OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: LYNWOOD MOREAU, ETC., ET AL., Petitioners v. JOHNNY KLEVENHAGEN, SHERIFF, HARRIS COUNTY TEXAS, ET AL.

CASE NO: 92-1

PLACE: Washington, D.C.

DATE: March 1, 1993

PAGES: 1 - 47

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IN THE SUPREME COURT OF THE UNITED STATES

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LYNWOOD MOREAU, ETC., ET AL., :

Petitioners :

v. : No. 92-1

JOHNNY KLEVENHAGEN, SHERIFF, :

HARRIS COUNTY, TEXAS, ET AL. :

- x

Washington, D.C.

Monday, March 1, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

MICHAEL T. LEIBIG, ESQ., Washington, D.C.; on behalf of the Petitioners.

HAROLD M. STREICHER, ESQ., Assistant County Attorney, Houston, Texas; on behalf of the Respondents.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 92-1, Lynwood Moreau v. Johnny Klevenhagen.

Mr. Leibig.

ORAL ARGUMENT OF MICHAEL LEIBIG

ON BEHALF OF THE PETITIONERS

MR. LEIBIG: Mr. Chief Justice, and may it please the Court:

The concern before the Court today involves the precise rules under which a state or local employer may reach agreements to substitute time off for cash overtime with their employees. It involves the interpretation of section 207(o) of the Fair Labor Standards Act and regulations issued under that section.

It is important that, under the usual rules, to realize that the Fair Labor Standards Act makes non-cash payment for overtime work illegal completely. It always has, and there is a reason for this. In 1937 when President Roosevelt first sent a message to Congress about the Fair Labor Standards Act he emphasized that one of the main purposes was to protect the unorganized and to establish an hours of work rule.

It might seem that the comp time rule, or the cash overtime rule, isn't directly related to the overtime

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rules, but it is. The reason cash overtime is required is because other schemes that were in existence widely in the United States before 1937, for instance paying for overtime in script or paying for overtime in time off or comp time are easily manipulated to avoid the 40-hour-a-week work rule. And that's the reason that the Fair Labor Standards Act itself, prior to the 1985 amendments which adjusted the act to the public sector, always outlawed compensatory time as a means of paying for overtime work.

In the 1985 amendments, after this Court's decision in Garcia, Congress responded a request from state and local governments to lighten the burdens that the Fair Labor Standards Act without a special statute would place on state and local government, and made a number of changes in the acts in specific response to pleas by state and local governments and their employees that special adjustments be made to recognize the special status of the states. The states were effective in those pleas, and section 2 of the 1985 amendments allowed the use of comp time and also changed the rules with regard to volunteers and a number of other rules with regard to joint employment.

Part of the amendments, section 6, expressly directed the Secretary of Labor to issue regulations interpreting and implementing the 1985 amendments. It is

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our argument that section 207(o) that deals with compensatory time and the conditions under which a public employer may use compensatory time that is not otherwise available, and are laid out in 207(o)(2)(A), require an agreement.

And the issue that the Court needs to address today are the precise conditions under which an agreement needs to be reached. There are a couple --

QUESTION: Speaking of the Secretary of Labor, Mr. Leibig, why isn't he here? Do we know that or do you know that?

MR. LEIBIG: Why isn't the Secretary of Labor?

QUESTION: Yes. I mean, why hasn't the Government expressed any view in this case?

MR. LEIBIG: Your Honor, I'm not sure completely. I'm not -- I wouldn't be surprised if it had something to do with the fact that the briefs in this case were due almost immediately after the election in which the administration changed.

QUESTION: I see.

MR. LEIBIG: And I think that relates directly to one of the arguments I want to make which has to do with why regulations, when there's a statute -- the way the Fair Labor Standards Act works generally is that it's an administrative act which is very dependent on the

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regulations not only for the use of comp time but across the board. And one of the flexibilities in the act, the portions of the act that are in regulations are in the Executive Branch, given to the Executive Branch by Congress, I think, partly specifically because of the increased flexibility that that allows over if they were in the statute themselves.

And I think the increased flexibility has been demonstrated particularly under the 1985 amendments. Not only did Congress make new amendments, but since then on issues in which the states have been particularly concerned they have gone to the Department of Labor and got adjustments to the regulations. In the Abshire case, which is a Ninth Circuit case dealing with who is exempt and who is not, that case was appealed to the Court and the Court denied cert. But at the same time state and local governments went to the Department of Labor and the Department of Labor changed the rules with regard to exemption specifically to recognize the special needs of state and local government. And that shows one of the reasons that it's wise under the Fair Labor Standards Act to have regulations dealing with this kind of an issue.

I want to emphasize that Congress was unmistakably clear that states, as states, are covered by the Fair Labor Standards Act. Both section 203 of the act

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itself, subsections (d) and (x), and section 207(o), part 1, expressly and clearly leave no doubt that state and local employees are covered.

Secondly, the 1985 amendments make it absolutely clear that the state function, that is personnel functions and the relationship between personnel functions and the payment of overtime, is also specifically and clearly regulated by the statute.

The question that I think the statute is ambiguous about is whether or not -- it is also clear that the statute requires an agreement prior to an employer using compensatory time. Where the ambiguity lies is, in the situation where the employees designate a representative to deal with the employer, must an agreement be reached with the representative prior to the implementation of compensatory time system. And I think the --

QUESTION: Is that ambiguity solved by the Department of Labor's reg, the one that, well, it's set out on page 28 of the red brief, that the question of whether employees have a representative for purposes of 7(o) shall be determined in accordance with state or local law? I mean, does that, is that the source of resolving the ambiguity?

MR. LEIBIG: The regulation is, but what is

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quoted on page -- the reference to state law that is quoted in the red brief is not a reference to the regulations, it's a reference to the preamble to the regulation. And that sentence in the preamble is put in the middle of sentences before it and after it which address one of the direct questions in this case. The question asked in which the reference to state law was made was in a state that has -- do you mean that you only need an agreement in states which have collective bargaining. And the preamble says no, we didn't mean that, our regulations don't say that, but we do believe that to determine who the representative is in a given state there may be a reference to state law.

QUESTION: But isn't it also to be read by saying to determine whether there is a representative for the purposes of subsection 1 you look to state law? In other words does this in a way take the same position that the, I think it was the Senate version of the legislative history took?

MR. LEIBIG: I think there are two questions there, Your Honor. The first is the difference between the Senate and the House report. If I could hold that for a minute I will comment on that. The other question about whether you look for state law, I do think you look to state law to determine whether or not there's a

representative, but when you look to state law you do not look merely to state collective bargaining law. In other words you're not just looking to state law to see whether or not there's a collective bargaining statute or not. If you were, the wording in the statute would be much simpler than it is now. It would not refer to all the things other than collective bargaining, which even little (i)(1) refers to.

So that you do look to state law, but you look for such things as if there is state law providing for collective bargaining, then state law requires exclusive representation and requires that unilateral changes can't be made on any wage-hour working condition without dealing with that representative. That model, the National Labor Relations model, exists in less than 25 states, and even in those states there are all sorts of other models in place for different types of employees.

Most states have different types of models ranging from a meet and confer model, where you have to meet but you don't have to agree, to having a situation in Texas where there's a Texas state statute that says employees can have a representative, but the representatives don't have the rights to collective bargaining agreements. So that I think --

But what the preamble to the regulation says,

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and I want to make clear this is the preamble to the regulation, so you've got to go to, it's a long drive from the statute to the preamble, but the preamble to the regulations I think are trying to say if two people show up or three people show up and say they're the representative, you look to state law, it might be agency law, it might be all sorts of law in the state.

QUESTION: Why don't you just as readily look to state law to determine what the significance of the designation of the representative is in states which do not allow collective bargaining agreements?

MR. LEIBIG: Because under the preamble, under that set reference in the preamble, which is the only reference to state law in this area anyway, if you read the whole paragraph it starts off by somebody asking exactly that question, do you look to state law to find out whether a collective bargaining representative can enter in full agreements. And the answer that the Department of Labor in the preamble gave is no. It's also the clear answer in the -- the plain meaning of the regulations themselves contain a clear statement that the representative -- what matters is the designation of the employees, not the recognition of the employer.

QUESTION: Mr. Leibig, where is the preamble set forth?

MR. LEIBIG: It's easier for -- he, Justice Souter referred to the red brief, but I think it's easier if you have the Petition to Cert Appendix. It is set forth in pages 30a and 32 -- I'm sorry, that's the actual regulation. The preamble is set forth in 33a through 35a.

QUESTION: Thank you.

MR. LEIBIG: The actual regulations are in the pages just before that.

If I could also mention the Senate and the House report that Justice Souter asked about. The House report refers to designated representatives, and the regulation, that is the regulation on 30a through 32a, adopt pretty much the House report. The argument is made by the petitioners that the House report may support that, but what about the Senate report. And I think the answer to that is if you look with rigor at the House and Senate report you will find that the actual language of section 207(o) is the direct language of the House report, not the Senate report. During the conference committee this section, it was the language of the House report that became 207(o) precisely, and if you compare it you will see what I mean.

I don't think there were differences in the wording for this point in the statutory language, but the structure of the House report became -- therefore you look

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to the legislative history of the House report and not the Senate report because the language that was enacted is the House language.

QUESTION: Mr. Leibig, you argue basically that the statute is ambiguous and we ought to refer to a regulation?

MR. LEIBIG: That's right.

QUESTION: Do you think we have to take into account the case of Gregory against Ashcroft in interpreting this statute? Certainly it is a traditional state function to determine whether the state is going to negotiate over overtime and whether the state must pay it. And true, the statute does contemplate that states will be subject to it, but perhaps it doesn't contemplate it in the fashion you suggest. And if we look to Gregory against Ashcroft we might come to a different conclusion, do you suppose?

MR. LEIBIG: No, Your Honor, I don't think if you look to Gregory v. Ashcroft you would come to a different conclusion, for this reason. First of all, I think on its face Gregory speaks of interfering with the usual state and local functions, and it does not, it seems to refer to the question of coverage. The conference Congress has to be clear about coverage. I grant it, not just coverage of the states as states, but also coverage

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of the function of the state that is being regulated.

Everybody agrees that this statute regulates the use of comp time by state and local employees. The question that the statute is ambiguous about is how do you arrange comp time agreements. In the statute, if you look to Gregory, Congress expressly says in the statute, there is an express delegation to regulations, and the regulations do this.

Now, the reason I think -- it's really the interchange between Chevron and Gregory, and how do you read those together. And I don't think the Court, I don't think that there are precedent I can cite to say how you read the two together. I think that's a real challenging situation.

I do think, though, if Gregory meant to abandon Chevron we are launched on a very dangerous course because, for example in the Report on Intergovernmental Relations that was submitted by the amici it lists a great number of statutes, 32 statutes, I believe, passed before 1981 that regulate state and local functions, and most of those statutes rely on regulations. The Fair Labor Standards Act will not work without its regulations, not just on the comp time issue, but it wouldn't work on many issues, and Congress knew that. So I think that's the first point.

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The second point is I do think, and there has been a number of law review commentary on the importance of increased rigor for Chevron, at least when it interacts with Gregory, but some would say generally. To the degree that you are a literalist or a strict constructionist in a general sense, that's strictly looking at the words and meanings of the statutes, then you should also be quite rigorous about Chevron, and I recognize that. Therefore --

QUESTION: Well, if you just look at the terms of the statute in the absence of the regulation, doesn't it appear to say that if employees aren't covered by subclause (i) then an agreement between the agency and the employee will govern, in effect?

MR. LEIBIG: Subclause (i) in the first --

QUESTION: I mean, that's what it says.

MR. LEIBIG: Subclause (ii) in the first prepositional phrase says in the case of employees not covered by subclause 1, granted.

QUESTION: Yes.

MR. LEIBIG: The problem is subclause 1 has a list of types of agreements, not types of employees. Subclause 1 -- and that's where the ambiguity lies. I don't think you can get to where I want to get by reading the statute alone, but you cannot also get to where the

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other side wants to get by reading the statute. That's why it's ambiguous.

QUESTION: Well, it seems to me you can get pretty far by just looking at the terms of the statute. Perhaps the regulation simply isn't permitted.

MR. LEIBIG: Let's do that for a minute. If you just read the terms of the statute you get a situation, as read by Harris County, you get a situation where the statute would then say if you want an agreement you need a collective bargaining agreement, a memorandum of understanding, any other form of agreement, an agreement with individuals, or an agreement with individual employees. That basically covers every possible type of agreement you have. If that's what this means, you didn't need section 2(A) at all because you could have just said the employer can have comp time whenever they want to because all they have to do is refuse every agreement and they are automatically in a place where they can impose, as Harris County did as a condition of employment, comp time.

So if that's what Congress meant, first of all they didn't need any of these words.

QUESTION: Well, but realistically the employer is not in a position to refuse every collective bargaining agreement that's pressed upon it. I mean, you're quite

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right that they could get there by simply refusing every agreement, but realistically that's not an available option.

MR. LEIBIG: It's isn't an available option in a limited number of states in the United States, and if Congress wanted to say that they could have. But it is an available option in more than, for police employees, for example, well over 50 percent of total police employees in the United States it is an available option.

It's an option in fact in this case Harris County took. They claim their agreement is based on an auditor's report. It's a form that you file when you're hired. It has your name, a bunch of boxes filled in how much money you're going to get paid, and then in little print at the bottom of the box it says I accept this employment and the conditions and regulations. And that's what you sign.

QUESTION: But that would still not be a vain act by Congress to set it up this way because it would preserve for those states that did have collective bargaining with public employees under 2(A) little (i), it would preserve the power and the position of the union in those states. You should be the last person, you know, to criticize it.

MR. LEIBIG: In that case, though, 2 little (i)

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would just say collective bargaining agreements, it wouldn't say -- first of all it wouldn't say memorandum of understanding in the normal sense, but you could argue about that, but it wouldn't say any other agreement between the public agency and representatives. Obviously this statute is not meant to provide only, that you only need agreement in states with collective bargaining. I think you do need an agreement in states with collective bargaining, and that's why the preamble to the regulations makes the reference to looking at state law to find out how state law sets up rights of representation.

I would emphasize in Texas there isn't a collective bargaining statute, but there is a statute that says public employees can deal with their employer through a representative, not to reach contracts but to deal with them on all sorts of other things. And the actual representative in this case regularly represents its members in grievances and before the city council in all sorts of ways, and has other agreements with Harris County that are enforced regularly. It has a dues check off agreement. It deals with Harris County all the time.

So that you're right, if Congress wanted to say there is only two situations, states with collective bargaining, and they have certain special rights, and states without collective bargaining, and in those states

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you can impose this as a term and condition of employment, they wouldn't have used these words.

More than that, what this -- these words are ambiguous is you look at them rigorously, and therefore what these words meant Congress vested in the Department of Labor, appropriately I would say even under a rigorous application of Chevron, to decide, not in the courts to decide, in the Department of Labor.

QUESTION: Well, I mean, words can be ambiguous but there is, you know, there is a scope of ambiguity. Red can mean, you know, r-e-a-d or r-e-d, but it can't mean donkey. Is what you're urging upon us within the scope of the ambiguity here?

MR. LEIBIG: I think so, and I think the way you judge that is you look at the words and see if they are unclear, not -- one definition of ambiguity is two meanings, but other -- the word ambiguity I think is also used to mean when a, in this context, the context of using regulations, when a statute is unclear. But to decide that --

QUESTION: The critical phrase is employees not covered by subclause (i), and as you point out, subclause (i) does not describe employees but it describes agreements. Why wouldn't it therefore be logical to say, you know, that it means employees not covered by

agreements under subpart (i)?

MR. LEIBIG: That wouldn't be logical for a number -- the first reason it wouldn't be logical is because if you play that out what that would mean, Congress wouldn't have needed all these words to say that. That's one of them. The second reason is if you look at the overall structure of the 1985 amendments that doesn't make sense, as we explain in the brief. But more importantly, if you look at the structure of the Fair Labor Standards Act as a whole it wouldn't make sense because it would vest employers with the possibility of doing, it was exactly happened in Texas, that is completely abrogate the need for any agreement at all because comp time can be imposed as a condition of employment.

QUESTION: Well, those are all good policy reasons, but what you urge upon us instead is that it means employees who do not have a representative?

MR. LEIBIG: No. What I urge on you is the statute is ambiguous. It could mean, and it would be reasonable for it to mean what you described earlier. It also could mean that the people covered by 1 are those people that have a representative and therefore could get various forms of agreement.

The question before the Court is who decides

which it means.

QUESTION: But I don't see how yours is one of the available options. I'm not sure that yours is within the scope of the ambiguity.

MR. LEIBIG: If you -- you mean because it could only --

QUESTION: Because you're not covered by little (i). You are not an employee covered by little (i) simply because you have a representative.

MR. LEIBIG: Whether you're an employee covered by little -- first of all there are a couple reasons why I think you are. One is from the regulations. But let me make another point. If you look -- first of all, if you read it there is doubt about it. Enough doubt at least, I would argue, to look at the legislative history. Both the Senate and the House report don't agree -- do agree about one thing, that (i) is meant to apply only where, in every case where there's a representative, and (ii) only applies where there is not a representative. And both the Senate and the House reports are very clear about that, and specifically indicate at, in the Senate report in the petitioner's Appendix at 101A and in the House report at 36A. So they both say the meaning that I said is what it means, that whether there's an agreement or not.

Another reason is the logical course of it. If

you do not have -- if (i) only applies to where there are actually agreements, then even in states where there is collective bargaining, if there was a collective bargaining agreement between a designated representative and the state and it didn't deal with comp time, petitioner would argue they can use comp time, even though under state law they would not ordinarily be able to use comp time because they would be changing wage-hour working conditions unilaterally.

Therefore if that's what it meant you would raise the same problems that petitioners complain about, that is Congress imposing on states that chose to have collective bargaining a requirement other than their law would require. So that the lack of logic -- one of the reasons that you look beyond the statute is the lack of logic of the other interpretation.

Now, I must admit to get to the full brunt of the lack of logic you have to look at what is this all about. This whole thing is to keep states from using comp time in a way that would undermine the basic 40-hour standard in the statute, which it can easily do. Let me give you an example what happens in Harris County.

What actually happens in Harris County is an individual deputy sheriff, it's 4 o'clock in the afternoon and the county needs somebody to work until midnight, the

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individual deputy is supposed to get off at 6, the county can, and this is legitimate, nobody has disputed this, can order them to stay until midnight, work 6 extra hours. Without these amendments they would have to pay for that in cash, but Congress, in order to lift burdens from the state, said you can pay for that time in comp time. So they pay them in comp time. He then has 9 hours on the books because he gets 6 hours at time and a half, he has 9 hours comp time.

The problem, and what happens in Harris County now is and then that week ends. The next week, when you have unilaterally imposed comp time, every day the sheriff can come to that deputy at 5 o'clock, when he's supposed to work until 6, and say go home today because I've got to eat up your comp time bank. And therefore they devalue the comp time. And there are other ways that that could be done.

QUESTION: How do you mean devalue it? Don't give him enough notice to make any use of it?

MR. LEIBIG: Right. If, for example if he were paid in money he could take the money and put in a bank. He would have the money there. When you're paid in comp time, as Senator Black, as Hubert Black who was the sponsor of the 1980 -- 38 amendment said, if an employer pays you in time off, then you can put the comp time in a

bank, and they call it a comp time bank. But unless you have an agreement that works out how this is going to work, and what actually happened in Harris County, the employer can come to you and say withdraw the money from the bank today, go home, right inside your regular schedule. And that happens. That's what my clients are after.

QUESTION: But is there any reason to think that that practice by an employer was condemned by Congress in this statute?

MR. LEIBIG: First of all, that practice was condemned by Congress in the Fair Labor Standards Act when they outlawed comp time. What happened in this statute --

QUESTION: But here they have reintroduced comp time.

MR. LEIBIG: Right. They have reintroduced it. That's my point. They have reintroduced it, but reintroduced it by putting certain restrictions on it. The reason for the restrictions is to open the window for state and local governments by lightening the burden a little bit, or half way. And as we cited in our brief, the article by Easterbrook where he points out is once Congress -- the state and local government went to Congress and said we want some relief from this statute. Congress said get together with your employees, and this

is in the legislative history, figure out what kind of relief you want, and come and tell us. They did. Both people said, both House and Senate said little (i) is what controls.

Then, after the rules were passed, now state and local government wants to say if you opened up the window a little bit, you've got to lift it all the way. If that happens, that will undermine federalism because in the future Congress will not leave these areas where they can regulate to leave flexibility, which I think they have done under the act.

If I could reserve the rest of my time.

QUESTION: Very well, Mr. Leibig.

Mr. Streicher.

ORAL ARGUMENT OF HAROLD M. STREICHER

ON BEHALF OF THE RESPONDENTS

MR. STREICHER: Mr. Chief Justice, and may it please the Court:

Petitioners here have created confusion where there is none. The plain language of subsection (o) of 207 is clear and it does not require going to extrinsic sources at all, and this is where the petitioners have created their confusion. The word agreement is the subject of both subpart 1 and subpart 2 of section 207, subsection (o)(2)(A). And with that understood the

meaning of the statute is clear, and no part of subsection (o) is rendered superfluous.

The plain meaning of paragraph 2 is that a public agency may provide compensatory time only pursuant to, one, an agreement between the public agency and representative of the employees, or, two, pursuant to an agreement between the employer and the employer. And I note that in Harris County this is exactly what has occurred, as each Harris County employee, as each one of the petitioners has stepped up to accept employment they have signed this individual form that Mr. Leibig mentioned and have agreed to the terms.

QUESTION: Well, Mr. Streicher, do you take the position that if there, in a state where there is a collective bargaining agreement but the agreement does not allow, it just doesn't cover comp time, now, do you think in such a state that the county would be able to enter an agreement with employees such as you have in this case? An individual employee to cover it?

MR. STREICHER: Justice O'Connor, I don't know the answer to your question, and that is one of my points, that one would need to go to that particular state's law to determine under which section one can meet.

QUESTION: Well, doesn't that indicate the statute is ambiguous? I don't know what the answer to

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Justice O'Connor's question is, and to me that makes the statute ambiguous. That is to say if there is a collective bargaining agreement but it's silent with respect to comp time, I'm not quite sure how to read the statute. Perhaps you think it's clear. Does little (i), or number 2, (ii) control?

MR. STREICHER: Yes, Justice Kennedy, I believe it would, there being no agreement in Justice O'Connor's scenario, then under subpart (i), then one would go, one would be authorized to go to subpart 2.

QUESTION: Then why don't you know the answer?

MR. STREICHER: I believe then, Justice Scalia --

QUESTION: That is the answer.

MR. STREICHER: -- that I, if I understood Mrs. O'Connor's question correctly then, if there is no agreement under subpart (i), then one would be authorized to go to subpart 2.

QUESTION: Well, but that's the question. Is there an agreement if there is a collective bargaining agreement that is silent? That doesn't seem to me that the answer to that is self evident.

MR. STREICHER: If one focuses on the words of this particular statute and focuses on the subject of subpart 1, that being is there an agreement reached

between a representative and the employer, there be -- if there is no such agreement then one would go to subpart 2.

QUESTION: But it's not clear that there's such agreement, because it doesn't talk about agreement, it talks about agreement with reference to compensatory time.

MR. STREICHER: I perhaps don't understand your question, Justice Kennedy. But if there is no agreement reached between the representative in those states that recognize a representative, and that one can meet and confer with that representative, then one would go to subpart 2.

QUESTION: Well, I certainly think some employers could argue that single (i) controls, that there is an applicable provision, it just says nothing about it. I think that's a plausible construction.

MR. STREICHER: One would have to go to the state law to determine the result of that answer, and in Texas, as we have stated in our Reply Brief and our Appendix, in Texas we cannot recognize a representative. It is against public policy.

QUESTION: Well, we're talking about two different things. We're talking about the meaning of the statute in the context of the hypothetical agreement we have outlined, and then there's also the question of whether or not an employee is authorized to conclude it.

But those are two separate questions.

I suppose you would look at -- if you're going to look at Texas law for little (i) as to whether you have a union agreement under little (i), suppose you look at Texas law for little (ii) as well, right? I mean, if state law prohibits individual agreements apart from the collective bargaining agreement with the authorized union, then you cannot have an agreement or understanding arrived at between the employer and employee under little (ii), right? Is that your position?

MR. STREICHER: No.

QUESTION: No?

MR. STREICHER: No. If in Texas, as we are, prohibited from entering into an agreement with the representative of employees, then we would be authorized, as we are, to enter into individual agreement with the employee.

QUESTION: I understand, but I'm talking about another state that has public employee unions and that prohibits employees from dealing with the public employer apart from their union. In such a state the employees would be disabled from making agreements under little (ii), wouldn't they?

MR. STREICHER: Yes.

QUESTION: There would be no agreement or

understanding, so you would preserve, you would preserve the exclusive bargaining power of the authorized union.

MR. STREICHER: If that was the effect of that state's law, yes, that was the exclusive bargaining agent.

I'd like to continue then on that particular point that the plain meaning of the statute, that being the subject of both part 1 and 2 is agreement, it allows the state laws to be preserved. And with all the various state laws out there I ask how one can override this plain meaning of the statute.

I want to now turn your attention to the background in which subsection 207 arose in order to gain a correct understanding of subsection 207. This Court had just decided the Garcia case in February of 197 -- 1985, which extended provisions of the FLSA to state and local governments. However, a great variety of compensatory time arrangements had developed between public employers and their employees, and long-standing practices existed concerning the use of compensatory time which were of mutual benefit to both the public employee and the public employer. This background of mutually beneficial compensatory time arrangements was the background in which Congress passed section 207(o). Already by November of 1985 Congress had passed section (o) to help public employees and public employers preserve their mutually

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beneficial compensatory time practices.

Congress was not for a minute going to allow the full weight of the Garcia decision to descend upon the public employers, be they state governments or local government entities. And for that proposition I point you to the Appendix for the Petition for Writ of Cert, page 65a, page 72a, 89a, 114a, and also the Garcia decision itself talks about this background in which existed when the Garcia decision was handed down.

Properly understood in light of this congressional purpose to preserve existing compensatory time practices, it's hard to imagine how Congress could have improved upon the statutory language that was actually chosen in section 207(o).

QUESTION: Is it your position that the employer may on his own substitute comp time for overtime even if he doesn't deal with individual employees?

MR. STREICHER: No. The employer can't, in those states that provide for dealing with the employees, as they do in Texas, in Harris County.

QUESTION: So, does Harris County forbid dealing with individual employees?

MR. STREICHER: No. In this particular case all of the petitioners have signed individual compensation forms whereby they accept the --

QUESTION: Comp time.

MR. STREICHER: -- comp time arrangement which exists in the personnel regs of Harris County. And, by the way, those regulations provide, or the individual agreements provide that the first 240 hours of compensatory time shall be placed in a bank for the employee, so-called comp time bank. After 240 hours -- by the way, those hours are time and a half hours, after that time the employees receive cash for each hour worked at the rate of time and one-half.

QUESTION: Mr. Streicher, you say it's hard to imagine how they could have put it better? I can imagine how they could have put it better. If it means what you say it means they could have said in little (ii), absent such applicable provisions, comma, an agreement or understanding arrived at between the employer and employee. That's the meaning you want to give it, right?

MR. STREICHER: Yes.

QUESTION: That would be a much clearer way to put it, don't you think, instead of in the case of employees not covered by subclause (i)?

MR. STREICHER: I believe they stated that, Justice Scalia, when they said those employees not covered by subsection 1.

QUESTION: Well, it would have made sense to me

to say pursuant to little (i), applicable provisions of the collective bargaining agreement, blah, blah, blah, blah, or other agreement, little 2, absent such applicable provisions --

QUESTION: That's very clear.

QUESTION: Isn't that clear?

(Laughter.)

QUESTION: But they didn't say that. Do you take the provision the statute refers to agreements or to groups, or to types of employees? Does it refer to types of agreements?

MR. STREICHER: Agreements. The subject of both subpart 1 and subpart 2 is agreement. It just cannot be any clearer than that. The statement of the statute, if we could reread paragraph 2 to gain this understanding, a public agency may provide compensatory time only pursuant to subpart 1, there it talks about an agreement between the public employer and a representative, and 2, also the subject matter is pursuant to an agreement. There it happens to be talking about an agreement entered into by the employer and the individual employee.

But it just cannot be any clearer that the subject matter is agreement in both subparts.

QUESTION: May I ask you, what if there were an agreement, collective bargaining agreement in existence

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which prohibited the use of comp time, would subparagraph 2 apply, because those employees would not be permitted to do it by a collective bargaining agreement, they were forbidden to do it?

MR. STREICHER: I don't believe, Justice Stevens, that subpart 2 could apply because in section, subsection (o), subpart (B) it talks about existing collective bargaining agreements, and if the existing collective bargaining agreement were one wherein no compensatory time was allowed, then that collective bargaining agreement would have been entered into pursuant to subpart 1, and that would be the relationship between that employer and those employees.

QUESTION: Haven't Labor Department regulations been against you?

MR. STREICHER: Justice White, I believe there is ammunition for both sides, but several of the Justices this afternoon pointed out the recognition by the Secretary of Labor himself that whether or not an employee has a representative shall be determined by state law. One just cannot overcome that in this case, and it's extremely important in this case to remember that because under Texas state law one cannot have --

QUESTION: I would think you would argue that it wouldn't make any difference whether they had a

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representative or not. They might have a representative, but they would have no agreement.

MR. STREICHER: That's correct. I'm sorry, perhaps I misunderstood. But again, the end result is there must be an agreement necessarily because we cannot recognize --

QUESTION: There must be a collective bargaining agreement with their representative.

MR. STREICHER: That's correct.

QUESTION: What do you do with the language in the Statement of Basis and Purpose for the rule, which says that the Department believes that the proposed rule accurately reflects the statutory requirement, according to the agency, that a CBA memorandum of understanding or other agreement be reached between the public agency and the representative of the employees where the employees have designated a representative? If they have designated a representative, says this, the agreement must be reached with that representative.

QUESTION: Preemption?

MR. STREICHER: Preemption, or I think then we have come into the Gregory, the Ashcroft area where there must be a plain statement by Congress to upset the balance, the traditional balance between Federal and state rights. There is no such plain statement made by Congress

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in this subsection (o).

QUESTION: Well, I mean, my goodness -- it has to be in every detail of the scheme? They have made the decision to apply the Fair Labor Standards Act to the states. That's the decision. It's clear that the states are going to be bound by the Fair Labor Standards Act.

MR. STREICHER: I agree with you.

QUESTION: And you're saying that every detail of the Fair Labor Standards Act must moreover be particularly clear as applied to the states, otherwise in every little section of the act you're going to have one rule for the states and one rule for the private employer? That doesn't strike me as very sensible.

MR. STREICHER: I agree with you, Justice Scalia, certainly that it was the intent of Congress to apply, or of this Court to apply the FLSA to the state and local governments, but it is not the intent of this Court without a plain statement by Congress to upset the traditional relationship between the rights of the states and the Federal rights.

QUESTION: Well, isn't it your argument that the requirement for plain statement in effect arises because otherwise the Secretary or Congress, depending on whether you zero in on the reg or the statute, would be foisting or mandating a collective bargaining obligation onto the

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states that they did not have. Isn't that your point?

MR. STREICHER: Correct, Justice Souter. Although the Chevron case talks about the Secretary or the administrator of regulations, but the Gregory case talks about what Congress can do. And to allow the regulations to have greater -- to have the Chevron case take precedent over the Gregory case would allow the regulations to do what Congress itself cannot do.

QUESTION: Is it your view in Texas that a public employer can use subclause 1 if it wants to, or that it must always use subclause 2?

MR. STREICHER: In Texas if the, pursuant to the statute, the Police and Firemen's Act, a election were held authorizing the collective bargaining arrangement, then one could get into subsection 1. And that of course is page 3a in our Brief in Opposition to the Petition for Writ of Cert. Specifically page 7a of that act, section 5, upon the adoption of the provisions of this act by any city, town, or political subdivision in this state to which this act applies as herein in this section provided, fire fighters and/or policemen shall have the right to organize and bargain collectively with their public employer as to wages, hours, working conditions, and all other terms and conditions of employment.

Upon the passage of that statute and upon an

election whereby the local voters adopt specifically this act, then only, Justice Kennedy, could a local governmental entity in Texas come under subsection 1.

QUESTION: Mr. Streicher, there has been some colloquy between the bench and you and your opponent about the provisions of a regulation and there has been reference made to something on page 34a of the Appendix that apparently is the reaction of the Department of Labor to requests for comment on a rule. And at the last paragraph on page 34a that carries over to 35a it says the Department believes that the proposed rule accurately reflects the statutory requirement that a collective bargaining agreement, memorandum of understanding, or other agreement be reached between the public agency and the representative of the employees where the employees have designated.

Now, what rule is that comment referring to? Do you know? It seems by its context it must be referring to a previously promulgated rule or regulation.

QUESTION: Is there a regulation to that effect?

MR. STREICHER: I believe there is, Your Honor.

QUESTION: Where is it, do you know? Well, if you don't know, just proceed, but it would --

QUESTION: On page 30a of the Appendix, isn't it, section 553.23, as --

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MR. STREICHER: I believe -- I'm sorry.

QUESTION: -- as is set forth at the top of page 33a. This is the Statement of Basis and Purpose. It's not just a response to comments either, it's the Statement of Basis and Purpose that must be adopted with the rules. And it's as authoritative as the rules themselves. It's a part of the adoption of the rules, isn't it?

MR. STREICHER: I believe you're right, Justice Scalia. It on page 30a talks about if the employees do not have a representative compensatory time may be used in lieu of cash only if there is such an agreement or understanding. But I wish to note, Justice Rehnquist, that the comment on page 34a by the Secretary does not mean that he refused the point that this particular governmental entity was making, and I would submit that it can be read congruently with my interpretation that if the subject matter of subclause 1 is agreement, there being no agreement reached, then therefore --

QUESTION: Yes, but what if the regulation says if there's a representative, if there is a representative been designated there has to be an agreement, regardless of what state law says.

MR. STREICHER: This statute, Your Honor, does not say that, though. And --

QUESTION: But the regulation does, on page 31a,

subpart (c), where employees of a public agency do not have a recognized or otherwise designated representative the agreement or understanding concerning compensatory time off must be between the public agency and the individual employee. But that's only the case where employees do not have a recognized or otherwise designated, or otherwise designated representative. And that language at the bottom of 34a is, as I understand it, an explanation of that same provision.

QUESTION: Well, is there some case or some law that says that a state may forbid or may not forbid collective agreements between their employees and a union? I take it you think Texas is statutorily and constitutionally capable of forbidding such agreements?

MR. STREICHER: I believe, Your Honor, that is the case, Justice White. The states have been free to regulate labor relations.

And if I could also make one point in regard to the prior question --

QUESTION: Well, if that's the law certainly the -- if that's the controlling law the regulation, to the extent it says that if there's a representative been named there must be an agreement, that just doesn't hold up.

MR. STREICHER: And that is not what this

particular subpart (i) speaks of. If I could take a brief moment to spend on page 31a, that the regulation states where employees of a public agency do not have a recognized or otherwise designated representative. Harris County, nor any local governmental entity in Texas, can recognize a designated representative. It is not possible to enter into an agreement in Texas with a representative unless the election that we previously discussed has been held.

QUESTION: You said they can have a representative, they just can't enter into an agreement with them?

MR. STREICHER: That's right.

QUESTION: So literally they have a representative.

MR. STREICHER: But not for the purposes of subsection (o), to enter into a compensatory time agreement. The representative in Texas, as was previously discussed, can present grievances and other concerns, employee concerns, but because of 5451c and c-1, we cannot meet and confer with a union representative of a public employee to enter into --

QUESTION: Of course if you read the Secretary's regulation literally that just would mean that's kind of tough luck. You cannot make the agreement that you need

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to make to provide for comp time. And that's one way to read it. It's unfortunate, but state law just disables you from taking advantage of this exception in the statute.

MR. STREICHER: Justice Stevens, if it were to stop there that may be true, but we have not stopped there. We do have individual agreements with the employees.

QUESTION: Yes, but if the regulations mean what they say literally, and they may or may not, you weren't entitled to do that because the subparagraph (i) prohibition kicked in and said you can't have it, as interpreted by the Secretary. Well, I'm just covering the same ground that has been covered.

QUESTION: I gather that your answer in your brief, or in somebody's brief, to the language at the bottom of 34a was the language at the top of 35a, wasn't it, namely the sentence that says it is the Department's intention that the question of whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with state or local law and practices. That and the preceding sentence, I gather, could be interpreted to mean that you cannot have an agreement with a designated representative if the state law does not permit that agreement.

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MR. STREICHER: That's exactly correct.

QUESTION: Yes, but what it says is they shall have a representative, not whether they shall have an agreement with a representative. I mean, it's really not very clear.

MR. STREICHER: If I could take a moment with the impact of the Court's decision, it could have a substantial impact not only on the respondents but on all state and local governmental entitles. It would have an impact in regard to their ability to provide essential services to the citizens of those entities, and I don't, can't think of a more quintessential service to the people of a local government entity than the police services. The current value of Harris County's --

Thank you.

QUESTION: Thank you, Mr. Streicher.

Mr. Leibig, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF MICHAEL T. LEIBIG

ON BEHALF OF THE PETITIONERS

MR. LEIBIG: I would just like to make three points. The first one deals with Texas law. I'd like to point out that the statute referred to by Mr. Streicher also says in section 6 that employees may have representatives and the representatives may deal with issues arising in the work place including wages, hours,

and working conditions. I admit it doesn't, it prohibits having a collective bargaining agreement but it does allow representation.

It's very important, and we have emphasized in our brief that we are not claiming, and the Fair Labor Standards Act does not require that there be a collective bargaining contract covering comp time. The only -- it requires a special new entity directed by Congress which is a comp time agreement under the Fair Labor Standards Act. The only consequences of having an agreement is that you can use comp time. The only consequences of violating the agreement is that if you are sued for cash overtime you do not have that defense which Congress granted you.

QUESTION: Yes, but to that extent you would have a collective bargaining agreement.

MR. LEIBIG: Well, it's not a collective --

QUESTION: I mean, you can call it anything you want to, but it's a collective bargaining agreement on that subject.

MR. LEIBIG: It's not a collective bargaining agreement in the sense that collective bargaining agreements are ordinarily agreements between, one, between exclusive representatives and their employees. They normally -- the situation in which collective bargaining agreements of the kind we're talking about are created

normally prohibit unilateral dealings between employees and that. This is different than that.

As the Fifth Circuit pointed out, a deputy sheriff in Texas could designate his minister to be his representative, or a lawyer, or anybody to be the representative. It's only if they want a representative you have to deal with the representative. And the reason for that is to encourage voluntariness of the agreements.

QUESTION: Do you contend as a matter of Texas law that the collective bargaining agent can enter into comp time agreements?

MR. LEIBIG: As a matter of Texas law employees can designate a representative --

QUESTION: Right.

MR. LEIBIG: Even Texas law gives them the right to do that and recognizes the right of the representative to act for the employees as an agent would act for the employees. Then they can enter into an agreement. Once the agreement is entered --

QUESTION: I wish you would tell me yes or no.

MR. LEIBIG: Yes. Yes, I do. Once an agreement is entered, though, it's very important -- the only way to enforce the agreement is as a defense against statutory claims under the Fair Labor Standards Act for cash. It's not enforceable anywhere else, and that's the only

consequence of the agreement. The state's courts can refuse to recognize it as a contract, a collective bargaining contract.

Another difference is it's not an exclusive representative situation. Each employee can designate or not designate whoever they want.

QUESTION: It's still a collective bargaining agreement, whether it's enforceable or not in this case.

MR. LEIBIG: Right. And the second thing I would like to point out --

QUESTION: And so are employees covered by little (i)?

MR. LEIBIG: I think employees are covered by, the employees in this case would be covered by, they are employees who do not have an agreement and therefore you cannot use 2(i).

One other thing I just want to make clear while I have time is that the agreement that the employer is referring to is just a form that has a little place at the bottom that you sign. It doesn't mention comp time, it doesn't mention anything. It says as a condition of employment you're accepting whatever regulations we have now or ever have, and we can change them whenever we want, and you sign that to get your pay check. It's not a negotiated agreement.

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QUESTION: I never doubted it, Mr. Streicher.

MR. LEIBIG: And the point of all this is the reason to require the designation of a representative is the traditional way to guarantee that agreements are voluntary. If you have a representative -- as long as employees have a right to have a representative, which is what we're talking about here, if they don't choose to have a representative then you can presume when they sign this form and are paid in that way they were volunteers.

If they do designate the representative then you should have to deal with the representative. And if the representative on an individual basis works out an agreement, then that agreement is only useful for one purpose, as a defense against claims for cash by the state under the Fair Labor Standards Act. The state can ignore it.

QUESTION: Does that position take you beyond the Secretary's position in the regs?

MR. LEIBIG: No, I think that is the Secretary's position.

QUESTION: Well, the Secretary took the position that if you have got a collective bargaining agreement this is the way you must agree on this subject. Did he take the position that if you don't have a collective bargaining agreement then they be the kind of agreement

that you speak of for defensive purposes and it must be done in that way?

MR. LEIBIG: I think the Secretary's position is you either have to have one of the kinds of agreements talked about in little (i) 1 --

QUESTION: Which is not necessarily a CBA.

MR. LEIBIG: Right. But the reason they say we look to state law -- states can say public employees can only choose exclusive representatives, and if they do they are regulating the choice of a representative not the arrival at an agreement. And states can, and Texas has. Texas has a statute --

QUESTION: Thank you, Mr. Leibig. Your time has expired.

MR. LEIBIG: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 1:59 p.m., the case in the above-entitled matter was submitted.)

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BY Ann Mari Federico

(REPORTER)