No. 98-1167

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD CHRISTENSEN, et al.,
Petitioners,

v.

HARRIS COUNTY, TEXAS, et al.,
Respondents.

BRIEF FOR RESPONDENTS

Filed January 13, 2000

QUESTION PRESENTED

Whether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. § 207(o), may, absent a preexisting agreement, require its employees to use accrued compensatory time.

PARTIES TO THE PROCEEDING

Petitioners:

Edward A. Christensen; Kenneth O. Adams; David W. Addison; Jose A. Alvarado; Robert Amboree; Bobby G. Andrews; Randy Anderwald; Gary R. Ashford; Craig L. Bailey; Richard Bailey; Richardo E. Balderaz; Herbert V. Barnard; Gerald Barnett; Paulette M. Barnett; Brad T. Bennett; Bridgett Blackmon; Flynt E. Blackwell; Gary F. Blahuta; Scott P. Blankenburg; Deborah Bliese; Bruce H. Breckenridge; J. W. Brooks; Brian Buchanan; Patricia M. Bui; Don E. Bynum; Clarence A. Callis; William M. Campbell; Heather Carr; Thomas J. Carr; Paul E. Carpenter; Robert Casey; Mark E. Cepiel; Eladio C. Chavez; Roy Clark; Denny D. Coker; Alford A. Cook; Gregory P. Cox; Donald D. Crayton; Richard D. Crook; David A. Davis; Gary W. Davis; Christopher E. Dempsey; Russell Dukes; Larry A. Eikhoff; Frank Fairley; David W. Finely; James P. Fitzgerald; Erine R. Fowler; Michael A. Garcia; Thomas M. Gentry; John Godejohann; Robert M. Goerlitz; David Gonzales; Raul V. Gonzales; Miguel A. Gonzalez; Billy Gray; William L. Gray; Lawrence P. Gries; Thomas P. Gurney; Preston R. Halfin; Sammy Head; Neil Hines; Larry D. Howell; Marshall P. Isom; James A. Johnson; Derry L. Jones; David E. Kaup; William C. Kenisell; Howard J. Kimble; Steve Kirk; Edgar D. Knighten; Freddy G. Lafuente; Michael G. LaGrone; Al Lanford; Vernon S. Lemons; Shemei B. Levi; Jeanne Long; Timothy Loyd; Joe S. Magallon; David B. Martin; Pedro Martinez; Russell L. Mayfield; Terry McGregor; Robert C. Meaux; Stephen Melinder; Marty M. Mingo; D. D. Montgomery; Jose L. Morin; Richard O. Newby; Arthur W. Nolley; William R.

PARTIES TO THE PROCEEDING - Continued

Norwood; Richard C. Nunnery; Karen D. O'Bannion; Raymond E. O'Bannion; Guadalupe Palafox; Wayne Parinello; Deborah Petruska; James A. Phillips; Simon C. Ramirez; Michael B. Rankin; James C. Reynolds; Willard G. Rogers; Gerald M. Robinson; Joe Ruffino; Lance J. Scott; Rob R. Self; Donald Shaver; James K. Shipley; James Smedick; Gina K. Spriggs (Grahmann); Jeffery M. Stauber; Larry L. Strickland; Billy J. Taylor; Kerry Townsend; Richard S. Trenski; Gordon Trott; Ed Trotti; Richard D. Valdez; Dalton E. Van Slyke; Frank L. Vernagallo; Ruben Villarreal; Johnny F. Walling; Gerald R. Warren; James M. Watson; Thomas G. Welch; John H. Wheeler; Joseph L. Williams; Rwanda Wiltz

Respondents:

Harris County, Texas, Tommy B. Thomas, Harris County Sheriff

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

STATUTES

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

MISCELLANEOUS

TABLE OF AUTHORITIES – Continued

Page

BRIEF FOR RESPONDENTS

The question presented by this case was decided correctly by the Fifth Circuit below, 158 F.3d 241, and by the Ninth Circuit in *Collins v. Lobdell*, 188 F.3d 1124 (9th Cir. 1999), *cert. pending*, 68 U.S.L.W. 3263, 3327 (Oct. 5 & Nov. 5, 1999). The Fifth and Ninth Circuits correctly held that Congress did not take away local governments' right reasonably to require law enforcement and fire protection employees to utilize accrued compensatory time, rather than "bank" that time in perpetuity.

The contrary holding for which Petitioners contend would defeat Congress's intent for enacting 29 U.S.C. § 207(o). A contrary ruling would permit employees of local governments to bank compensatory time until they reach the maximum number of hours permitted, return at that point to paid overtime, and preserve their "banks" of accrued compensatory time until they resign or retire, cashing it out at then-existing hourly rates. *See* 29 U.S.C. § 207(o)(3)(A), (B). That scenario affords little or no relief to local governments responsible for providing, within limited budgets, emergency police and fire protection to their citizens. Each employee, after his or her maximum cap of compensatory hours is reached (240 hours of accrued compensatory time in Harris County's case), will return to overtime pay, and the County will incur an ever-increasing future liability for "cashing out" employees' compensatory time "banks."

Absent clear direction from Congress, the Court should not impose the additional administrative and

financial burdens on local governments for which Petitioners and the *amici* supporting Petitioners contend. Providing police services in a major metropolitan county is already a demanding task. As natural disasters, law enforcement emergencies, and other unanticipated events occur, the Harris County Sheriff needs more deputies on duty on some days than others, and the needs often are great and wholly unpredictable. The Sheriff requires flexibility to deploy his forces on overtime as needs arise by awarding compensatory time off, and then reasonably to manage the County's liability for that compensatory time. As the Fifth Circuit correctly held, the Harris County policy at issue here does not violate 29 U.S.C. § 207(o), and that should end the judicial inquiry. The decision below should be affirmed.

STATEMENT OF THE CASE AND THE STIPULATED FACTS

This case was tried below on the following stipulation of the pertinent facts:

> Harris County personnel regulations provide for the payment of compensatory time off for its employees in accordance with the Fair Labor Standards Act. It is the policy of the Harris County Sheriff's Department that the compensatory time of employees, who for purposes of the Fair Labor Standards Act are considered non-exempt, will be maintained below a predetermined maximum level. Pursuant to this policy, each Bureau Commander determines the maximum number of compensatory hours that may be maintained by the employees in his or her bureau. Such determination is based upon an assessment of the personnel requirements of the particular bureau. Whenever it appears that an employee has accumulated compensatory hours which approach the maximum allowable number of compensatory hours authorized by the Fair Labor Standards Act, the employee is advised that he or she is nearing the maximum number and is requested to voluntarily take steps to begin reducing the number of accumulated compensatory hours. If the employee does not voluntarily take steps to reduce the accumulated hours within a reasonable time, the employee's supervisor is authorized to order the employee to reduce his or her accumulated compensatory time. While the Department attempts to arrange mutually agreeable times for the employee to utilize his or her accumulated compensatory time, an agreement cannot always be reached between the employee and the supervisor. In that event, the supervisory personnel are authorized by the Department to issue an order directing the employee to utilize compensatory time at a time or times that will best serve the personnel requirements of the bureau. If the employee is dissatisfied with the supervisor's order, he or she may complain to higher levels of supervision within the Department on an informal basis.

Pet. App. D, pp. 29a-31a; Pet. Br. at 20-21.

Petitioners' Brief overlooks important parts of the stipulated facts. Unlike the impression Petitioners attempt to create, the employees of the Harris County

Sheriff's Department are not required arbitrarily to use accrued compensatory time. As the stipulated facts establish, the Sheriff's Department alerts employees as their accrued compensatory time nears the maximum and asks them voluntarily to schedule time off. Failing that, Sheriff's Department supervisors attempt to reach an agreement with each employee about when time off will be taken. Only if no agreement can be reached with an individual employee is that employee scheduled for mandatory time off.

In addition, the Sheriff's Department does not require its employees to utilize *all* of their compensatory time. Harris County's policy comes into play only when an individual employee's time approaches the maximum, and the policy merely requires use of enough time so that the employee does not exceed the maximum number of compensatory hours permitted.

On the basis of the stipulated facts,[1] Petitioner's moved for summary judgment in the district court, contending that Harris County's policy described in the stipulation violates 29 U.S.C. § 207(o)(5). R. Doc. 26. Harris County filed a cross motion for partial summary judgment. The district court, relying on *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert. denied sub nom. Schriro v. Heaton*, 515 U.S. 1104 (1995), granted Petitioners' motion for summary judgment, declaring that "Harris County may not force employees to use their accumulated compensatory time without violating the Fair Labor Standards Act." Pet. App. C. p. 28a (judgment of district court); *see Moreau v. Harris County*, 945 F. Supp. 1067, 1068-69 (S.D. Tex. 1996).

[1] Since this case proceeded through both courts below solely on the stipulated facts (Pet. Br. at 20) Harris County objects to Petitioners' going outside the record in their Brief on the Merits to quote Harris County Personnel Regulations (Pet. Br. at 17-18) and correspondence between the Harris County Attorney's Office and the Wage and Hour Division of the Department of Labor (Pet. Br. at 18-19). The decision in this case should turn on whether Harris County's policy, as described in the stipulated facts, violates 29 U.S.C. § 207(o).

On appeal, in a majority opinion by Judge Higginbotham joined by Judge Parker, the Fifth Circuit reversed the district court and entered judgment for Harris County. 158 F.3d 241; Pet. App. A, pp. 1a-14a. Judge Dennis concurred in part and dissented in part. 158 F.3d at 247-51; Pet. App. A, pp. 14a-23a.

In August 1999, the Ninth Circuit considered the same question in *Collins v. Lobdell*, 188 F.3d 1124 (9th Cir. 1999). Examining the conflict between the Fifth Circuit in this case and the Eighth Circuit in *Heaton v. Moore*, the Ninth Circuit panel unanimously agreed with the Fifth Circuit majority in this case.

This Court granted certiorari on October 12, 1999. J.A. 4.

SUMMARY OF THE ARGUMENT

The 1985 Amendments to the FLSA were enacted to lessen the financial burdens imposed on local governments by this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The

1985 Amendments permit employees of local governments to agree with their employers to accept compensatory time in lieu of overtime pay. Congress did not expressly foresee that employees might agree to accept compensatory time and then refuse to use it. Neither the statute, 29 U.S.C. § 207(o), nor the Department of Labor regulations expressly answer the question presented by this case.

But the intent of Congress on the question presented is discernible. In accordance with 29 U.S.C. § 207(o), Petitioners have agreed to accept compensatory time *in lieu of* overtime pay. The interpretation of section 207(o) for which Petitioners and the Solicitor General argue would permit these employees – contrary to their agreements – to receive and control compensatory time *in addition to* receiving paid overtime. Petitioners seek the right to "bank" compensatory time to the maximum limit, then return to receiving overtime pay, and to save their "compensatory time bank" for cashing-out at then-current rates of pay upon their retirement or resignation. This interpretation subverts the intent of the 1985 Amendments.

Nothing in section 207(o) or in the Secretary's regulations supports the notion that employees have an "employee owned savings account of compensatory time," that must be treated as if it is employee-owned cash, as the Eighth Circuit believed in *Heaton v. Moore*, 43 F.3d 1176. Rather, both the statute and the regulations create a balance between employers' and employees' needs. When an employee agrees to accept compensatory

time in lieu of overtime pay, there must be some mechanism for enforcing that agreement or the agreement becomes illusory.

Section 207(o) does not give exclusive control over compensatory time to employees. For example, even after an employee agrees to accept compensatory time in lieu of overtime pay, the employer may still eliminate as much of the compensatory time as it wishes by making a cash payment to the employee. The employee must accept that payment and cannot retain his or her compensatory time if the payment is made. When Congress has intended for the Fair Labor Standards Act to give public employees control over choices "solely at the employee's option," it has specifically so provided, as demonstrated by 29 U.S.C. § 207(p)(2),(3).

Although Petitioners argue Harris County's policy deprives them of the intended benefit of compensatory time, that is not the case. The stipulated facts show that Harris County encourages its employees voluntarily to schedule use of their compensatory time. Only when an employee fails to use compensatory time and declines to agree to a schedule for using compensatory time is the employee involuntarily scheduled for time off by County supervisors. The purpose of compensatory time is time off from work. Harris County provides for employees to have the time off at the rate of one and one-half hours of compensatory time off for each hour of overtime worked.

Petitioners' and the Solicitor General's call for deference to Department of Labor regulations and an informal Wage and Hour Division Opinion Letter should be rejected. The regulations do not address the question

presented by this case. The Solicitor General seeks support from a plainly erroneous interpretation of a sentence in 29 C.F.R. § 553.23(a)(2), which states that an agreement between an employer and its employees "*may*" include other provisions governing the preservation, use, or cashing out of compensatory time. The Solicitor seeks to turn that *permissive* sentence into a *mandatory* sentence, arguing that an employer is not allowed to have rules about using compensatory time unless the employer and its employees have agreed to such rules in their "agreement or understanding." That is an impermissible interpretation of the regulation. The regulation states no more than preservation, use, and cashing out of compensatory time are proper subjects for collective bargaining or negotiation between public employers and their employees.

The Wage and Hour Division's September 14, 1992 Opinion Letter is not entitled to deference. The Secretary of Labor does not even suggest that her formal interpretations of the FLSA published in the Code of Federal Regulations are entitled to *Chevron* deference, 29 C.F.R. § 531.25; thus this informal, private Opinion Letter is not entitled to such deference. On its face, the Opinion Letter is not a reasoned opinion, but merely a statement of the Wage and Hour Division's "position." The Wage and Hour Division has issued inconsistent opinion letters about compensatory time usage. Finally, the Opinion Letter's interpretation of the Act and the regulations is plainly incorrect.

ARGUMENT

I. ADOPTION OF PETITIONERS' CONSTRUCTION OF SECTION 207(o) WOULD DEFEAT CONGRESSIONAL PURPOSE AND INTENT.

A. BACKGROUND OF THE 1985 AMENDMENTS TO THE FLSA AND THE DEPARTMENT OF LABOR REGULATIONS IMPLEMENTING THOSE AMENDMENTS.

The statute at issue, 29 U.S.C. § 207(o), was enacted as part of the 1985 Amendments to the Fair Labor Standards Act ("FLSA"), in response to this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In *Garcia*, the Court held that the FLSA could constitutionally be applied to local governments. In response to the *Garcia* decision, "both Houses of Congress held hearings and considered legislation designed to ameliorate the burdens associated with" the changes that would have to be made in response to that decision. *Moreau v. Klevenhagen*, 508 U.S. 22, 26 (1993). "The projected 'financial costs of coming into compliance with the FLSA – particularly the overtime provisions' – were specifically identified as a matter of grave concern to many States and localities." *Id; see also* S. REP. NO. 99-159 at 8 (1985), *reprinted in part in* 1985 U.S.C.C.A.N. 651, 655-56 (recognizing that the legislation was in response to the effects of *Garcia* regarding FLSA principles with respect to employees of local governments); H.R. REP. NO. 99-331 at 8, 17 (1985) (same).

To that end, the 1985 Amendments allow local governmental agencies to award compensatory time "in lieu of" overtime pay after an employee agrees to accept

compensatory time. The Petitioners in this case are parties to the requisite agreements to accept compensatory time. *See Klevenhagen*, 508 U.S. at 29.[2] These agreements are important to Harris County. Employees engaged in law enforcement often work overtime because they are called upon to deal with matters such as natural disasters, criminal investigations, and other emergency situations. Extra demands for law enforcement services often cannot be planned or reasonably budgeted for, and they often require many more deputies and support personnel than normally are on duty. Thus, it is not unusual for law enforcement personnel to remain on duty for many hours of overtime during individual pay periods.

The focus of concern when Congress approved compensatory time in lieu of overtime pay was on the employee's ability to make *use* of his or her accumulated compensatory time. *See* H.R. REP. NO. 99-331 at 23. Congress did not contemplate the situation with which the Court is now faced because it believed employees would use compensatory time once it was accrued. *See* 131 Cong. Rec. 28,987 (1985) (statement of Sen. Kasten) ("This [legislation] will allow workers with erratic work periods more flexibility in meeting their needs."); 131 Cong. Rec. 29,224

[2] As stated in the parties' stipulation, Harris County's personnel regulations provide for compensatory time off for its employees. In their brief the Petitioners purport to quote the current Harris County personnel regulation pertaining to compensatory time and state that the provision was readopted as it had appeared in the regulations at least since 1992. Pet. Br. at 17 n.12. The quoted personnel regulation is outside the record and is not the regulation currently in effect.

(statement of Rep. Martinez) ("[M]any employees . . . have actually come to prefer having comp time instead of overtime pay for those extra hours worked. To them, the extra time to spend on projects that benefit themselves, their homes, their future and their families, are more important than cash they could earn."); 131 Cong. Rec. at 29,225 (statement of Rep. Gilman) ("[This legislation] allows workers the freedom to receive deserved compensation in the manner they prefer while reducing the compliance cost of [*Garcia*] for public employers. Many of the hard-working people employed by our State and local governments value their private time more than the overtime pay they could earn."); *see also* Opinion Letter from Wage & Hour Div., Dep't of Labor (March 26, 1986), *available in* 6A LAB. REL. REP. (BNA) WHM:99:5091, 5092 ("The FLSA has no effect on the conditions for the scheduling and/or the use of compensatory time off. . . . ").

Congress sought to balance the employee's right to make use of earned compensatory time and the employer's need for flexibility in operations. As a result, Congress provided that the employee must be permitted to use the time within a reasonable period after requesting to do so, so long as the requested use of time does not unduly disrupt the agency's operations. 29 U.S.C. § 207(o)(5); *see* S. REP. NO. 99-159 at 23. Congress's concern expressed in Section 207(o)(5) *was not* that the employee might *have to use* his or her compensatory time, but that the employer might *prevent* the employee from doing so. Congress was concerned that employees might be "coerced to accept more compensatory time in lieu of overtime payment in a year than an employer realistically

and in good faith expects to grant to that employee if he or she requests it within a similar period." *See* H.R. REP. NO. 99-331 at 23; § 207(o)(5).[3]

Much of Petitioners' argument (and the argument of the *amici* on Petitioners' side) dwells on the original purposes of the FLSA. Their principal argument seems to be that permitting employees to bank compensatory time in perpetuity is in line with what they claim was the FLSA's hostility towards overtime work in general and a "default rule" that deters employers from requiring overtime by requiring payment for overtime work in cash. Petitioners' argument fails to acknowledge Congress's express choice in the 1985 Amendments to the FLSA to allow public agencies to award compensatory time in lieu of overtime pay. Petitioners' argument violates this Court's teaching in *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987), that "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." (emphasis added).

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[3] Petitioners quote the legislative history as follows: "Congress was 'very concerned that public employees . . . 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.' " Pet. Br. at 29 (quoting H.R. REP. NO. 99-331 at 23). Petitioners ignore the fact that Congress was *not* addressing compelled usage of accrued compensatory time by the employer, but instead was addressing its concern about employers giving compensatory time in lieu of overtime pay and then not allowing the employee to take the time given. *See* H.R. REP. NO. 99-331 at 23.

The regulations adopted by the Secretary of Labor after the 1985 Amendments to the FLSA add nothing to answering the question presented by this case. For the most part, the regulations reiterate what is already in the statute. *See, e.g.*, 29 C.F.R. § 553.22; § 553.23(a)(1). Other sections of the regulations address subjects not related to the question in this case.

Judge Dennis, concurring and dissenting in the Fifth Circuit, thought that one of the Secretary's regulations, 29 C.F.R. § 553.23 (a)(2), could be expanded beyond its express terms to provide guidance for this case. *Moreau*, 158 F.3d at 247-51 (Dennis, J., dissenting). As *amicus curiae*, the United States picks up that theme in this Court. Section 553.23 of the regulations is titled "Agreement or understanding prior to performance of work," and states, in pertinent part: "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." 29 C.F.R. § 553.23 (a)(2) (emphasis added).

Section 553.23(a)(2) states *only* that the employer and employee *may agree* to terms about the utilization of accrued compensatory time. In other words, those are *permissible* subjects for collective bargaining or negotiation between public employers and their employees. The regulation does *not* say or even imply that there *must* be an agreement regarding utilization of accrued compensatory time before an employer may make reasonable rules about that subject. If during the rulemaking process, the Secretary of Labor thought that the 1985 Amendments stripped local governments of power to have reasonable

rules requiring their employees to utilize accrued compensatory time off, the Secretary should have proposed a regulation implementing that view, and subjected such a regulation to a comment period and judicial review. It is not proper for the United States to try in this Court to convert the *permissive* statement in 29 C.F.R. § 553.23(a)(2) into a *compulsory* requirement that precludes local government employers from making reasonable rules to manage their responsibilities and budgets with respect to employee compensatory time, unless their employees agree to such rules.

B. PERMITTING THE EMPLOYER TO REQUIRE THE USE OF COMPENSATORY TIME MERELY GIVES MEANING TO THE 1985 AMENDMENTS TO THE FLSA.

Petitioners have agreed to accept compensatory time in lieu of overtime pay under the FLSA. Harris County's rule (which no party challenges as violative of the FLSA) is that an employee's accrued compensatory time may not exceed 240 hours. If the employees' agreements to accept compensatory time in lieu of overtime pay are to have their intended effect, the law must allow Harris County to require its employees to reduce their accrued time to keep it below the 240 hour cap.

If a public employer may not require its employees to reduce accumulated compensatory time at or near a statutorily-allowed cap, then the 1985 Amendments to the FLSA will become a nullity, one employee at a time. Each employee returns, by law, to overtime pay as soon as he or she accumulates the capped number of compensatory

time hours, despite his or her agreement to accept compensatory time in lieu of overtime pay. The careful balance that Congress struck between employees' needs and local agencies' need to manage their limited, taxpayer-supported budgets will be lost. Petitioners' claim that employees have the sole choice whether to use compensatory time, if adopted, would merely build in a delay before public agencies again must pay overtime, despite their employees' agreements to accept compensatory time off in lieu of overtime pay. *See* 29 U.S.C. § 207(o)(1) ("Employees of a public agency . . . may receive, in accordance with this section *and in lieu of* overtime compensation, compensatory time. . . . ") (emphasis added).

Under the system advocated by Petitioners, employees will be allowed to bank compensatory time to the maximum cap and then revert for all future overtime hours to overtime pay. When and if the employee chooses to use his or her compensatory time, the employer must allow it; but then the employee can fill his or her bank to the maximum hour cap again and revert to overtime pay. The compensatory time bank will provide, in essence, another resignation or retirement benefit to the employee, to be "cashed in" upon resignation or retirement at then-current (probably higher) rates of pay. Local governments will have to accrue for ever-increasing liabilities for unused compensatory time. The statutory allowance of compensatory time in lieu of overtime pay that Congress enacted to alleviate financial pressures on local governments will be illusory.

The 1985 Amendments to the FLSA and the legislative history demonstrate that Congress believed that the employees would use, or could be required to use,

accrued compensatory time, thereby relieving public employers from the obligation to pay cash for overtime work. Neither the 1985 Amendments to the FLSA nor the legislative history shows any intent to create a new form of "savings account" or "retirement or resignation benefit" for public employees. Compensatory time was to accommodate the needs of the local governments while ensuring (1) that public employees receive a form of compensation – time off – at a premium rate for overtime worked and (2) that employees' use of their compensatory time not be delayed unreasonably.

When determining the meaning of a statute, the Court "look[s] not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). The policy of the 1985 Amendments was to allow public agencies to provide their services within limited budgets by permitting them to agree with their employees that the employees would accept compensatory time in lieu of overtime pay. *See* 29 U.S.C. § 207(o)(1). The object of the Amendments *was not* to permit employees of public agencies to receive overtime pay *in addition to* building a "bank" of compensatory time available for use, or cashing in at resignation or retirement. When the 1985 Amendments are seen in that light, it is clear that Harris County's compensatory time policy does not contravene 29 U.S.C. § 207(o) or the intent Congress had when it enacted that statute.

C. THE REASONING OF THE EIGHTH CIRCUIT IN *HEATON V. MOORE* IS FLAWED.

The Eighth Circuit's opinion in *Heaton v. Moore*, is incorrect and should be disapproved by this Court. 43 F.3d 1176 (8th Cir. 1994), *cert. denied sub nom. Schriro v. Heaton*, 515 U.S. 1104 (1995). The basis for the *Heaton* court's holding was its pronouncement that "[e]mployees are allowed to 'bank' compensatory time in what amounts to an employee-owned savings account of compensatory time." *Heaton*, 43 F.3d at 1180. "The banked compensatory time is essentially the property of the employee." *Id.* The court thought that the employee should be allowed to use his or her "savings account" of compensatory time in the same way an employee can spend overtime pay. *See id.* Judge Dennis, in his concurring and dissenting opinion in this case below, did not adopt the Eighth Circuit's rationale; and the Fifth Circuit majority and the Ninth Circuit in *Collins v. Lobdell* rejected it altogether. *See Lobdell*, 188 F.3d at 1128-29; *Moreau*, 158 F.3d at 247-51 (Dennis, J., dissenting). The United States, appearing here as an *amicus curiae*, does not appear to endorse the Eighth Circuit's rationale.

The *Heaton* court thought the Department of Labor regulations "consistent" with its vision of "an employee-owned savings account of compensatory time." *See id.* at 1180 n.3 (citing 29 C.F.R. §§ 553.23(c)(1)(ii), 553.25(b)). Nevertheless, the Secretary's regulations do not answer (directly or indirectly) the question for which this Court has granted review. Nor do the regulations require the judiciary to reach any particular answer to that question.

For every right given employees in the statute and regulations, employers are given a balanced right. For instance, in order for the employee to receive compensatory time in lieu of overtime pay, the employee must agree. 29 U.S.C. § 207(o)(2). Nevertheless, the regulations allow a public employer to satisfy the requirement for an agreement by giving notice to its employees that compensatory time will be awarded in lieu of overtime pay. 29 C.F.R. § 553.23(c)(1). Unless a particular employee expresses his or her unwillingness to accept compensatory time in lieu of overtime pay, the notice satisfies the requirement of an agreement. *See id.*

Neither the statute nor the regulations mention "an employee owned savings account of compensatory time." Neither the statute nor the regulations purports to create a system by which individual employees unilaterally may convert their agreement to accept compensatory time off *in lieu of* overtime pay back to a system in which the employees have sole control of compensatory time, receive compensatory time for awhile and then qualify again for overtime pay. The notion of a "compensatory time savings account " created by the Eighth Circuit causes that result. That result contravenes the basic reason why Congress enacted the 1985 amendments to the FLSA. *See* H.R. REP. NO. 99-331 at 8, 17; S. REP. NO. 99-159 at 8.

D. THE REASONING OF THE FIFTH CIRCUIT MAJORITY IN THIS CASE AND THE NINTH CIRCUIT IS CORRECT.

The Fifth Circuit majority below and the Ninth Circuit recognized that neither the language of the statute nor the Secretary's regulations provide an answer to the question presented for review. *See Collins*, 188 F.3d at 1128-30; *Moreau*, 158 F.3d at 245. Both courts rejected the premise – argued by Petitioners here – that, because Congress stated that employees should be permitted to use their compensatory time upon request within a reasonable time, employees were otherwise given *exclusive* control over the use of accrued compensatory time. *See* 29 U.S.C. § 207(o)(5) (stating that an employee "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.") This is the principle of *inclusio unius est exclusio alterius* that Petitioners would have this Court adopt. *See* Pet. Br. at 11-12.

As noted by the Fifth Circuit, an edict that an entity "should not be taxed for fifteen years" leads to the natural assumption that the entity can be taxed after the fifteen years have elapsed. *Moreau*, 158 F.3d at 246; *Raleigh & Gaston Ry. v. Reid*, 80 U.S. 269, 270 (1871). An edict that an employer, barring disruption of operations, must allow its employees to use compensatory time upon request does not lead to the natural assumption that the

employees have sole and exclusive control over their compensatory time.[4]

The Ninth Circuit agreed that "the FLSA does not prohibit public employers from requiring employees to use comp time." *Collins*, 188 F.3d at 1130. That is the result that makes the most sense under the Act, the legislative history, and the regulations. Once the employee and employer have agreed that the employee will accept compensatory time in lieu of overtime pay, there must be a method of enforcing that agreement. If an employee is free to accrue compensatory time to the maximum limit, hold that time in a "savings account," and then receive overtime pay while "banking" his or her compensatory time until resignation or retirement, that would undermine the employer-employee agreement, the statute, and Congressional intent.

Public employers must be permitted to adopt rules enforcing employees' agreements to accept compensatory

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[4] As the Ninth Circuit has noted, the rule of *inclusio unius est exclusio alterius* is "a rule of interpretation, not a rule of law." *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992). As that court explained:

> Understood as a descriptive generalization about language rather than a prescriptive rule of construction, the maxim usefully describes a common syntactical implication. 'My children are Jonathan, Rebecca and Seth' means 'none of my children are Samuel.' Sometimes there is no negative pregnant: 'get milk, bread, peanut butter and eggs at the grocery store' probably does not mean 'do not get ice cream.'

Id.

time off in lieu of overtime pay. Harris County's policy, as described in the stipulated facts, reasonably achieves that result. It encourages employees voluntarily to reduce accrued compensatory time as they approach the maximum allowable number of accrued hours. The policy then requires the employee and his or her supervisor to try to agree on how to reduce the accrued hours. Failing an agreement, Sheriff's supervisors schedule the employee for involuntary time off as necessary to keep his or her accrual under the maximum. This violates neither the language of 29 U.S.C. § 207(o) nor Congress's intent.

E. OTHER PROVISIONS IN THE STATUTE SUPPORT THE AUTHORITY OF THE COUNTY TO IMPLEMENT ITS POLICY.

Rather than an intent to allow employees to bank compensatory time in perpetuity, 29 U.S.C. § 207(o) reflects the contrary intent. It provides that "[i]f compensation is *paid* to an employee *for accrued compensatory time off*, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment." 29 U.S.C. § 207(o)(3)(B) (emphasis added). Likewise, the Secretary's regulations provide that "[p]ayments for accrued compensatory time earned after April 14, 1986, may be made *at any time* and shall be paid at the regular rate earned by the employee at the time the employee receives such payment." 29 C.F.R. § 553.27(a) (emphasis added).

As a result, both the statute and the regulations contemplate a circumstance in which a public employer may – without seeking the employee's permission – reduce or

eliminate the accrued compensatory time of an employee by making a cash payment.[5] As long as the employee is paid for his accumulated compensatory time at his or her current regular rate of pay, the statute is satisfied.

The regulations confirm that these pre-termination reductions are at the *employer's* option. 29 C.F.R. § 553.27(a) (stating that payments may be made at any time). Obviously, if the payments can be made at any time, the employer is choosing whether to make them. Neither the statute nor the regulations suggest that an employee has any right to demand payments. Moreover, if the employee were given such a right, the employer's option to substitute compensatory time for cash payments for overtime worked would become meaningless. Likewise, if it were necessary that the employee agree to a pre-termination reduction of accumulated compensatory time by cash payment, the employee could eliminate the future use of compensatory time by refusing to accept the cash payment and declining to use his or her accumulated compensatory time. This result would be contrary to Congressional intent.

Because 29 U.S.C. § 207(o)(3)(B) permits cash payments for accrued compensatory time, no rule of statutory construction or agency interpretation can provide otherwise. As the Court stated in *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254 (1992), "courts must presume that a legislature says in a statute what it

[5] The payment provision in subsection (3)(B) must necessarily apply only to pre-termination reductions of compensatory time because subsection (4) covers payment at termination of employment.

means and means in a statute what it says there." "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " *Id.*

This provision allowing employers to reduce compensatory time with monetary payments also shows that Congress did not intend for employees to possess sole or exclusive control over accrued compensatory time. For example, there may be employees who would prefer to accumulate large quantities of compensatory time so that they can take long vacations. Nevertheless, the employer is given the option of depriving those employees of that ability by reducing the employees' compensatory time through payment. One cannot logically conclude – given this situation – that the employee has absolute control over the use of his or her compensatory time.

II. THE SECRETARY OF LABOR'S REGULATIONS DO NOT ADDRESS THE QUESTION PRESENTED, AND THE WAGE AND HOUR DIVISION'S OPINION LETTER IS NOT ENTITLED TO DEFERENCE.

A. THERE IS NO BASIS FOR "DEFERENCE" TO THE SECRETARY'S POSITION BECAUSE CONGRESSIONAL INTENT IS CLEAR.

Petitioners argue that "[t]he courts must defer to all of the Secretary's 'fair and considered judgement [sic] on the matter in question. . . . ' " Pet. Br. at 33. Similarly, the Solicitor General argues that "any uncertainty about the proper disposition of this case should be resolved by reference to the Secretary of Labor's reasonable regulations and interpretive guidance implementing the FLSA."

Brief for the United States as Amicus Curiae at 15. Petitioners and the Solicitor General base their call for "deference" on the premise that Congress has not spoken in the text of the statute or the legislative history with respect to the issue before the Court.

First, it should be noted that this argument is a significant departure from the Petitioners' argument in the Fifth Circuit. There Petitioners asserted that Harris County's policy requiring use of compensatory time "contravenes the *plain language* of the 1985 Amendments to the Act." (emphasis added). Petitioners' Appellee's Brief in the Fifth Circuit at 13. *See Moreau*, 158 F.3d at 241 (noting Petitioners' argument that section 207(o)(5) decides the issue). Now, Petitioners and the Solicitor General assert that the statute is silent with respect to the specific question before the Court. Pet. Br. at 25 ("[T]he statute is silent on the precise compelled use question raised here."). This Court should not accept Petitioners' and the Solicitor General's argument that the Court should decide this case by defaulting to some form of "deference" to the Secretary of Labor.

Although the 1985 Amendments do not expressly answer the precise issue in this case, Congress's intent can be discerned, and that intent is in line with the decisions of the Fifth and Ninth Circuits. Obviously, section 207(o) contains no words stating or even implying that local governments may *not* adopt reasonable policies requiring their employees to use compensatory time, once compensatory time has been agreed to. On the other hand, the statute allows employers to pay off accrued compensatory time at the employee's current hourly rate prior to the termination of employment. 29 U.S.C.

§ 207(o)(3)(B). The statute contains no restriction on the amount of compensatory time that may be "cashed out" by the employer. Thus, the employer is free to pay off an employee's entire compensatory time balance, or as little as a single hour at any time.

When Congress wanted in the FLSA to provide that a local governmental employer may exercise a particular right under the FLSA *only at the employee's option*, Congress knew exactly how to say that. In 29 U.S.C. § 207(p)(2) and (3), Congress allowed local governments certain flexibility to ask public safety personnel to work overtime in different capacities and to exclude such work from overtime compensation. But in each situation so authorized, Congress included the phrase "solely at such individual's option," thereby giving the employees sole control over the employer's exercise of the granted authority. *See* 29 U.S.C. § 207(p). No similar language in section 207(o) makes the rights granted under that section of the statute exercisable *solely at the employee's option*. Yet, Petitioners clearly seek to have the Court recognize a right to bank compensatory time to be used *solely at the employee's option*. This Court presumes that Congress acts "intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another." *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994).

Further, the FLSA imposes only a minimum wage rate and a *maximum* number of hours of work per week. It does not require employers to provide a minimum number of hours of work. Consequently, an employer may shorten an employee's work week without violating the Act. If the employer may shorten work weeks and

cash out compensatory time separately without violating the Act, it may do so in combination as well by ordering the employee to use a portion of his or her accrued compensatory time. Thus, the intent of Congress is clearly expressed by the statute, and the Secretary of Labor's interpretation is not controlling. As this Court stated in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989), "no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *See also National Credit Union Admin. v. First Nat'l Bank & Trust*, 522 U.S. 479 (1998); *Demarest v. Manspeaker*, 498 U.S. 184 (1991).

The Solicitor General attempts to dismiss this argument by comparing this case to those in which this Court invalidated certain pay plans that were a "means of evading the FLSA's overtime requirements." Brief for the United States as Amicus Curiae at 18 n.9. Those cases clearly are different. They dealt with attempts to manipulate *rates* of pay. In this case, Harris County's policy does not reduce rates of pay. It reduces hours of work required to be performed. When Petitioners are required to utilize some of their accrued compensatory time, they are not required to report for work, yet they receive compensation at their current rate of pay for all compensatory hours utilized. Thus, their hours of work are reduced and they receive cash compensation for overtime hours previously worked. Neither of these "effects" of the policy is prohibited by the FLSA.

In *Adams v. City of McMinnville*, 890 F.2d 836, 838 (6th Cir. 1989), the public employer unilaterally changed the

work schedule of its firefighters. The effect of the change was to reduce the total number of hours each firefighter worked so that overtime pay would not be required. The firefighters alleged that this was discrimination prohibited by the FLSA. *See id.* The Sixth Circuit noted that the city did not attempt to alleviate the fiscal predicament threatened by the *Garcia* decision by reducing the firefighters' effective hourly pay rate, while requiring them to work the same number of hours. *See id.* at 839. The court concluded that "when a public employer responds to fiscal pressures created by the FLSA by reducing employees' hours in order that they not work overtime, thereby eliminating the city's need to pay premium wages for overtime, the employer does not violate section 8" of the Fair Labor Standards Amendments of 1985. *Id.* at 840.

The Sixth Circuit stated that legislative history explicitly distinguishes between a public employer who responds to the application of the FLSA to its employees by reducing their regular hourly pay rate and an employer who simply reduces the overtime hours its employees will work. Quoting from the legislative history, the court said the following:

> The Conference Committee noted that
>
> > [a] unilateral reduction of regular pay or fringe benefits that is intended to nullify this legislative application of overtime compensation to State and local government employees is unlawful. Any other conclusion would in effect invite public employers to reduce regular rates of pay shortly after the date of enactment so as to negate the

> premium compensation mandated by this legislation.
>
> Joint Explanatory Statement of the Committee of Conference, H.R.Conf.Rep. No. 357, 99th Cong., 1st Sess. 9, *reprinted in* 1985 U.S. Code Cong. & Admin. News 651, 670. In contrast, the Conference Committee also stated that "[a]n employer's adjustment of work schedules to reduce overtime hours would not constitute discrimination under this provision so long as it was not undertaken to retaliate for an assertion of coverage." *Id.* at 8, 1985 U.S. Code Cong. & Admin. News 670.

890 F.2d at 840.

Here, Harris County's compensatory time policy does not reduce the employee's effective hourly rate of pay. Petitioners contend that this policy is a "means of avoiding the cost of FLSA premium rate overtime compensation" which must be found to violate the Act. Pet. Br. at 29. That contention is meritless because Harris County must pay for overtime work at a premium rate. The employee works one hour of overtime and is provided one and one-half hours of compensatory time off for that one hour of work. The policy simply allows Harris County the relief which Congress intended to make available to public employers when it enacted section 207(o).

Petitioners imply throughout their brief that Harris County's compensatory time policy deprives them of the intended benefit of compensatory time. In that regard Petitioners speak of compensatory time being "devalued" by the "unilateral manipulation of work schedules" and

manipulation of time off to the "employer's convenience." Pet Br. at 30. The underlying premise of this description is that Sheriff's Department supervisors always make unilateral decisions about when employees may take compensatory time off, and employees never get to select times of their own choice. That premise is an unacceptable distortion of the stipulated facts. *See* Pet. App. D, pp. 29a-31a. As the stipulated facts show, supervisors schedule involuntary compensatory time only after the employee has approached the maximum accrued number of hours, the employee has failed voluntarily to schedule time off, and the supervisor and the employee have not been able to agree about a schedule for time off.

The intended benefit of compensatory time off is *time off from work*. Petitioners seek here to bank the maximum amount of compensatory time for a future payment in cash, and then to return to overtime pay. In the final analysis, this case concerns something that Congress never intended – a claimed right to "bank" compensatory time indefinitely in order to return to overtime pay and to create a savings account to be cashed in at termination of employment equal to 240 hours times a rate higher than that in effect at the time the overtime was worked. The conflict between the parties is not about "flexibility" or "opportunities to take extended vacations."[6] If accrued

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[6] In the Brief for the United States as Amicus Curiae at 17, it is suggested that Congress enacted Section 207(o) primarily to preserve public employees' freedom to enjoy opportunities to take extended vacations, get away from job stress and attend to family matters, citing hearings before the Subcommittee on Labor Standards of the House Committee on Education & Labor and the Subcommittee on Labor of the Senate Committee on Labor & Human Resources.

compensatory time can be banked until termination of employment, public employers will be faced with a significant budgetary problem. Congress enacted the 1985 Amendments to allow local governments to avoid such problems.[7]

B. THE DEPARTMENT OF LABOR'S OPINION LETTER IS NOT ENTITLED TO DEFERENCE.

As discussed infra at pages 33-34, the Secretary of Labor's *regulations* do not address the question presented by this case, and it is improper for Petitioners and the Solicitor General to try to rewrite those regulations in the guise of *interpretation*. Recognizing this, Petitioners and the Solicitor General ask the Court to defer to an *Opinion*

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[7] One commentator has described the passage of the Amendments as follows:

> It is undisputed that the decision to allow comp time in the public sector was predicated on a desire to ameliorate projected labor cost increases for cities and states because of compliance with the FLSA, particularly its overtime provisions. The public sector comp time provisions of the FLSA are thus the product of a political deal struck when there were substantial and possibly destructive fiscal pressures on states and municipalities. Beyond acknowledging that comp time was already common practice for many public employers and often incorporated into collective bargaining agreements, the legislative history makes no mention of a desire to be 'family friendly' or to promote 'flexibility'.

David J. Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?*, 20 BERKELEY J. EMP. & LAB. L. 74, 111 (1999).

Letter from the Wage and Hour Division of the Department of Labor to Harris County, dated September 14, 1992, *available in* 1992 WL 845100 (hereinafter the "Opinion Letter"). Petitioners quote from the Opinion Letter at page 19 of their Brief. Petitioners and the Solicitor General have raised the Opinion Letter for the first time in this Court. Petitioners did not rely on it in the Fifth Circuit, and it is not mentioned in either of the opinions below. *See* 158 F.3d at 241; 945 F. Supp. at 1067. The Opinion Letter was not relied on by the Eighth Circuit in *Heaton v. Moore*, 43 F.3d at 1176, or the Ninth Circuit in *Collins v. Lobdell*, 188 F.3d at 1124.

The Wage and Hour Division's informal Opinion Letter certainly is not entitled to deference under the second step of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Secretary of Labor does not even suggest that her *formal* "interpretations" of the FLSA, published in the Code of Federal Regulations, are entitled to *Chevron* deference. 29 C.F.R. § 531.25. In the introduction to those formal interpretations, the Secretary acknowledges that "the ultimate decisions on interpretations of the [FLSA] are made by the courts," and she contemplates that they will be given only the respectful consideration described in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). 29 C.F.R. § 531.25. Without question, the informal, private Opinion Letter on which Petitioners and the Solicitor General rely is of even lesser force than the Secretary's published, formal interpretations of the FLSA.

Several of the Circuits correctly have declined to give Wage and Hour Division Letter Opinions *Chevron*-type deference. *E.g., Myers v. Copper Cellar Corp.*, 192 F.3d 546,

554 (6th Cir. 1999); *Owsley v. San Antonio Indep. Sch. Dist.*, 187 F.3d 521, 524-25 (5th Cir. 1999); *Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993); *see* K. DAVIS & R. PIERCE, ADMINISTRATIVE LAW TREATISE § 3.5 at 120 (3d ed. 1994) ("Congress has not delegated to any agency the power to make policy decisions that bind courts and citizens through formats like letters, manuals, guidelines, and briefs. No court should allow an agency to bind citizens or courts by applying *Chevron* step two to Agency policy decisions announced in formats Congress has not authorized for that purpose.").

There are compelling reasons why this particular Opinion Letter should be given no weight by this Court. First, it is hardly a reasoned opinion of any type. It is, on its face, little more than a statement of the Wage and Hour Division's "position." Both of the operative paragraphs of the Opinion Letter start with the phrase "it is our position that. . . . "

Second, the position of the Wage and Hour Division on the question discussed in the Opinion Letter has not been consistent. In 1986, shortly after 29 U.S.C. § 207(o) became law, the Wage and Hour Division answered the following question about compensatory time awarded to police officers:

> [D]o the provisions of FLSA limit management's authority to schedule the use of earned compensatory time off . . . at its discretion, or must there be a mutual agreement between the employer and employee regarding when this time may be taken off?

The Division answered: "The FLSA has no effect on the conditions for the scheduling and/or use of compensatory time off under these circumstances." Opinion Letter from Wage & Hour Div., Dep't of Labor (March 26, 1986), *available in* 6A LAB. REL. REP. (BNA) WHM:99:5091.

In a 1988 opinion letter, the Division answered the following question pertaining to game wardens: "May an employer require that earned compensatory time be taken off *within the same work period* in the absence of a specific agreement?" Opinion Letter from Wage & Hour Div., Dep't of Labor (July 29, 1988), *available in* 6A LAB. REL. REP. (BNA) WHM:99:5212, 5213. (Emphasis in original). The Division answered: "We presume that your question means: may an employer 'balance' the employee's hours of work over the length of the work period so that the statutory maximum hour standard is not exceeded. The answer is yes." *Id.* If a game and fish agency can require its wardens to work overtime early in a pay period and then take compensatory time off later in that same pay period without violating the FLSA, the agency should also have power to require that compensatory time off be taken in subsequent pay periods, after an employee's accrual nears the maximum number of hours, without violating the Act.

Finally, the Opinion Letter (and the central argument of the Brief of the United States as *Amicus Curiae*) is based on a plainly incorrect reading of 29 C.F.R. § 553.23(b). The regulation says only that an agreement or understanding between a public employer and its employees "*may* include other provisions governing the preservation, use, or cashing out of compensatory time, so long as those provisions are consistent with section 7(o) of the Act." It

neither says nor suggests that such an agreement is mandatory, and it cannot be read to mean that the employer is powerless to enforce reasonable policies regarding "the preservation, use, or cashing out of compensatory time" in the absence of an agreement about such matters with its employees.

The complexities that would be created by the broad prohibition for which Petitioners and the United States contend are endless. To argue, as Petitioners and the Solicitor General necessarily do,[8] that 29 U.S.C. § 207(o)(2)(A) must be read to imply that decisions concerning "use" of compensatory time belong entirely to employees absent a pre-existing agreement to "empower" their local employers to enforce reasonable policies concerning such matters is a plainly erroneous interpretation of the Act.

[8] To reach the result for which he contends, the Solicitor General must resort to highly attenuated argument not consistent with any reasonable rules of statutory construction, *viz*: "Absent an agreement to the contrary . . . , an 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. . . . " Brief of the United States as Amicus Curiae at 14.

CONCLUSION

For these reasons, the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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