(Dup.)

To Be Argued By:
Daniel A. Osborn, Esq.

05-55650

IN THE

United States Court of Appeals

FOR THE

Ninth Circuit

ROBERT NIGG; KEITH LEWIS, as private attorney generals and on behalf of himself and all others similarly situated;

Plaintiffs-Appellants

and

GINA HARRELL

Plaintiff

v.

UNITED STATES POSTAL SERVICE

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR APPELLANTS

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PRELIMINARY STATEMENT

Both the Postal Service's brief and the District Court's decisions begin their analysis by focusing on the wrong statute. Because the only issue before the District Court (and the primary issue on appeal) is whether the FLSA applies to postal inspectors, the starting point for this Court's analysis should be the text of the FLSA, not, as the Postal Service argues, the text of Section 1003(c). The text of the FLSA plainly states that it applies to postal inspectors. For the Postal Service to prevail, it must show that inspectors fall within one of the exemptions set forth in the statute or that the statute has been repealed.

In nearly 30 pages of opposition brief, the Postal Service was unable to identify a single statutory exemption that excuses it from paying overtime to its inspectors. Likewise, the Postal Service was unable to point to any statutory repeal of the FLSA that applies to postal inspectors. Instead, the Postal Service argued that its compliance with Section 1003(c) excuses its compliance with the FLSA. The District Court accepted the Postal Service's argument and concluded that the Postal Service's "interpretation" of Section 1003(c) is permissible as a matter of law. (R. 80).

The District Court's decision must be reversed because the Postal Service's "interpretation", while standing alone may be a "permissible" interpretation, is not permissible when considered in relation to the FLSA. The Postal Service does not

have the authority to create an exemption from the FLSA merely by complying with Section 1003(c). Only Congress can amend the FLSA to create exemptions and it has not done so.

ARGUMENT

A. Congress' Enactment of Section 1003(c) Did Not Exempt Postal Inspectors from the FLSA

In 1974, Congress extended the overtime protections of the FLSA to all individuals, including postal inspectors, employed by the United States Postal Service. 29 U.S.C. § 203(e)(2)(B). Notwithstanding the clear and unambiguous language of the statute, the Postal Service argues that it is not required to pay postal inspectors overtime. As noted above, to prevail, the Postal Service bears the burden of establishing that postal inspectors fall "plainly and unmistakably" into one of the recognized exemptions of the FLSA (Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960); Alvarez v. IBP, Inc., 339 F.3d 894, 905 (9th Cir. 2003); Do v. Ocean Peace, Inc., 279 F.3d 688, 691 (9th Cir. 2002)) or that the applicable provision has been repealed (an argument the Postal Service does not advance).

In its opposition brief, the Postal Service fails to point to a single exemption enumerated in the FLSA that "plainly and unmistakably" exempts postal inspectors from receiving overtime. Instead, the Postal Service attempts to bootstrap itself into

an exemption for individuals who receive Law Enforcement Availability Pay ("LEAP"), even though postal inspectors do not receive such pay.[1] Specifically, the Postal Service argues that Section 1003(c) precludes FLSA overtime because it "requires" that the Postal Service pay postal inspectors comparable to GS-1811 criminal investigators and GS-1811 investigators are exempt from the FLSA because they receive LEAP. (Appellee's Br. p. 10-11).

The Postal Service's argument must be rejected for several reasons. First, Section 1003(c) requires only that the Postal Service maintain the pay of postal inspectors on a standard of comparability to others performing similar work; it does not require the Postal Service to enact the same compensation scheme as GS-1811 criminal investigators or any particular agency. Second, LEAP recipients are not eligible for FLSA overtime because Congress enacted a specific exemption for LEAP recipients; when Congress enacted Section 1003(c), it declined to create an FLSA exemption and it did not extend the exemption for LEAP recipients. Finally, as explained in Appellant's Opening Brief but which will not be repeated here, because Congress did not create an FLSA exemption for postal inspectors, the Postal Service

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[1] In 1994, Congress passed the Law Enforcement Availability Pay Act, 5 U.S.C. § 5545a, to provide certain premium pay to federal law enforcement officers. At the same time it enacted LEAP, Congress amended the FLSA to exempt LEAP recipients from overtime pay. Postal inspectors do not receive LEAP and, consequently, do not fall within the exemption for LEAP recipients.

cannot "effectively" exempt postal inspectors from the FLSA by choosing to create a compensation system similar to LEAP.

1. Section 1003(c) Mandates Only That the Postal Service Pay Postal Inspectors Comparably to Comparable Positions

This Court has long held "that there is a strong presumption that the plain language of [a] statute expresses congressional intent, rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed." Campbell v. Allied Van Lines Inc., 410 F.3d 618, 622 (9th Cir. 2005); United States v. Tobeler, 311 F.3d 1201, 1203 (9th Cir. 2002). Only if the language of the statute is ambiguous, will the Court consult the legislative history and then only to the extent the legislative history will aid in the determination of Congress' intent. Moyle v. Director, Office of Workers' Compensation Programs, 147 F.3d 1116, 1120 (9th Cir.1998), cert. denied, 526 U.S. 1064 (1999); In re Dawson, 390 F.3d 1139, 1146 (9th Cir. 2004).

Section 1003(c) provides that the "[c]ompensation and benefits for all Postal Inspectors shall be maintained on a standard of comparability to the compensation and benefits paid for comparable levels of work in the executive branch of the Government outside the Postal Service." 39 U.S.C. § 1003(c) (emphasis added). While the terms "comparable" and "comparability" are not defined in the statute,

Webster's Dictionary defines the terms to mean "similar" or "like." Merriam-Webster's Collegiate Dictionary 234 (10th ed. 1999). Thus, the plain language of Section 1003(c) requires only that the Postal Service pay postal inspectors similarly to individuals that are doing similar work in the executive branch. The statute does not include any specific instruction as to how postal inspectors are to be paid and the Postal Service retains broad latitude in formulating its compensation system. This is consistent with Congress' determination that, for purposes of employee compensation, the Postal Service should be treated like a private employer (which would be subject to the FLSA) and retains the authority to set its own compensation rates. Sprague v. United States, 677 F.2d 865, 866 (Ct. Cl.1982); Cooper v. U.S. Postal Service, Case No. 00 C 0172, 2001 WL 1442553, at *5, (N.D. Ill. Nov. 14, 2001).

So long as the compensation and benefits afforded postal inspectors are "maintained on a standard of comparability", the Postal Service is free to pay postal inspectors more, less, or different salary and benefits than other federal law enforcement officers without running afoul of Section 1003(c). Section 1003(c) does not require the Postal Service to pay any particular compensation or benefit and it does not require the Postal Service to pay postal inspectors identically to law enforcement officers of any particular agency. Section 1003(c) requires only that the

ends be comparable (compensation and benefits), not the means (FLSA overtime versus the Postal Service's "availability pay" versus LEAP).

Despite the plain language of the statute, the Postal Service argues that Section 1003(c) "requires the compensation and benefits of Postal Inspectors to be comparable to the compensation and benefits of GS-1811 criminal investigators." (Appellee's Br. pp. 10-11) (emphasis added). The Postal Service also contents that "Congress mandates that the compensation and benefits of the Postal Inspectors . . . be comparable to the compensation of GS-1811 criminal investigators." (Appellee's Br. p. 19) (emphasis added). The Postal Service makes these statements without citing to the text of Section 1003(c), the legislative history of the statute, or any authority whatsoever. As this Court is well aware, if Congress wanted the compensation of postal inspectors to be the same as GS-1811 criminal investigators, it could have drafted Section 1003(c) to reflect that desire. It did not. Instead, Congress chose to require only that the pay be similar to persons performing comparable levels of work in the executive branch of the government. Even the Postal Service recognizes that "[w]hen Congress enacted Section 1003(c), it was aware that GS-1811 criminal investigators and their agencies had uniform pay scales and a uniform system for dealing with overtime." (Appellee's Br. p 23). Considering that Congress knew about the uniform pay scale for GS-1811 investigators and could

easily have required the Postal Service to adopt it, Congress' decision to not identify or even refer to GS-1811 investigators in Section 1003(c) is very telling. In short, the plain language of Section 1003(c) undermines the Postal Service's argument that Congress "required" it to implement the "uniform pay scale" of the GS-1811 position. Because Congress did not mandate that the Postal Service pay postal inspectors like GS-1811 criminal investigators, Congress did not determine that postal inspectors, like GS-1811 criminal investigators that receive LEAP, should be exempt from the overtime provisions of the FLSA.

The legislative history also does not support the Postal Service's argument. In fact, the legislative history is completely devoid of any discussion of Section 1003(c).[2] Section 1003(c) was included in an omnibus appropriations bill for the Department of Defense for the fiscal year 1997. (SER. 399-404; 410-412). The bill, H.R 3610 is more than 700 pages long, but the portion related to the Postal Service and Title 39 consists of just <u>five</u> pages. Congressman McHugh, a member of the Subcommittee on the Postal Service, drafted the legislation amending Title 39. According to Congressman McHugh, the changes to Title 39 were necessary to correct a structural flaw that existed within the Postal Service. (SER. 410-412).

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[2] All of the Postal Service's citations to the statements of Senator DeConcini refer to Congress' enactment of LEAP, not Section 1003(c). The Postal Service's brief does not cite to any legislative history regarding Section 1003(c).

Specifically, the Inspector General Act of 1978 requires that audits of government agencies be conducted in accordance with Generally Accepted Government Auditing Standards, which mandate that auditors be "organizationally independent" from the operations they audit. Id. At the Postal Inspection Service, the Postal Service Inspector General was also the Chief Postal Inspector, meaning that the individual responsible for conducting audits was not "organizationally independent" from the organization he audited. Id. House bill 3610 "corrects this systemically flawed structure by mandating an independent Office of the Inspector General." Id. The statute does not mention the FLSA or GS-1811 investigators or their pay scale.

The Postal Service's entire argument is premised on the completely unsupportable position (by the text of the statute and the legislative history) that Section 1003(c) requires it to pay postal inspectors the same salary and benefits paid to GS-1811 criminal investigators. Based on this premise, the Postal Service argues that because it is required to implement an availability pay (or premium pay) system similar to LEAP, it should get the benefit of the FLSA exemption for LEAP. However, the plain language of Section 1003(c) demonstrates that Congress did not require the Postal Service to pay its inspectors comparable to GS-1811 criminal investigators. Rather, the Postal Service chose to pay postal inspectors like GS-1811 criminal investigators. Although GS-1811 criminal investigators do perform work

that is "comparable" to the work of postal inspectors, they are only one of several positions that do so.[3] The Postal Service could also have chosen to pay postal inspectors similar to the United States Secret Service Division, United States Park Police, or Customs Officers. Law enforcement officers working in the Secret Service Uniformed Division, the United States Park Police Officers, and Customs officers are all eligible to receive overtime under the FLSA. (SER 366; DC Code § 5-1304(d)(1); Abbot v. United States, 204 F.3d 1099, 1100 (Fed. Cir. 2000); Bull v. United States, 63 Fed. Cl. 580 (Fed. Cl. 2005). Customs Officers also "receive overtime pay under (COPRA) [Customs Officer Pay Reform Amendments] at the rate of 2 times the basic hourly rate--a 100-percent premium." (SER 297). The Postal Service had many "comparable" positions to chose from because, as stated by the Office of Personnel Management, the federal "agencies are covered by *a patchwork of different premium pay statutes* or are given broad administrative authority." (SER 294).

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[3] In its brief, the Postal Service argues that the since the postal inspectors did not contest the Postal Service's comparison of postal inspectors to GS-1811 criminal investigators, this Court should find that "Congress intended the phrase to mean GS-1811 criminal investigators." (Appellee's Br. 14-15). The Postal Service's logic is tortured. It is one thing for the postal inspectors to admit that GS-1811 criminal investigators perform comparable work; it does not follow that the postal inspectors agree that GS-1811 criminal investigators are the only other individuals that perform comparable work or that LEAP is the only comparable pay system.

2. When Congress Enacted Section 1003(c) It Chose Not to Amend the FLSA to Exclude Postal Inspectors

As the postal inspectors explained in their opening brief, in 1990 Congress passed the Federal Law Enforcement Pay Reform Act of 1990 ("FLEPA"), which entitled federal law enforcement officers to certain overtime pay (referred to as "administratively uncontrollable overtime" or "AUO") and, in certain cities, cost of living increases. See 5 U.S.C. § 5305; 5 U.S.C. § 5545. Lanier v. District of Columbia, 871 F. Supp. 20, 21-22 (D.D.C. 1994). Although Congress originally intended to include postal inspectors in FLEPA, the Postal Service asked Congress to be excluded from this statute because, according to the Postal Service, it had "'ample authority and flexibility to make Postal Inspector positions attractive' and adequately address recruitment/retention problems." (R. 48). Congress granted the Postal Service's request and inspectors were not included in FLEPA. (Id.). Just one year later, however, the Postal Service issued a report saying that it was "facing potentially critical human resources problems due to lack of comparable compensation with other federal law enforcement agencies." (R. 42).

In 1994, Congress amended FLEPA by creating LEAP. See Treasury, Postal Service and General Government Appropriations Act, 1995, Pub. L. No. 103-329 § 633, 108 Stat. 2382 (1994). At the same time Congress created LEAP, it amended

the FLSA to exempt LEAP recipients from the FLSA's overtime requirements. See Pub. L. 103-329, Title VI, § 633(b)(1), 108 Stat. 2425 (Sept. 30, 1994), adding 29 U.S.C. § 213(a)(16) and 213(b)(30). Because postal inspectors had been excluded from FLEPA, they were not affected by these changes in the law. However, exactly two years after Congress passed LEAP, it passed Section 1003(c). Unlike what it had done just two years earlier, Congress did not amend the FLSA to exempt postal inspectors or individuals who are compensated pursuant to Section 1003(c).[4] Had Congress intended to exempt postal inspectors from LEAP, it could have amended the FLSA, like it did when it passed LEAP. Alternatively, Congress could have required that postal inspectors be paid LEAP, or it could have required that postal inspectors be paid the same as GS-1811 criminal investigators. Congress did not do any of these things. As the Supreme Court has stated, there is strong presumption "that Congress will specifically address language in the statute books that it wishes to change." United States v. Fausto, 484 U.S. 439, 453 (1988). When Congress enacted Section 1003(c) it was aware that federal law enforcement officers were subject to the provisions of the FLSA, yet it decided not to exempt postal inspectors.

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[4] Although the legislative history provides scant evidence of Congress' intent, it appears that Section 1003(c) was designed to require the Postal Service to live up to its promise to keep the position of postal inspectors financially attractive -- something it had failed to do. (See SER. 406).

The only inference that can be drawn from the passage of Section 1003(c) is that Congress did not intend to exclude postal inspectors from the FLSA.

B. Section 1003(c) Is Capable of Co-Existing with the FLSA

The Postal Service's argument that availability pay is irreconcilable with FLSA overtime is a half-hearted attempt to argue that the FLSA provision applicable to postal inspectors has been impliedly repealed. Under the doctrine of implied repeal, one federal statute may repeal another only when the intention of the legislature is clear and manifest. Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976); Posadas v. National City Bank, 296 U.S. 497, 503 (1936). When Congress does not expressly state its intent to repeal or preempt a statute, the presumption against implied repeal can only be overcome when: (1) there is an irreconcilable conflict between the provisions in the two laws; or (2) the later law was clearly intended to "cove[r] the whole subject of the earlier one and is clearly intended as a substitute." Posadas, 296 U.S. at 503. The Supreme Court has vigorously applied this standard and has not found any statute to be impliedly repealed since it found the securities laws impliedly repealed the antitrust laws in 1975. Branch v. Smith, 538 U.S. 254, 293 (2003) (O'Connor, concurring in part and dissenting in part). Outside of the antitrust context, the Supreme Court has not recognized the implied repeal of any statute since 1917. Id.

To prove implied repeal, the Postal Service must do more than show that the two statutes would or could produce different factual results when applied to the same factual situation. Radzanower, 426 U.S. at 155; Morton v. Mancari, 417 U.S. 535, 550-551 (1974). Rather, it must show that there is an irreconcilable conflict between the two statutes, e.g., that they are "incapable" of co-existence or that there is a plain repugnancy between the two laws. Radzanower, 426 U.S. at 155; Morton, 417 U.S. at 550-551; Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963); Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 421 (1986); United States v. Philadelphia National Bank, 374 U.S. 321, 350-351 (1963).

Section 1003(c) and the FLSA can both be applied to postal inspectors. Section 1003(c) is a broadly worded statute that merely requires postal inspectors to be paid "comparably," a term that is not defined in the statute. The Postal Service can pay postal inspectors comparably to other federal agencies and pay them FLSA overtime at the same time. As previously explained, law enforcement officers working in the Secret Service Uniformed Division and the United States Park Police Officers receive overtime under the FLSA. (SER 366; DC Code § 5-1304(d)(1); Abbot v. United States, 204 F.3d 1099, 1100 (Fed. Cir. 2000)). Customer Officers were recently held to be entitled to overtime. Bull, 63 Fed. Cl. at 589.

C. The Dymond and Sprague Decisions Do Not Apply to This Motion

When Congress enacted Section 1003(c) in 1996, postal inspectors were not eligible for FLSA overtime based on two opinions in which the court held that postal inspectors fell within the "administrative" exemption of the FLSA. See Sprague v. United States, 677 F.2d 865, 868 (Ct. Cl. 1982); Dymond v. United States Postal Serv., 670 F.2d.93, 94 (8th Cir. 1982)[5]. Based on these two cases, and the principle that Congress is presumed to have knowledge of existing law, the Postal Service concludes that when Congress passed Section 1003(c) "it did so aware of the fact that Postal Inspectors at that time were not and had never been *subject to* the provisions of the FLSA." (Appellee's Br. p. 14) (emphasis added).

Contrary to the Postal Service's position, both the Dymond and Sprague cases started with the understanding that postal inspectors were in fact subject to (or

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[5] At the time of these decisions, postal inspectors also performed the "audit" functions. The Department of Labor's determination that postal inspectors were administrative employees was based, in large part, on the performance of these audit functions. As a result of the 1996 amendments to the Postal Reorganization Act, Congress created the Office of the Inspector General which took over the audit functions of postal inspectors, meaning that their primary job function became that of a law enforcement officer. Since law enforcement officers are not administrative employees, postal inspectors no longer fit within the administrative employee exemption. Bratt v. County of Los Angeles, 912 F.2d 1066, 1068-70 (9th Cir. 1990); Reich v. State of New York, 3 F.3d 581, 585-87 (2d Cir. 1993), cert. denied, 510 U.S. 1163 (1994), overruled by implication on other grounds by Seminole Tribe v. Florida, 517 U.S. 44, 59-66 (1996).

protected by) the FLSA, but that the FLSA did not apply to postal inspectors because they fell within an exemption that applies to "administrative" employees. See Dymond, 670 F.2d at 94 ("The FLSA was first made applicable to the Postal Service in 1974"); Sprague 677 F.2d at 868 ("We assume *arguendo* postal inspectors are law enforcement officers within the meaning of 29 U.S.C. § 207(k)"). Indeed, it would make no sense for these courts to have found that postal inspectors fell within one of the statutory exemptions to the FLSA if the statute did not apply to the inspectors in the first place.

If this Court is to presume that Congress knew of the existing law, then the Court should presume that Congress also was able to understand and interpret the status of the law. In 1996, the courts had clearly ruled that individuals whose primary duty consisted of law enforcement activities were not "administrative" employees. Moreover, when Congress enacted Section 1003(c), it also created an independent Office of the Inspector General which would perform audits. Consequently, when Congress enacted Section 1003(c), it knew that postal inspectors were covered by the FLSA; that the only reason they were not entitled to FLSA overtime was because they performed audit functions and were deemed "administrative" employees; that postal inspectors would no longer be performing audits and would be primarily law enforcement officers; and that the courts had repeatedly held that law enforcement

officers were entitled to FLSA overtime. Despite all of this knowledge, Congress still chose not to amend the FLSA to exempt postal inspectors like it had done just two year before when it passed LEAP. The only conclusion that can be reached is that Congress did not intend to exempt postal inspectors from the overtime provisions of the FLSA.

CONCLUSION

Congress specifically identified employees of the Postal Service, which includes postal inspectors, as individuals protected by the overtime provisions of the FLSA. The District Court authorized the Postal Service to "effectively" extend the FLSA exemption for LEAP recipients to postal inspectors, even though postal inspectors do not fit "plainly and unmistakably" within the exemption. The District Court's decisions must be reversed because only Congress has the power to exempt classes of workers from the FLSA. Although Congress had several opportunities to exempt postal inspectors, it never did so.

Date: October 12, 2005

Respectfully submitted,

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