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CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-878

THE NATIONAL LEAGUE OF CITIES, ET AL., *Appellants*

v.

JOHN T. DUNLOP, Secretary of Labor

No. 74-879

THE STATE OF CALIFORNIA, *Appellant*

v.

JOHN T. DUNLOP, Secretary of Labor

On Appeals from the United States District Court for the District of Columbia

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Brief Amici Curiae for the States of Alabama, Colorado, and Michigan, in Support of John T. Dunlop, Secretary of Labor

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This brief *amici curiae* in support of the position of John T. Dunlop, Secretary of Labor of the United States, is filed pursuant to Rule 42(4) of the Rules of this Court.

INTEREST OF THE STATES OF ALABAMA, ET AL.

At first blush, the interest of the States would appear to be with those who attack the 1974 amendments to the Fair Labor Standards Act insofar as those amendments set a minimum wage and maximum hours for non-supervisory non-policy-making state and local government employees. We can therefore understand and sympathize with the decision of our colleagues from other States who are urging this Court to strike down this law. However, on more sustained reflection, we have concluded that such a result would be a pyrrhic victory for the States. We have done so although we are no less dedicated than the appellants to preserving the legitimate constitutional rights and prerogatives of the States.

By virtue of the original FLSA the vast majority of employees in the private sector are protected by federal minimum wage and maximum hour provisions, and the 1974 amendments, in addition to expanding the coverage of state and local employees, also brought federal employees under the Act. No constitutional challenge has been, or can be, brought to this latter aspect of the law. The result is that at present the same provision protects almost all employees, private and public. If the appellants in these cases were to succeed, state employees would not be covered by the FLSA and each State would have to determine whether to voluntarily pay the minimum wage and to provide overtime benefits to its own employees. The question therefore is whether it is in the interest of all the States to encourage competition between themselves and their subdivisions on the basis of lowering the labor standards of employees already on the poverty line, with a consequent reduction in efficiency and in their ability to attract more able individuals who, in such a labor market, would work for the federal government or private employers. It is our conclusion that competition on this basis demeans the public service.

We also believe, and develop in the argument herein, that the doctrinal implications of appellants' arguments would have a long-term adverse impact on the States. But above all we regard it as our duty to protect against debasement, for small pecuniary advantage, the sacred concept of "Our Federalism"; we remind our colleagues who, citing *Younger* v. *Harris,* 401 U.S. 37, 44, seize on that phrase, that the author of the *Younger* opinion, Mr. Justice Black, was in the *majority* in *Maryland* v. *Wirtz,* 392 U.S. 183, and that Mr. Justice Harlan, the author of the latter opinion, was as sensitive as any Justice to the States' *real* constitutional preogatives.

ARGUMENT

Contrary to the appellants' perfervid insistence, this case does not involve a problem of federalism, much less a serious threat to the integrity of state and local governments. For, the provisions of the 1974 amendments to the Fair Labor Standards Act[1] under attack here are an extension, necessary to further perfect the smooth and efficient flow of interstate commerce, of a long-standing national legislative program to eliminate substandard labor conditions.

I

The "Power * * * To regulate Commerce * * * among the several States * * *" was a conscious grant to Congress by the sovereign States, freely given:

> "When victory relieved the Colonies from the pressure for solidarity that war had exerted, a

[1] P. L. 93-259, 88 Stat. 55, amending 29 U.S.C. § 201, *et seq.*

> drift toward anarchy and commercial warfare between states began. . . . each State would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view. This came to threaten at once the peace and safety of the Union. Story, The Constitution, §§ 259, 260. The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was to take into consideration the trade of the United States. Documents, Formation of the Union, 12 H. Docs. 69th Cong. 1st Sess. p. 38.
>
> "The desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of the state's power over its internal affairs. No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished. The states were quite content with their several and diverse controls over most matters but, as Madison has indicated, 'want of a general power over Commerce led to an exercise of this power separately, by the States, which not only proved abortive, but engendered rival, conflicting and angry regulations.' 3 Farrand, Records of the Federal Convention 547." (*Hood* v. *DuMond,* 336 U.S. 525, 533-534)

And, as Mr. Justice Jackson went on to note in *Hood,* the Commerce Clause the Constitutional Convention drafted and the States ratified establishes both the "principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy" and "its corollary that the states are not separable economic units." (*Id.* at 537-538.) It follows, as Chief Justice Marshall understood (see *Gibbons* v. *Ogden,* 9 Wheat. 1, 194, 195), and, as Chief

Justice Stone restated that understanding in modern terms:

> "The commerce power * * * extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce * * *. The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution * * *. It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress." (*United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 119.)

In sum, the States that formed this Nation determined that it was in the overall interest of each to arm the national government they created with the plenary powers necessary and proper to manage the new society's economic life. They took this step because experience had demonstrated that it was in the nature of things that local economic decision-making led to destructive economic warfare between the States, as neighbors sought to safeguard or advance their interests by actions detrimental to the public good designed to maintain or gain a competitive edge. Thus, Congress would fail to keep faith with the trust it has been granted were it to fail to protect the flow of commerce by prohibiting such "unfair tactics." (*cf. United States* v. *Darby,* 312 U.S. 100, 122-123.)

II

Congress has found that the payment of substandard wages by an employer operating an enterprise in commerce burdens and obstructs the flow of commerce. The national legislature has therefore made it the policy of the United States to "eliminate * * * labor conditions detrimental to the maintenance of minimum standards of living necessary for health, efficiency and general well being of workers" in such enterprises. (See § 2 of the FLSA.) Since the FLSA "declare[s] its purposes in bold and sweeping terms * * * [b]readth of coverage [is] vital to its mission." (*Powell* v. *United States Cartridge Co.,* 339 U.S. 497, 516.) Acting on that premise, Congress has now determined to guarantee employees working for enterprises in commerce a minimum wage and maximum hours, without regard to whether their employer is public or private. Viewed from the standpoint of the legitimate needs of the States, of public employees, and of interstate commerce itself, no other decision could have been made.

The dynamic that moves private employers to reduce costs by maintaining substandard labor conditions drives public employers in the same direction. No private employer can maintain his competitive position for long if his labor costs exceed those of the other employers in the field. Public bodies are in fact in equally constant competition with each other. Thus, States and other public bodies advertise to attract new industries, new residents and tourists. Lower taxes and other monetary incentives are commonly offered.[2] The real and disturbing financial

[2] See, for example, the appendix hereto which reproduces an advertisement which the State of Massachusetts, an appellant in No. 74-878, placed in the New York Times on the Sunday after the appellants' briefs were filed in this Court, New York Times, March 9, 1975, § 3, p. 3, and an advertisement placed by the State of New York in the current Fortune Magazine, March 1975, p. 189.

difficulties which state and local governments perennially face as the result of the desire for more service and the resistance to higher prices of their customers (the taxpayers), therefore require the reduction of costs to the maximum feasible extent. (See NLC Br. pp. 81, 86.) Unfortunately, but not surprisingly, the consequence has been that some jurisdictions, like some private employers, have followed the course of least resistance and paid sub-standard wages to their employees who because of surpluses in the labor market must accept that wage or join the ranks of the unemployed. Thus, the remaining public employers who wish to deal with their employees decently, like their private counterparts, are unable to do so, absent national legislation. In other words, if Congress can not place a floor under the wages of public employees, the interstate rivalry on the basis of local concessions detrimental to the public good the Commerce Clause was designed to end will continue.

H. Rep. No. 1366, 89th Cong., 2d Sess., pp. 16-17, explained the 1966 Amendments extending the FLSA, *inter alia,* to employees of public hospitals and schools (sustained in *Maryland* v. *Wirtz,* 392 U. S. 183) by stating:

> "A custodial worker in an educational institution is as much in need of a minimum standard of living as a custodial worker in an aircraft plant. A food service employee faces the same cost-of-living problems whether employed by a hospital or a food service contractor. Neither employee should be compelled to subsidize the costs of these services to the consumer. Such institutions are compelled to purchase goods and contract services from employers who must pay the minimum wage. They cannot, in good conscience, deny their own employees this bare minimum."

This is true of each and every public employee. It matters not whether the substandard wages which the employee receives for his labor are paid by a private employer or by a public employer, be it the federal government, a State, or one of its subdivisions. Nor does it matter to the employee whether the requirement to work an excessive number of hours is imposed by a private or public employer. In either case, the employee's need for food, shelter and clothing is the same, the national unit of currency in which he pays for his purchases is the same, and the national market in which he must make those purchases is the same; and in either case the hours he can call his own of which he is deprived are the same.

Finally, the burdens imposed on the flow of interstate commerce by a failure to bring public enterprises in commerce under the FLSA are clear and plain. In 1974 Congress concluded that:

> "[By] the establishment of a minimum wage rate * * * [for] workers who do not currently enjoy such protection, and eliminating overtime exemptions where they have been shown to be unnecessary, the economy will be stimulated through the injection of additional consumer spending and the creation of a substantial number of additional jobs." (S. Rep. No. 93-690, 93d Cong., 2d Sess., p. 9.)

Moreover, as Senator Javits, the ranking Republican member of the Senate Labor Committee emphasized, Congress, in addition to stimulating the economy, also desired to promote industrial peace:

> "[W]e are very resentful, very unhappy, when workers in the public domain threaten to strike. This is inevitably the result of the deep feeling

> that economic justice cannot otherwise be obtained, and I respectfully submit that we will go a lot further in getting tranquility in the labor field by giving them a minimum wage status and an overtime status than in almost any other way I can think of, and prevent the feeling on their part that the only way one can get justice is by rule of the jungle, to wit, by strikes and ceasing essential public service." (120 Cong. Rec. S.2518, February 28, 1974, (daily ed.).)

The facts necessary to judge the impact of state and local governments on interstate commerce are these:

In 1971 state and local goverment purchases of goods and services, much of which had moved in interstate commerce, totaled $135 billion, approximately 13 per cent of the gross national product.[3]

In 1973 state and local governments employed 11.4 million workers, 14.8 per cent of the workforce.[4]

In 1973, approximately 400,000 public employees were paid less than $1.90; the approximate wage rate necessary to generate a poverty level income for an urban family of four was $2.27. Moreover, 10 per cent of all public employees worked more than 40 hours a week.[5]

In 1973 there were 375 work stoppages at the state and local level resulting in a loss of 1,257,200 man

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[3] 119 Cong. Rec. S14057, July 19, 1973 (daily ed.).

[4] U. S. Depart. of Commerce, Bureau of Census, Public Employment in 1973, p. 9.

[5] Background Material on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., p. 220; H. Rep. No. 93-913, 93d Cong., 2d Sess., p. 28.

days. This is a three-fold increase since 1966 in the number of stoppages and in days lost. [6]

In the face of these expressions of Congress' intent and this data we do not comprehend how it can even be argued that there is not "a rational basis for finding [the] legislative scheme [embodied in the 1974 FLSA amendments] necessary to the protection of commerce." And, as this Court has squarely held in *Katzenbach* v. *McClung,* 379 U.S. 294, 303-304, and other cases too numerous to cite, an exercise of the commerce power that satifies that test satisfies the Constitution.

III

We not only understand, we share, the financial dilemmas which have prompted the appellants to challenge the 1974 amendments. Nevertheless, we are convinced, with all respect to them, that the interests of the States require bearing the costs of compliance since these are the inherent minimal price payable for the "material success that has come to inhabitants of the states which make up [the] federal free trade unit [established by the Commerce Clause, which success] has been the most impressive in the history of commerce" (*Hood* v. *DuMond,* 336 U.S. at 538).

Like the 1966 Act, the 1974 Act establishes "only a minimum wage and a maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which * * * [state] duties are performed" (*Maryland* v. *Wirtz,* 392 U.S. at 193). Thus, "Congress has 'interfered with' * * * state functions only to the extent of providing that when a state employes people * * * it is subject to the same restric-

[6] U. S. Dept. of Labor, Bureau of Labor Statistics, Work Stoppages In Government, Report 434, Table 1.

tions as a wide range of other employers whose activities affect commerce * * *." (*Id.*) And, in the 1974 amendments Congress applied these same restrictions to the federal government as an employer. As the Senate Report stated:

> "The Committee intends that government apply to itself the same standards it applies to private employers. This principle was manifested in 1972 when the Senate overwhelmingly voted to apply Federal equal employment opportunity standards to public sector employers. Equity demands that a worker should not be asked to work for subminimum wages in order to subsidize his employer, whether that employer is engaged in private business or in government business." [7]

Surely, there is nothing in "Our Federalism" (*Younger* v. *Harris*, 401 U.S. 37, 44) that requires that the States be granted a preferred position over the United States. Indeed, in our view, the fact that the States are treated in like fashion as the national government itself is sufficient to demonstrate that this exercise of the commerce power is not one that could bring about "the utter destruction of [a] State as a sovereign political entity" (cf. *Maryland* v. *Wirtz,* 392 U.S. at 196). Moreover, the claim of a constitutional entitlement to preference over private employers raises grave questions of principle. We believe that we are not distorting the sense of Mr. Justice Brandeis' observations in his dissent in *Olmstead* v. *United States,* 279 U.S. 438, 485, when we invoke them in the present context:

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same

[7] S. Rep. 93-690, 93d Cong., 2d Sess., p. 24.

> rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example."

Certainly the appellants have failed to suggest a principled constitutional theory that would require that state and local governments be permitted to pay a below-poverty level wage when Congress has determined that its own employees and those of private employers whose effect on interstate commerce is indistinguishable are to be paid an amount that allows them to earn at least the basic necessities of life.

IV

The practical considerations demonstrating that the 1974 amendments are necessary to protect commerce have not only prompted us to file this brief *amici curiae* in support of the Secretary of Labor, but are decisive on the constitutional issue raised by appellants. For "interstate commerce itself is a practical conception." (*Labor Board* v. *Jones & Laughlin,* 301 U.S. 1, 41-42.) Congress is constitutionally empowered to, and did, as the reports of its committees demonstrate,[8] adopt the 1974 amendments expanding the FLSA's coverage in response to these economic realities. And, after *Jones & Laughlin* there can be no doubt that Congress was not required to restrict the exercise of its legislative power to regulate interstate commerce to the narrow scope last given credence in *Carter* v. *Carter Coal Co.,* 298 U.S. 438, on which our brother from California is compelled to rely (Cal.

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[8] S. Rep. No. 93-690, 93d Cong., 2d Sess., H. Rep. 93-913, 93d Cong., 2d Sess.

Br. 30-32). Quite aside from the legal defects of appellants' restrictive view of the Commerce Clause we are forced to take issue with their reasoning as to the relationship between the federal and state governments because it is fraught with danger to the States, as we now demonstrate.

Taking their cue from the dissenting opinion in *Maryland* v. *Wirtz,* 392 U.S. at 201-205, the appellants rely heavily on the language in the several opinions in *New York* v. *United States,* 326 U.S. 572, which stated that there remain some limitations on the power of the federal government to impose taxes on the states. (See NLC Br. pp. 64-68; Cal. Br. pp. 25-26.) It is contended that because the congressional taxing power is of equal dignity with the commerce power, the limitations on the former should also be applied to the latter. The short answer to the same argument is that it was squarely met and unanimously rejected in *United States* v. *California,* 297 U.S. 175, 184-185).[9]

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[9] "The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see Metcalf & Eddy v. Mitchell, 269 U.S. 514, 522-524, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. Helvering v. Powers, 293 U.S. 214, 225, Ohio v. Helvering, 292 U.S. 360, South Carolina v. United States, 199 U.S. 437, see Murray v. Wilson Distilling Co., 213 U.S. 151, 173, explaining South Carolina v. United States, supra. Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual."

This precedent, followed in *Maryland* v. *Wirtz,* 392 U.S. at 198, is dispositive of appellants' reliance on the tax analogy. But even acceptance of that analogy would not inevitably, or even properly, lead to the invalidation of the 1974 amendments. For, if the tax immunity doctrine were to be borrowed here, the precise analogy would be the cases involving the power of one government to tax the income of the employees of another government. Since *Helvering* v. *Gerhardt,* 304 U.S. 405, 420-421, it has the law that the federal government does have such power:

> "Even though, to some unascertainable extent, the tax deprives the states of the advantage of paying less than the standard rate for the services which they engage, it does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states. At most it may be said to increase somewhat the cost of the state goverments because in an interdependent economic society, the taxation of income tends to raise (to some extent which economists are not able to measure, see Indian Motocycle Co. v. United States, supra (283 U.S. p. 581, footnote 1)) the price of labor and materials. The effect of the immunity if allowed would be to relieve respondents of their duty of financial support to the national government, in order to secure to the state a theoretical advantage so speculative in its character and measurement as to be unsubstantial. A tax immunity devised for protection of the state as governmental entities cannot be pressed so far."

The *Gerhardt* case was followed in the converse situation in *Graves* v. *People of New York ex rel. O'Keefe,* 306 U.S. 466, which held that the state governments are empowered to tax the income of the employees of the federal government and of federal corporations, and which overruled *Collector* v. *Day,* 11 Wall. 113. The Court thus discredited the doctrinaire theorizing of the latter case whereunder any tax by either sovereign on the functions or employees of the other was regarded as unconstitutional, and instead focused on the realities of the situation.

It was in this more modern spirit that Mr. Justice Harlan wrote for the Court in *Maryland* v. *Wirtz,* when he said: "Since the argument is made in terms of interference with 'sovereign state functions,' it is important to note exactly what the Act does." (392 U.S. at 193.) He pointed specifically to the exemption in the 1966 Act of "employees employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) * * *."[10] When the 1974 amendments are examined, Congress' care is similarly demonstrated because they exclude:

> "(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—
>
> "(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and
>
> "(ii) who—
>
> "(I) holds a public elective office of that State, political subdivision, or agency,
>
> "(II) is selected by the holder of such an office to be a member of his personal staff,

[10] *Id.*, quoting § 13(a)(1) of the Act as it then stood, 29 U.S.C. § 213(a)(1) (1964 ed., Supp. 2).

"(III) is appointed by such an officeholder to serve on a policymaking level, or

"(IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.[11]

Particularly because of these exclusions, we are confident that the 1974 amendments will not adversely affect any essential function of the States and that their only adverse impact will be "to increase somewhat the costs of the state governments." (*Helvering* v. *Gerhardt*, 304 U.S. at 420-421.)

That fiscal disadvantage is far less than the inevitable cost to the States if appellants' view of the interrelationship of the federal and state governments were to prevail. For the federal government could be excluded from regulating the wages and hours of the employees covered by the 1974 amendments only by returning to the absolutist notions of *Collector* v. *Day, supra,* as California, which relies on that case (Cal. Br. p. 25), well appreciates. And in that event the States would lose the power (acknowledged in *O'Keefe, supra*) to tax the incomes of the constantly growing number of federal employees. This is a price that we are unwilling to pay to retain the dubious right to maintain for our own employees standards below those to which the federal government and private employers must adhere.[12]

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[11] Section 6(a)(2) of the 1974 Act amending § 3(e)(2)(C) of the original Act.

[12] We also cannot overlook the strong tendency of absolutes to be carried to the limts of their illogic. And so, a return to the philosophy of *Collector* v. *Day* would also jeopardize cases such as *United States* v. *City of Detroit,* 355 U.S. 466, and its companion cases, which have been far more liberal than the prior law in

CONCLUSION

For the above stated reasons, as well as those set forth by the Secretary of Labor, the judgment of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

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allowing the States to impose property taxes on private parties even though there is a resulting economic impact on the federal government. As the federal government becomes a more and more important purchaser of the goods and services of private business, a return to the older precedents would create fiscal difficulties for the States now, and even more serious difficulties over time.

APPENDIX

APPENDIX

MASS DEDUCTIONS

How companies are finding the new responsive tax environment here an incentive to do more business.

It's taxing enough to find financing for new equipment or a new plant without winding up with an increased tax bill at the end of the year on top of it. Massachusetts recognizes this fact of economic life and has revised its corporate tax structure to prevent this.

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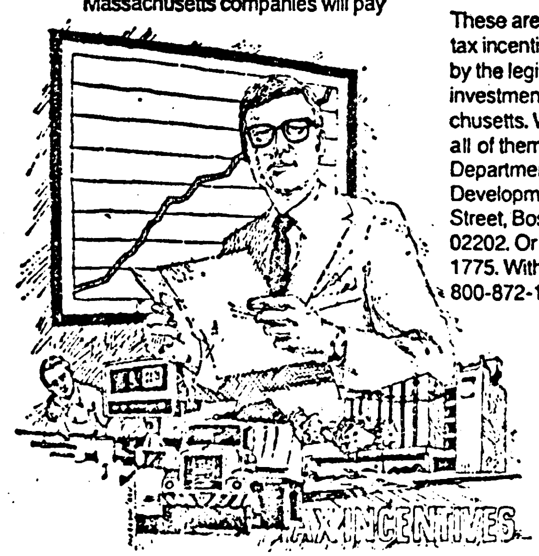

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