers may lawfully order the use of compensatory time pursuant to

agreement, Petitioners and their amici apparently fail to grasp what an "agreement" under the FLSA is. As intended by Congress and as made clear by the DOL regulations, the FLSA allows public employers in states like Texas to institute compensatory time programs unilaterally. Employers like Harris County may make compensatory time programs "an express condition of employment." Thus the only "agreement" the FLSA requires is the employee's deigning to work knowing that that the County administers a comp time program consistent with the express requirements of the FLSA.[2]

This verity is fatal to Petitioners' appeal, because it forces them to the untenable argument that although an employer like Harris County can make its comp time program as a whole a condition of employment and enforce it as to anyone who comes to work there, those same employees could reject particular details of the plan (to wit, the provision allowing the employer to direct the use of comp time) and render those provisions unlawful under the FLSA.

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[2] The International Association of Firefighters, in their *amicus* brief, ***do*** recognize that this term, under the FLSA, essentially contemplates unilateral imposition of compensatory time plans by employers, requiring employees in states like Texas to quit or accept the plan. IAFF Br., Section II. This undoubtedly explains why the IAFF argues mightily – though without support in the language of the FLSA, in its legislative history, or from Petitioners themselves – that the FLSA prohibits public employers to direct the use of compensatory time even ***with*** agreement.

The Court need take the analysis no further to decide the present dispute. Under the stipulated facts, Petitioners received advance notice not only of Harris County's overall compensatory time plan, but also of the specific policy under which the County intended to direct the use of compensatory time to keep accruals below pre-determined maximum levels. Petitioners do not contend that this notice was deficient under the FLSA. And they continued to work for the County. Under the Act, this operated as acceptance of the compensatory time plan and all of its specific features, and is all the "agreement" the Act requires.

This is the correct result. There were good reasons that Congress intended to empower public employers in states without collective bargaining to make compensatory time programs an "express condition of employment." If each individual employee could opt out of the program at his or her discretion the goal of promoting employer flexibility in these states would be seriously undermined. The regime apparently urged by Petitioners, under which individual employee consent would also be required for each and every detail of a comp time program, would be an unmanageable nightmare for public employers, requiring either a patchwork of hundreds of individual, and potentially varying, agreements or, more likely, the forced abandonment of comp time altogether.[3]

[3] In states permitting public employees to organize, such as the state of Washington, *see Collins v. Lobdell*, 188 F.3d 1124 (9th Cir. 1999), a duty of good faith bargaining intermediates the process of agreement but still ultimately permits enforcement of a uniform policy as to all employees, whether they object individually to features of the policy or not. See Section II.B., infra.

And more broadly, the central purpose of the 1985 amendments was to increase public employer flexibility and to moderate the requirements of the FLSA in the public sector. To this end, Congress authorized compensatory time plans, requiring only that they be established in advance, that compensatory time be accrued at time and one-half, and that employee requests to utilize the time be granted except where doing so would cause undue hardship. As both the Fifth and Ninth Circuits have recognized, the Act places no other restrictions on employer discretion, and certainly no restriction forbidding employers to direct the use of compensatory time to keep accruals below pre-determined maximum levels. The Fifth and Ninth Circuits have properly concluded that to imply such a restriction would undermine the employer flexibility Congress so plainly intended to preserve. This Court should reach the same result, which best comports with the plain language of the FLSA, with the flexibility intended by the 1985 amendments, and with the delicate balance between Congressional power and state sovereignty that underlies FLSA jurisprudence.

ARGUMENT

I. UNDER THE STIPULATED FACTS, HARRIS COUNTY HAD "AGREEMENT," WITHIN THE MEANING OF THE FLSA, TO ITS COMPENSATORY TIME PLAN, INCLUDING A SPECIFIC POLICY PERMITTING THE COUNTY TO DIRECT THE USE OF COMPENSATORY TIME

Under Section 207(o)(2), a public employer wishing to institute a compensatory time program may do so either (i) pursuant to a "collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees" or (ii) in states, like Texas, where public employees may not have bargaining representatives, pursuant to individual agreements with the employees.

Specifically, Section 7 provides, in relevant part:

> Compensatory time
>
> (1) Employees of a public agency which is a . . . political subdivision of a State . . . 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 this section.
>
> (2) 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 and 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).

In states like Texas, which do not authorize public sector collective bargaining, employee agreement to a compensatory time system is analyzed under Subsection 207(o)(2)(A)(ii). *Moreau v. Kelvenhagen*, 508 U.S. 22, 113 S.Ct. 1905, 123 L.Ed. 2d 584 (1993). As intended by Congress and confirmed by the regulations issued by the Department of Labor, employers instituting compensatory time programs under this subsection may require their employees to agree to compensatory time "as an express condition of employment" provided the employee or applicant has notice of the program and is specifically informed that accrued comp time may be "preserved, used or cashed out consistent with" the FLSA. 29 C.F.R. § 553.23(c)(1); H. R. Rep. No. 331, 99th Cong., 1st Sess. 20 (October 24, 1985) ("The agreement or bilateral understanding to provide time off as compensation for overtime may take the form of an expressed condition of employment, so long as (1) the employee knowingly agrees to it as a condition of employment, and (2) the employee is informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of this new subsection.") (under Section 207(o)(2) "[c]ompensatory time would be allowed pursuant to an agreement, . . . ***or with prior notice to the***

employees") (emphasis added); S. Rep. No. 150, 99th Cong., 1st Sess. 11 (1985) (same).

In other words, a Texas employer who decides to implement or maintain a compensatory time program satisfies the "agreement" requirement of Subsection 207(o)(2)(A)(ii) by giving its employees notice that use of comp time will be a "condition of employment" and that the program will be administered in conformance with the express provisions of Section 207(o). Any employee who receives such notice and then either accepts or continues employment thereby manifests the "agreement" required by the FLSA.

Though the details are not set out in the stipulated facts, Petitioners themselves contend that this is precisely what happened in Harris County. Following enactment of the 1985 Amendments, the County unilaterally implemented a compensatory time system, thereby making agreement to the compensatory time program an express condition to employment in the sheriff's department. Pet. Br. at 16-18. Some of the deputies objected to ***any*** compensatory time system and challenged the Department's comp time program – unsuccessfully – all the way to this Court. *Id.*; *Moreau*, 508 U.S. 22. Because these deputies chose to remain employed with the Department, their only option was to argue that Subsection 207(o)(2)(A)(ii) did not apply to them or the Department. This Court rejected that argument.

As noted earlier, Petitioners and the United States concede that a public employer may lawfully direct the use of compensatory time if there is a prior "agreement" to that effect. Pet. Br. at 25; United States Br. at 19 n.10.

Under the language of the FLSA and the stipulated facts, such an agreement existed here and the Court can resolve this case without even deciding whether the "agreement" must include a detailed provision preserving employer discretion to direct comp time usage. Here the County plainly provided advance notice of its policy: "[i]t is the policy of the Harris County Sheriff's Department that the compensatory time of employees, . . . will be maintained below a predetermined maximum level." Not only was this general policy known by the employees, in specific instances where it might be applied, the employee was given advance notice "that he or she is nearing the maximum number." Petitioners do not argue that this notice is deficient under the FLSA.[4] Accordingly, individual employees who objected to this specific policy had the same option as any employee who objected generally to the comp time plan as a whole: they could resign or continue to work.

Having continued to work after receiving all required notice, Petitioners agreed to the policy under the FLSA. The Court's analysis need proceed no further than this point. Petitioners' appeal should be rejected.

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[4] Petitioners might conceivably argue that once a comp time plan is implemented, modifications to the plan are impermissible without some greater "agreement" than was necessary at the outset. While it is true that vagaries of state law might affect an employer's ability to make unilateral changes in established policies or past practices (likely the case, for example, in states that permit public employee bargaining) there is nothing ***in the FLSA*** requiring an employer to obtain new agreement every time the comp time program is amended. Rather, all that is required is notice, followed by employee decisions to continue working. 29 C.F.R. § 553.23(c).

II. EVEN IF HARRIS COUNTY HAD NOT ARTICULATED ITS POLICY IN THIS LEVEL OF DETAIL, IT WOULD STILL HAVE RETAINED THE DISCRETION UNDER THE FLSA TO DIRECT THE USE OF ACCRUED COMPENSATORY TIME

Even assuming Harris County had not issued its specific policy indicating that it would direct the use of compensatory time to keep accruals below certain maximums, the County would still have retained the authority to issue such directives. As both the Fifth and Ninth Circuits have recognized, this conclusion flows from at least two sources: 1) the underlying common law powers of employers to direct their work forces and manage their affairs; and 2) the absence of any language in the FLSA suggesting that Congress intended to restrict these powers by forbidding employers to direct the use of compensatory time.

Petitioners ground their argument to the contrary on Subsection 207(o)(2)(A), which includes the only "agreement" requirement of the 1985 Amendments. Petitioners contend that this Subsection requires more than just a general agreement to a compensatory time program. The agreement, they assert, must specifically set forth the employer's reservation of the right to direct the use of compensatory time.

Petitioners' contention fails for at least two reasons. First, Congress plainly knew how to constrain employer discretion when enacting the FLSA and its amendments. Congress did so explicitly in numerous mandatory provisions of the Act – minimum wage, for example – which are invariable by agreement. Nothing in the language or

legislative history of the Act suggests that Congress intended to prevent employers from directing employees to use up some of their compensatory time. To the contrary, Congress plainly intended to increase, rather than decrease, public employer flexibility through adoption of the provisions at issue. This argument is developed in detail in the Fifth and Ninth Circuit decisions, as well as in the brief of Harris County before this Court, and need not be reiterated here.

Second, because employers in a state such as Texas can impose the overall compensatory time plan as a condition of employment, it is simply illogical to conclude that Petitioners could avoid compliance with the fine points of the plan by objecting to them singularly. Spokane County develops this argument below.

A. The Plain Language of the FLSA Contemplates General and Informal, Rather than Specific and Formal, Understandings with Respect to Compensatory Time

The 1985 Amendments to the FLSA provide that a public employer wishing to provide compensatory time in lieu of overtime compensation may do so either (i) pursuant to a "collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and 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 the employee before the performance of the work . . . " 29 U.S.C. § 207(o)(2)(A).

Nothing in this language suggests that such agreements must include in advance every possible detail or fine point of the comp time program. Nor do the regulations indicate that customary employer discretion is destroyed unless the employer is both prescient and precise. Rather, the DOL regulations indicate that this provision is satisfied by something as simple as an "understanding" or even an "oral" agreement, and they further provide that more specific detail is wholly permissive. 29 C.F.R. § 553.23(b). Such agreements ***"may"*** include any number of specific details. 29 C.F.R. § 553.23(a)(2).

Section 207(o)'s omission of any reference to a need for detailed employee agreement is most properly interpreted to mean that general agreement, as provided by Subsection 207(o)(2)(A), to a compensatory time program is all the FLSA requires. It is hardly a stretch to conclude that Congress intended the details of public employer comp time programs to be worked out just like any other workplace dispute not covered by federal law – that is, according to the governing laws of each of the 50 states.

B. Because Employers Such as Harris County Can Lawfully Make Compensatory Time Programs in General a Condition of Employment, Employees Cannot Logically Possess Veto Power over the Lesser Details of the Plan

Having failed to find language in the Act forbidding employers to direct the use of compensatory time, Petitioners and the United States attempt to avoid the effect

of the FLSA's deafening silence by invoking the following syllogism.

> Under "the FLSA, any authority an employer might have to adopt a compensatory time program now derives solely from the voluntary agreement of the employees, not from any inherent power of the employer to prescribe the terms of employment. If employees withhold agreement, they retain an undisputed right to premium pay rather than compensatory time. . . .
>
> [a]n employee's greater power to insist on monetary compensation for all overtime includes a lesser power to accrue compensatory time as he or she wishes . . . "

United States Br. at 8 and 14. In other words, because an employee may withhold consent to participate in a comp time program at all, he or she may also withhold consent as to any details of such a program.

While it is true generally that a greater power implies a lesser, the Solicitor General has the situation backwards. In Texas, it is the public employer, not each individual public employee, who determines unilaterally whether to have a comp time program. The employee can consent or not. But under the FLSA, if the employee decides to withhold consent, ***the employer does not cancel the program.***[5] ***The employee decides to work elsewhere.*** In other

[5] Of course, if enough applicants or current employees objected to a comp time program, even public employers who may choose to make comp time an "express condition of employment," might abandon it. Though, in such a case, the

words, Subsection 207(o)(2)(A)(ii), as intended by Congress and as interpreted by the Department of Labor, assigns the greater power to the public employer, not to the individual employee. The more apt syllogism is this: Under Subsection 207(o)(2)(A)(ii), employees, like Petitioners, who accept or continue employment with an employer that uses comp time as an express condition of employment may not then object to the use of comp time as a general matter. It therefore follows that this same employee cannot further object under the FLSA to specific details about the employer's program. In other words, whether the objection is general or specific the remedy under the FLSA is the same: resign or reject the job offer.

Furthermore, this same ultimate authority to implement a compensatory time program largely obtains even in states that permit public employee bargaining. Most states do permit such bargaining. James T. O'Reilly, *Collision in the Congress: Congressional Accountability, Workplace Conflict, and the Separation of Powers*, 5 Geo. Mason L. Rev. 1, 21 (1996). Spokane Fire District No. 1, defendant in *Collins v. Lobdell*, is located in Washington State, which allows public employees to organize, identify an exclusive representative, and bargain collectively pursuant to the State's Public Employees' Collective Bargaining Act, RCW 41.56. To govern this process, Washington generally follows the principles, structure, and precedent established by and under the National Labor Relations Act. *See, e.g., Pasco Police Officers' Ass'n v. City of Pasco*, 132

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decision would presumably be prompted by market or in-state political forces, not in response to the FLSA veto power Petitioners claim here.

Wn.2d 450, 459, 938 P.2d 827, 832 (1997); *Vancouver Sch. Dist. No. 37 v. Service Employees Int'l Union, Local 92*, 79 Wn. App. 905, 917, 906 P.2d 946, 952-53 (1995).

According to this well-developed body of law, once a group of public employees has selected and the state has certified an exclusive representative, the employer has a duty to bargain in good faith over terms and conditions of employment – the so-called mandatory subjects of bargaining. RCW 41.56.040, 41.56.060, 41.56.100; *see also Pasco*, 132 Wn.2d at 460. Where agreement is reached, and a majority of the voting employees in the collective bargaining unit ratify it, the agreement becomes binding on the unit as a whole, including those employees who voted against ratification.

When agreement is ***not*** reached, and the employer has negotiated in good faith to impasse, it may, subject to some timing limitations, implement its final offer. *See generally* 1 Patrick Hardin, *The Developing Labor Law* 692 (3d ed. 1992). If they wish, employees may withhold their labor by striking. *City of Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 379, 831 P.2d 738, 740 (1992). The employers may temporarily – and eventually permanently – replace the strikers and hire new employees willing to accept the implemented terms and conditions.[6]

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[6] If the employer were to insist to impasse on an illegal provision – such as one permitting it to, for example, refuse to hire women, or to pay less than the minimum wage required by the FLSA, employee objections would be protected from retaliation. RCW 41.56.050. Thus an employer could not discharge and replace strikers protesting the illegal provision.

In the "uniformed" services – generally police and fire – Washington modifies these general principles and forbids strikes because of the powerful state interest in ensuring uninterrupted protection of public safety. RCW 41.56.430, 41.56.490. Because police officers and firefighters are denied the primary economic weapon of labor – the ability to withhold services by striking – the legislature also forbade their employers to lock the employees out or to implement final offers in bargaining. *Id.* Instead, when impasse is reached on any lawful mandatory subject, a neutral third party arbitrator determines the appropriate contract through the contested process of interest arbitration. RCW 41.56.440, 41.56.450.

So, in Washington, a public employer seeking to institute a compensatory time plan must offer it as a contract proposal, must negotiate in good faith with the employees' exclusive representative, and must reach a lawful impasse before the plan can be implemented as a final offer. Employees who object may strike because they object to the plan and may, if they persist and the employer does as well, ultimately be replaced by new employees willing to accept the plan. In the uniformed services, the employer must similarly bargain to impasse, and must then convince an interest arbitrator to include the plan provisions in the final contract. If successful, the employer may then utilize the plan despite the objections of the Union.

Thus, the ultimate principle that an employer offers conditions of employment, and employees accept those conditions by coming to work, obtains for most purposes in collective bargaining states like Washington as it would in Texas. At bottom, an employer who negotiates

in good faith to impasse may ultimately impose a comp time plan and may retain only those employees willing to accept it. In the police and fire arena, the same result may be reached over employee objections if an interest arbitrator includes the comp time provisions in the "agreement" he or she ultimately imposes. In either case, there will be many situations where public employees, even when they constitute a majority, may be required to accept a comp time plan though they object to it, in whole or in part.

The FLSA plainly recognizes and permits these various outcomes. Hence, Subsection 207(o)(2)(A) provides that a comp time plan may be implemented pursuant to a collective bargaining agreement. Nothing in Section 207(o) suggests that in providing that comp time could be instituted pursuant to a collective bargaining agreement, Congress intended to impose the additional requirement that all, or even a majority of employees, expressly consented to the plan.[7] Rather, Congress's obvious intent was to allow public sector employers and employees to reach agreement on their comp time programs in the same way as the reached agreement on other issues – through the applicable state's normal collective bargaining process.

Again, because the FLSA would permit implementation of a comp time program pursuant to a collective bargaining agreement even where state law provided mechanisms for such a program to be implemented over the objections of some, or even all, of the employees, it necessarily follows that the FLSA does not impose any

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[7] Of course, as a practical matter, that will usually be the case. As Congress repeatedly recognized, comp time plans are popular with most employees.

special requirement for express employee consent to the individual terms of such plans. It is simply illogical to conclude, as Petitioners and the Solicitor General do, that while specific consent is ultimately unnecessary to a compensatory time plan as a whole, specific assent is necessary on a minor subtopic of the plan – namely, the finer point of whether the employer can compel utilization of the comp time.

Petitioners may, of course, concede that even though all this may be true, the employer must still identify this particular act of discretion in its notice to employees (in Texas and similar states) or in its collective bargaining proposal (in Washington and its brethren.) At this level, Petitioners' argument becomes impossibly technical. The FLSA contains no express restriction preventing employers from ordering the use of compensatory time. Carried to its logical conclusion, Petitioner's argument would require public employers to anticipate a limitation imposed *silently* by the FLSA, then to preserve the discretion they had no notice they had lost by inserting specific language in this regard.

If this were the rule, compensatory time plans would quickly come to resemble the Prussian Legal Code. Congress cannot have intended this result in amendments whose principal objective was to preserve public employer flexibility and ease compliance with the FLSA. Further, this argument would have implications well beyond the present issue. What other areas of customary employer discretion did Congress intend silently to restrict? What other traditional management powers must public employers state expressly in order to preserve them against silent destruction? Must employers

spell out every detail of a compensatory time plan to render it valid?

It is far more likely that Congress intended the sensible result that employers preserve their normal discretion to operate except where Congress explicitly restricted that exercise – by requiring a minimum wage, for example. Congress did not do so in this area and public employers therefore should remain free to exercise their customary management powers. The Fifth and Ninth Circuits correctly arrived at this result and this Court should do so as well.

C. Consistent with the Principles of Federalism, this Court Should Interpret the FLSA to Restrain, Rather than Expand, Its Impact on the States and their Subdivisions

The principles of federalism rooted in the Tenth Amendment counsel that the FLSA be construed to provide public employers maximum flexibility in managing the levels of accrued compensatory time, subject only to the single constraint found in 29 U.S.C. § 207(o)(5). Although Congress does have some ability to regulate state functions, the Tenth Amendment imposes a broad restriction on this ability:

> Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly. . . . If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language

> of the statute. . . . In the case of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions. . . .

Gregory v. Ashcroft, 501 U.S. 452, 460, 470 (1991) (citations omitted) (refusing to read the Age Discrimination in Employment Act to apply to state court judges because such an intent was not clearly expressed in the statute); *see also McNally v. United States*, 483 U.S. 350, 360 (1987) (federal statutes should not be construed in a manner to infringe on states' abilities to regulate state officials without a clear intent from Congress). Accordingly, the Court must narrowly construe statutes encroaching on state functions to ensure that regulation of state functions by the federal government does not exceed that allowed under the Tenth Amendment. Because Congress has not clearly expressed an intent to prohibit public employers from requiring employees to use accrued compensatory time if they refuse to do so voluntarily, as discussed above, FLSA cannot be interpreted to outlaw the practice.

Further, because the issue of whether FLSA is even constitutional as applied to state and local governments is a close one, it should be construed narrowly in this context. In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court held that as applied to traditional state governmental functions, FLSA violated the Tenth Amendment, infringing on state sovereignty. A mere nine years later, the Court reversed itself in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The *Garcia* decision was reached by the slimmest of margins in a 5-4 vote, with the dissenters arguing that the majority's opinion did not comport with the principles of federalism embodied in the Constitution. This counsels against an

expansive reading of FLSA as applied to state and local governments: the FLSA should be construed to provide state and local governments maximum latitude in making determinations about wages and hours of their employees, to the extent consistent with the plain language of the statute.

Additionally, some members of Congress believed that *Garcia* was wrongly decided and improperly intruded on states' rights. *See, e.g.*, 131 Cong. Rec. S14044 (daily ed. Oct. 21, 1985) (statements of Sens. Thurmond and Symms); 131 Cong. Rec. S11081 (Sept. 9, 1985) (statement of Sen. Helms); 131 Cong. Rec. S11033 (Sept. 9, 1985) (statement of Sen. Symms); 131 Cong. Rec. S9495 (July 15, 1985) (statement of Sen. Symms). The result was that the 1985 compensatory time amendment was enacted as compromise legislation. *See, e.g.*, 131 Cong. Rec. H9235 (daily ed. Oct. 28, 1985) (statements of Reps. Murphy and Hawkins); 131 Cong. Rec. S14044 (daily ed. Oct. 21, 1985) (statement of Sen. Thurmond). Such indications of Congressional concern over the perceived derogation of federalism in *Garcia* also advise against construing the amendments to broadly regulate areas of traditional state functions, if not explicitly stated in the statute. In sum, federalism dictates that limitations on state and local governments' ability to utilize compensatory time not appearing expressly in the FLSA should not be imposed by judicial fiat. Both the Fifth and Ninth Circuits observed precisely this restraint.

Unwarranted preemption of the states' dispute resolution processes applicable to public employees also will result if this Court inflicts restrictions on public employers' use of compensatory time, other than as

expressly provided in FLSA. The vast majority of public employees to whom this Court's ruling will apply are represented and covered by collective bargaining agreements or subject to civil service rules, as provided under state law. Under either type of scheme, the method for resolving differences concerning interpretations of agreements or employment practices is through arbitration or other dispute resolution process, not through the federal courts.

This Court should proceed with all due caution before adopting a rule that would potentially remove many of these day-to-day labor disputes from the state and local tribunals and other dispute resolution procedures specifically designed to resolve them, and bring them instead into federal court as claims under the FLSA.

It takes no great stretch of imagination to envision the kinds of disputes that could be turned into FLSA claims under Petitioners' interpretation. Any dispute even touching on comp time would become an invitation to forum shopping of the worst kind. For example, suppose during a flu epidemic, a public employer temporarily required employees to provide 48-hours advance notice for non-emergency absences. The employer's position is that the collective bargaining agreement allows such temporary measures. The union disputes the employer's interpretation, and further notes that non-emergency absences might also impact the use of comp time. Ordinarily, this would be a run-of-the-mill collective bargaining dispute apt for resolution under normal state grievance or arbitration procedures specially developed to resolve it. However, under Petitioners' position, the union would be able to chose between the customary

state forum, or it could bring an FLSA claim in federal court, where it would claim that the employers' failure to obtain express agreement on this particular detail violated the FLSA. Similar scenarios would likely result from any number of areas of traditional workplace disputes.

It is impossible to glean any Congressional intent to create such a wide displacement of state law dispute resolution in Section 207(o). Rather, in enacting the 1985 Amendments, Congress was clear in what it intended to bring within the ambit of the FLSA. Thus, at least five types of disputes that may be properly brought in federal court under the FLSA:

- whether employees are receiving comp time "at a rate not less than one and one-half hours for each hour of employment," 29 U.S.C. § 207(o)(1);
- whether the comp time program was adopted pursuant to collective bargaining, some other agreement, or, where the program is an "express condition of employment," whether it was adopted with appropriate notice, 29 U.S.C. § 207(o)(2);
- whether employers are using comp time beyond the statutory maximums, 29 U.S.C. § 207(o)(3)(A);
- whether cash payments for comp time are made at the appropriate wage rates, 29 U.S.C. § 207(o)(3)(B) and 29 U.S.C. § 207(o)(4); and
- whether employees are being properly allowed to take time off. 29 U.S.C. § 207(o)(5).

These provisions plainly demonstrate that Congress was capable of identifying with precision those mandatory requirements employers were to observe. Notably, Congress did not include a prohibition on employer-directed use of compensatory time, nor on the many other imaginable details that might attend compensatory time plans. This strongly suggests that Congress intended disputes over such details to be resolved at the state level, under state law. This is consistent with this Court's holding in *Moreau v. Klevenhagen*, 508 U.S. 22 (1993), where the Court looked to state law to determine the meaning of "representative" under Subsection 207(o)(2)(A).

D. Neither the FLSA Nor the 1985 Amendments Are Designed to Protect the Interests of Employees Who Want to Manipulate a Comp Time Plan by Refusing to Schedule Time Off

Perhaps the most strained argument of all is Petitioner's contention that allowing employees a unilateral veto over policies to manage comp time liabilities best meets the purposes of the FLSA and the 1985 Amendments. Petitioners, by their own account, are employees who have always objected to compensatory time in lieu of premium pay but were required to accept it as an "express condition of employment." *See* Petitioners' Br. at 16. Their intention is clear. They want to amass and then maintain the statutory maximum of comp time so that they can require the Harris County Sheriff's Department

to pay cash premiums for future overtime.[8] In other words, Petitioners are a group of employees who want to work, on average, more than 40 hours per week, and when they do so, they want to receive premium pay. This is not the profile of the employee Congress was concerned with when it enacted FLSA or when it adopted the 1985 Amendments.

The Fair Labor Standards Act, enacted in 1938, grew out of the economic devastation of the Great Depression. The purposes of FLSA were to create a minimum wage standard to prevent wage exploitation, to promote fair competition in interstate commerce, and to generate additional jobs. With respect to the latter purpose, Congress believed that requiring overtime pay for hours greater than the maximum contained in the statute would encourage employers to hire more workers, employing each employee for fewer hours. *See* H. R. Rep. No. 1452 (1937); *see also* S. Rep. No. 884 (1937); H. R. Rep. No. 2182 (1938); Conf. Rep., H. Rep. No. 2738 (1938).

> The purpose [of FLSA] was to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra

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[8] This was precisely the same kind of manipulation attempted by the Spokane County employees who brought the action in *Collins v. Lobdell*. There, the employer agreed to permit the firefighter employees to perform certain tasks rather than contracting them out. The understanding from the outset was that these tasks would be performed for compensatory time and not for cash. A number of employees refused to utilize their compensatory time as it accrued. Absent power to direct the use of some of the accrued comp time, this would have forced the employer to a Hobson's choice: leave the work undone, or pay unbudgeted cash for it. *Collins v. Lobdell*, 188 F.3d at 1126.

> work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost. The statute by its terms protects the group of employees by protecting each individual employee from overly long hours.

Bay Ridge Operating Co., Inc., 334 U.S. 446, 459 (1948); *see also Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 796 (1945) (FLSA enacted "to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce."); *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 577 (1942) (a fundamental purpose of FLSA was to reduce unemployment by reducing hours of work; "In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was a part of the plan from the beginning.").

In sum, the ideal of the FLSA is the 40-hour workweek. For obvious reasons, this goal is difficult to achieve in the public sector, especially with emergency services like police and fire protection. Unanticipated emergencies like the Rodney King unrest in Los Angeles, natural disasters, and unique events like the millennial celebrations, or the WTO protests in Seattle, inevitably mean that there will be weeks when the men and women who make up the police forces and fire departments of this nation will be called upon to work more than 40 hours. Comp time does not eliminate this, but it does allow for the employee and employer to strive for a 40-hour ***average***.

Thus, the employee who works 60 hours fighting fires one week restores the balance, and furthers Congress's intent, by working ten hours the next week, 30 hours the next three weeks, or by taking time off in any other combination. Congress's intent of promoting the goal of the 40-hour workweek is frustrated, not furthered, by employees like Petitioners who work the overtime, but then refuse to take any time off.

The other interests Congress sought to further in enacting the 1985 Amendments to the FLSA are hardly opaque. Plainly the driving factor was the concern about the costs imposed by application of the FLSA to states and their subdivisions. At the time the Amendments were passed, these costs were estimated at "between $0.5 billion and $1.5 billion nationwide." *See* H.R. Rep. 331 at 9, *supra*. The Amendments were designed to allow the States and their subdivisions additional flexibility in meeting their "special responsibilities in promoting the public good." *Id.* at 17. At the same time, Congress was plainly cognizant of the interests of public employees. Congress' chief concern in this regard was that employees should be able to use their comp time they accrued. Accordingly, Congress spoke of seeking "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. There was also concern that employees might run up comp time balances that were so great they would not be able to use them. *Id.* Notably absent was any concern that employees might refuse to use the comp time they earned, or that if

they did so, such employees warranted special protections under the FLSA beyond those already available to them under state law.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted this 12th day of January, 2000.

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