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CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-878 and 74-879

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

v.

JOHN T. DUNLOP, Secretary of Labor, *Appellee*

STATE OF CALIFORNIA, *Appellant*

v.

JOHN T. DUNLOP, Secretary of Labor, *Appellee.*

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

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BRIEF AMICUS CURIAE FOR THE COALITION OF AMERICAN PUBLIC EMPLOYEES

This brief *amicus curiae* is filed by the Coalition of American Public Employees (Coalition) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE COALITION OF AMERICAN PUBLIC EMPLOYEES

The Coalition of American Public Employees (Coalition) is an association of organizations, each of which represents employees both for purposes of collective bargaining and for other purposes of mutual aid and protection. These employees are predominantly employees of state and local governmental bodies.

American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO has approximately 700,000 members who are employees of state and local government bodies and represents many more such employees. National Education Association (NEA) is the largest teacher organization in the United States, with a membership of approximately 1.6 million professional educators, most of whom are teachers or administrators in public educational institutions. National Treasury Employees Union (NTEU) represents approximately 65,000 non-supervisory employees of the United States Department of the Treasury. American Nurses Association (ANA) has approximately 200,000 members, many of whom are employees in state and local governmental institutions. Physicians National House Staff Association (PNHA) has a membership of approximately 10,000 physician house officers, predominantly interns and residents, many of whom are employees of state and local institutions.

In toto, the Coalition represents approximately 3 million public employee members and in addition approximately 2 million more public employees who are represented by the constituent organizations of the

Coalition through negotiated collective bargaining agreements on their behalf.

The Coalition and its constituent organizations are the freely selected representatives of millions of public employees directly affected by the 1974 amendments to the Fair Labor Standards Act whose validity is at issue here. As such, these organizations have had, and have now, a continuing interest in support of these amendments and in urging the Court to reject this attack upon their enforcement. In addition, the Coalition and its constituent organizations share the Congressional concern embodied in those amendments to minimize labor disputes and to prevent economic exploitation of marginal workers.

ARGUMENT

MARYLAND v. WIRTZ, 392 U.S. 183, WAS CORRECTLY DECIDED AND SHOULD BE FOLLOWED

Introduction

The single issue which this brief *amicus curiae* will address is whether *Maryland* v. *Wirtz,* 392 U.S. 183 (hereafter sometimes referred to as *"Maryland"*), shall remain the law. That issue is raised for the first time in this litigation at pp. 120-128 of the brief on the merits of the National League of Cities (hereafter the "League"), and appellant California still appears to believe that reversal can be achieved without overruling *Maryland.*[1] But, as we shall briefly show, it is the *only* genuine issue on this appeal.

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[1] The brief for appellants in No. 74-878, National League of Cities *et al.,* will be cited herein as "NLC Br."; the brief for appellant in No. 74-879, the State of California, will be cited as "Cal. Br.".

Every argument raised by the appellants for invalidating the 1974 amendments[2] to the Fair Labor Standards Act ("FLSA") insofar as they affect public employees was either decided against appellants' position when *Maryland* sustained the 1966 amendments, or was stated to be premature in a suit for declaratory and injunctive relief. Most obviously and decisively, *Maryland* v. *Wirtz* rejected the appellants' basic contention that the establishment of a minimum wage for state and local government employees is beyond the legislative powers of Congress. But the opinion there also anticipated the major details of the present appellants' arguments.

Thus, the present appellants' rhetorical excesses[3] were foreshadowed by generous portions of hyperbole in the appellants' brief in *Maryland,* which drew from this Court the following cool response:

> "Since the argument is made in terms of interference with 'sovereign state functions,' it is important to note exactly what the Act does. Although it applies to 'employees,' the Act specifically exempts any 'employee employed in a bona

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[2] Public Law 93-259, 88 Stat. 55, amending Fair Labor Standards Act of 1938, 52 Stat. 1060 etc., 29 U.S.C. §§ 201 *et seq.*

[3] The summit is perhaps reached at NLC Br. 58: "This Act's 1974 Amendents are repugnant to the entirety of the Constitution of the United States." See also, e.g., NLC Br. 51: "startling new takeover of a State and local Government essential governmental function"; NLC Br. 55: "Congress move[d] in to regulate and clamp controls on the entirety of State and local Governments as Governments"; Cal. Br. 21: "Congress has intruded into the very halls of the legislatures of the sovereign States"; Cal. Br. 23: "this case * * * entails a patent federal attempt to regulate all sovereign activity"; Cal. Br. 24: "The unprecedented Federal intrusion at hand goes to the entire operation of the State governments".

> fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) . . . .' * * *
>
> The 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 * * * duties are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform medical and educational functions is not factually accurate." 392 U.S. at 193, footnotes omitted.

As the 1974 amendments similarly exclude non-civil service employees who are elected or appointed to policymaking positions or to the personal staffs of elected officials,[4] the present appellants' polemics are also "not factually accurate."

The particular aspect of the amendents which appellants most vigorously attack are the overtime limitations for fire fighters and employees engaged in law enforcement. Here also, the *Maryland* opinion presents a precise parallel, for in that case the States emphasized the practical difficulties which would be raised by applying the FLSA's overtime provisions to State school and hospital personnel; this Court carefully considered and decisively rejected the argument, 392 U.S. at 194, n. 22. So too, appellants' objection that the legislative findings were inadequate is not only unfounded, but is "quite irrelevant", for "[w]e are not concerned with the manner in which Congress reached its factual conclusions" (392 U.S. at 190, n. 13).

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[4] See § 6(a)(2)(C) of the 1974 Act, reprinted at NLC Br. 4a.

Likewise significant is what *Maryland* v. *Wirtz* held would *not* be decided in a suit for declaratory judgment and injunctive relief against the operation of a statute. With characteristic scruple to resolve only those constitutional issues necessarily presented, Justice Harlan pretermitted consideration of the question whether the Eleventh Amendment forbids suits against the States under §16 (b) for liquidated damages for violations of the Act. 392 U.S. at 199-200. Yet, the appellants in both cases argue the Eleventh Amendment issue here without even adverting to its disposition in *Maryland* v. *Wirtz* (NLC Br. 128-131; Cal. Br. 53-58). In *Maryland* the Court also held that "the District Court was correct in declining to decide, in the abstract and in general, whether schools and hospitals have employees engaged in commerce or production" (392 U.S. at 201). So too, it would be premature to determine in the abstract whether particular employees of the states or their subdivisions who work elsewhere than in Schools and hospitals are constitutionally covered.

We note finally that appellants are challenging the application of the 1974 amendments to all state and local government employees, without even excluding school and hospital employees, whose coverage was sustained in *Maryland* v. *Wirtz*. Those employees are affected by the 1974 amendments because the amount of their minimum wage was raised and because they were brought under the Age Discrimination in Employment Act of 1967.[5] See §§ 3 and 28(a)(2) of the 1974 amendments (NLC Br. 1a, 19a). Appellants do not even attempt to argue that the constitutionality of minimum wage laws depends on the amount of the min-

[5] 81 Stat. 602, 29 U.S.C. § 621 *et seq.*

imum wage which Congress establishes, or that if Congress can establish minimum wages and maximum hours for state and local employees, it cannot protect those same employees against discrimination on the basis of age.

In sum, appellants cannot obtain the relief which they seek in this action unless *Maryland* v. *Wirtz* is overruled.

Maryland v. Wirtz Was Firmly Grounded in Precedent and Principle.

The League asserts that "[t]he Court did not consider the impact of the 1966 amendments on the entire constitutional scheme of Federalism" (NLC Br. 123; see also *id.* 26).[6] This criticism of the opinion, written for the Court by Mr. Justice Harlan, who was not insensitive to the legitimate interests of the States, is wholly unwarranted.[7] He reasonably concluded that if scrupulous attention were given to "exactly what the Act does" (392 U.S. at 193), the conclusion that the 1966 amendments were within the constitutional power of Congress followed as a matter of course because there was a rational basis for the 1966 amendments (id. at 193-195) and because the argument that the commerce power "must yield to state sovereignty in the performance of governmental functions * * * sim-

[6] At NLC Br. 26 the same criticism is made also of the briefs in the *Maryland* case. This seems less than fair to Professor Charles Alan Wright's able Brief for Appellant (State of Texas), or to the elaborate presentation in the Brief of Appellants (Maryland et al.) in that case, in which 13 of the present appellant States joined and which was signed by 3 of the same attorneys general who are signatories to the League brief.

[7] To be sure, his opinion fell very far short of discussing each of the "114 references to States in the Constitution" (NLC Br. 6, n. 6; see also *id.* 46).

ply is not tenable'' (*id.* at 195) in light of this Court's precedents, which were then analyzed.

In discussing these precedents, the League begins with the astounding claim ''that no case cited by the Court [at 392 U.S. at 193-199] involved a challenge to Federal interference with State or City Government operations'' (NLC Br. 123). Unless the phrase ''interference with State or City Government operations'' is given some new and occult meaning not explained in the League's brief, that statement is obviously wrong; it would be more accurate to state that *each* case cited involved such interference, as the States in those cases vigorously contended. The next statement at NLC Br. 123 is likewise unfounded; for example *Sanitary District* v. *United States,* 266 U.S. 405 dealt neither with a situation ''where the interest of the Federal Government was held superior to the interest of the States in regulating private industry'' (NLC Br. 123) nor with a situation ''where a State was held to be directly engaged in commercial competition with a particular private industry (*id.*). And even as the League's generalizations regarding the precedents cited in *Maryland* are wholly without merit, so its attempt to distinguish the three specific precedents which it discusses (NLC Br. 124-125), serves only to confirm that they were directly in point and controlling.

The first of these cases was *Sanitary District* v. *United States,* 266 U.S. 405, where Mr. Justice Holmes wrote for a unanimous Court. *Sanitary District* was an action by the United States under the Rivers and Harbors Act of 1899, 30 Stat. 1121, to limit the withdrawal of water from Lake Michigan by the Sanitary District of Chicago. The League says that *Sanitary District* ''cannot be read without reference to the

treaty power and the conduct of foreign relations by the Federal Government" (NLC Br. 124). But the Court itself made clear that the case *should* be so read when it stated that the "main ground [for the Act of Congress] is the authority of the United States to remove obstructions to interstate and foreign commerce. There is no question that this power is superior to that of the states to provide for the welfare or necessities of their inhabitants" (266 U.S. at 426). The latter sentence, specifically relied on in *Maryland* (392 U.S. at 196) is sought to be deprecated as "dictum" (NLC Br. 124). The words of Mr. Justice Holmes merit respectful attention even if they were "dictum" or written *ex cathedra.*[8] But the pronouncement of dicta was not Mr. Justice Holmes' style, and in his opinion in *Sanitary District* he did not depart from his custom of dealing only with essentials. For, the Sanitary District defended on the ground, among others, that the continued withdrawal of more water than the United States would allow was vital "to the health of the inhabitants of Chicago, both for the removal of their sewage and avoiding the infection of their source of drinking water in Lake Michigan, which had been a serious evil before" (266 U.S. at 425). Justice Holmes refused to balance the Chicago residents' need for water against that of the federal government to eliminate an obstruction to navigable waters, precisely because he deemed such a balancing process to be constitutionally impermissible,

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[8] Directly apposite here is Justice Holmes' observation that "one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end." Holmes, Speeches, Law and the Court, 98, 102.

once it was established that Congres had exercised its legislative power under the Commerce Clause. Thus, the *Maryland* opinion correctly observed that *Sanitary District* establishes "that the Federal Government, when acting within a delegated power, may override coutervailing state interests whether these be described as 'governmental' or 'proprietary' in character" (392 U.S. at 195) [9].

Equally wide of the mark are the League's attempts to distinguish *United States* v. *California,* 297 U.S. 175, for both the points made at NLC Br. 125-126 relate only to the determination in *Maryland* v. *Wirtz* that state schools and hospitals are engaged in commerce, a proposition for which that opinion did not rely on *California.* [10] That unanimous decision *does,* as was

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[9] As an alternative ground for evading the force of the *Sanitary District* precedent the League argues that the rational basis for legislation" in that case "is much more apparent than the connection in the amendments upheld in *Wirtz* between State Government and commerce" (NLC Br. 125). But of course, the question whether there is a rational basis for legislation differs from the question whether a regulation of commerce can validly be applied to state or city government operations, the issue to which this portion of the League's brief is purportedly addressed, see *id.* at 123. These points were dealt with separately in the opinion in *Maryland,* and *Sanitary District* was not cited to establish that the 1966 amendments to the FLSA had a rational basis.

[10] While this Court in *Maryland* v. *Wirtz* "did not find that State-owned schools and hospitals *produced* either goods or services with destinations in other States," (NLC Br. 125, emphasis supplied), it *did* find that they *purchased* goods from other States, see 392 U.S. at 194-195. And, of course, schools and hospitals are not the only state agencies that make such purchases. Similarly, the argument "that States and Cities here are not in *serious* competition with other States and Cities or with private businesses" (NLC Br. 126, emphasis supplied), has nothing to do with the holding which *Maryland* v. *Wirtz* derived from *United States* v. *California.* Indeed, in *Maryland* the existence of competition be-

said in *Maryland,* establish the principle that "[i]f a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation" (392 U.S. at 197), as was well understood even before *Maryland.* See, *California* v. *United States,* 320 U.S. 577, 586; *Case* v. *Bowles,* 327 U.S. 92, 101, 102, n. 8; *California* v. *Taylor,* 353 U.S. 553, 568.

The League seeks to distinguish *Case* v. *Bowles,* 327 U.S. 92, on the ground that it arose under a statute

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tween public and private schools and hospitals was only one of two separate grounds justifying the FLSA's "enterprise" definition of coverage, see 392 U.S. at 192-193. However, appellants argue so strenuously that they are not engaged in competition with private enterprise or with other state and local governments, that a few comments on that point (which other briefs will doubtless elaborate) seem appropriate:

The circumstance that governments subcontract many activities to private employers establishes the existence of genuine economic competition between them and the potential subcontractors. It is rather surprising that it should be argued that the Constitution *requires* that states and cities be given an advantage in competing with private enterprise. Further, the particular skills of non-policy making employees, whose wages and hours alone are regulated under the statute, are readily transferable between private and public employers. Secretaries utilize the same alphabet and the same shorthand symbols whether they are working for a private bill collecting agency or a tax collecting agency (cf. NLC Br. 51) or other governmental activity, and the engineering and janitorial services in a government building do not differ one iota from those performed in a private office building. Additionally, it is utterly unrealistic to deny that States and municipalities are constantly in competition with each other, for example, to attract new enterprises, see, *e.g.,* the appendices to the Brief *Amicus Curiae* of the States of Alabama *et al.,* filed in the present cases. Would the Governor of Florida (NLC Br. 12) accept the avowal (Cal. Br. 47) of "California's noncompetitive nature"?

enacted pursuant to the war power rather than the commerce power (NLC Br. 124, n. 98). But the principle there established, that there is no "doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other" (327 U.S. at 101) and followed in *Maryland,* 392 U.S. at 195, was not and cannot be thus limited. Rather, the decision was based on a broad holding concerning the effect that the Supremacy Clause *does have* on state powers (*id.* at 102-103), and that the Tenth Amendment *does not have* on powers delegated to the national government (*id.* at 102, text and note at n. 8, citing, *inter alia,* four Commerce Clause cases, including *United States* v. *Darby*, 312 U.S. 100 and *United States* v. *California,* 297 U.S. 175).[11]

The upshot is that *Maryland* v. *Wirtz* was not, despite the claim of appellants there, "a case of first impression";[12] *a fortiori,* contrary to NLC Br. 51, this case is not either. Rather, in order for appellants to prevail in this case, it is necessary not only that *Maryland* v. *Wirtz* be overruled, but also that this Court disapprove the unanimous decisions in *Sanitary District* v. *United States, supra,* and *United States* v. *Cali-*

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[11] Additionally, even as the creation of a national war power was "a primary purpose of the federal government's establishment" (*id.* at 102), so was the establishment of a commerce power. It is familiar history that the State of Virginia initiated the movement which ultimately produced the Constitution in order to federalize the regulation of foreign and interstate commerce. See, *e.g., Hood* v. *DuMond,* 336 U.S. 525, 533-534.

[12] Brief of Appellants (Maryland *et al.*), No. 742, Oct. Term 1967, p. 12.

fornia, supra, and the 7 to 1 decision in *Case* v. *Bowles, supra.*

Additionally, it would be necessary that this Court disapprove the unanimous decision in *California* v. *Taylor* 353 U.S. 553, where this Court squarely held that Congress may, in the exercise of its commerce power, regulate the relationship between a state government and its employees. California there argued:

> "A fundamental attribute of state sovereignty is the right of a state to establish the terms upon which its employees will carry out state functions." [13]

It asserted further:

> "The incidental importance of collective bargaining by state employees engaged in interstate railroad commerce, cannot justify federal interference with the sovereign right of a state to control its employee relationship." [14]

In this connection California argued that the case "presents to the Court the task of balancing and accommodating constitutional powers—the power of Congress to regulate labor relations in interstate commerce * * * and the power of the sovereign states to control through state laws their relationship with their employees".[15] These constitutional arguments were dismissed by Mr. Justice Burton in a single paragraph (353 U.S. at 568) on the authority of *United States* v. *California, supra,* and *California* v. *United States,* 320 U.S. 577.

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[13] Brief for Petitioner State of California, No. 385, Oct. Term 1956, p. 51 (heading).

[14] *Id.,* p. 55 (heading).

[15] *Id.,* p. 56.

California v. *Taylor* is nowhere mentioned in the League's 132-page brief. California, on the other hand, attempts to distinguish each of its three previous losses on this issue, as well as *Sanitary District, supra,* and *Board of Trustees* v. *United States,* 289 U.S. 48, by citing these cases for the following proposition: "State activities have never been totally immune from regulation where such activities were 'proprietary', i.e. activities which were or could be performed by private enterprise." (Cal. Br. 46, n. 22.) This sentence is remarkable for three reasons. First, *United States* v. *California* expressly rejected the governmental-proprietary distinction in this precise context, 297 U.S. at 183-184, quoted in *Maryland,* 392 U.S. at 197-198;[16] second, the history of California's reliance on that distinction confirms its utter uselessness for reasoned *constitutional* analysis;[17] and third, the argument is tan-

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[16] While California relies on *Employees* v. *Missouri Public Health Dept.,* 411 U.S. 279, 284, as having revived the governmental-proprietary distinction, it ignores that passage of the opinion (quoted at p. 18 *infra*) which is pertinent in *this* case.

[17] In *United States* v. *California* the State argued that its railroad was engaged in a governmental ("sovereign") function. In *California* v. *United States,* it sought to escape that precedent by contending that while "the operation of a railroad" was "an activity usually carried on by private enterprise", the commerce power did not extend to what was "at the time of the adoption of the Federal Constitution * * * generally recognized as a usual, traditional and essential governmental function", such as "the construction, maintenance and administration of ports by States" (Brief for Appellant State of California, No. 20, Oct. Term 1943, p. 45). The State now acknowledges that the wages and working conditions of its railroad and seaport employees may be regulated under the commerce power because these activties are "proprietary", but argues that Congress may not regulate the wages and hours of "airport environmentalists" because they are engaged in a "governmental" function (Cal. Br. 47, text and note at n. 24, line 5).

tamount to a concession that California is not entitled to the sweeping relief sought in the complaint, since, of the activities engaged in by employees whose wages and hours are actually regulated under the 1974 amendments most, if not all, "could be performed by private enterprise".[18]

The short of the matter is that appellants have been unable to advance any principled rule for "carv[ing] up the commerce power" (392 U.S. at 198), which would preserve any portion of that power with regard to state activities, but would deny Congress the authority to regulate the wages and hours of state employees. The attempt to find a constitutional basis for denying Congress the power to regulate state activities which affect interstate commerce is as intellectually fascinating as trying to square the circle—and, as shown by 50 years of litigation, is inevitably just as futile. Only rarely have the States approached the task by candidly invoking discredited constitutional authority, as does California here by quoting *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (Cal. Br. 30-32). The more common techniques have been verbal gymnastics,[19] tacit invitations to escape logic altogether by shrill emotive appeals,[20] and resort to wholly inapposite authority.

The latter technique is exemplified by the League's reliance on a justly celebrated passage from Justice

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[18] This of course includes fire fighting, the regulation of which most troubles California (Cal. Br. 11-20). See the leading FLSA case of *Skidmore* v. *Swift & Co.*, 323 U.S. 134, and is companion, *Armour & Co.* v. *Wantock*, 323 U.S. 126.

[19] See, *e.g.*, the references at p. 14, n. 17, *supra*, and also the passages collected at ns. 8, 9, and 10 of the Brief of the Appellees (Wirtz *et al.*) in *Maryland*, No. 742, Oct. Term 1967.

[20] See, *e.g.*, the passages quoted at p. 4, n. 3, *supra*.

Brandeis' dissenting opinion in *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 311 (NLC Br. 90, 112). But Mr. Justice Brandeis did not regard the States as "laborator[ies]" in which to vivisect the Congressional commerce power. The issue in *Liebmann* was not Federalism; it was whether the courts should strike down legislation in the name of substantive due process. Thus, Mr. Justice Brandeis also said:

> "There must be power in the State *and the Nation* to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the 14th Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technonogical unemployment and excess productive capacity which have attended progress in the useful arts. 285 U.S. at 311, emphasis added.

Plainly, Mr. Justice Brandeis would not have denied Congress the power to experiment in its fight against substandard wages and unemployment (a major objective of the overtime provisions of the FLSA) by first excluding state employees from the FLSA, then including some, and later adding others. (*Cf. Maryland,* 392 U.S. at 199, n. 28.)

We submit finally, that the reasoning of the dissenting opinion in *Maryland* v. *Wirtz* was not correct, and should not now be adopted by the Court. In urging that the 1966 amendments be struck down, the dissenting Justices invoked the analogy of the tax immunity cases such as *New York* v. *United States*, 326 U.S. 572. With all respect, we contend both that this analogy is inapposite, and that it could not, even if sound, protect the states from the particular regulation of commerce which was involved in *Maryland* and is involved herein.

As to the first point, the analogy was squarely and explicitly rejected in *United States* v. *California*, 297 U.S. 175, 185.[21] This holding in turn was clearly foreshadowed by the unanimous decision in *Board of Trustees* v. *United States*, 289 U.S. 48, 56, also cited in *Maryland* v. *Wirtz*, 392 U.S. at 198. With respect to the second point, we note that in the factual circumstance closest to the issue involved in this case, the regulation of wages and hours of government employees, the states enjoy no immunity. For, in *Helvering* v. *Gerhardt*, 304 U.S. 405, it was held that the federal government does have power to tax the income of state employees and state officials. And while the dissent in *Maryland* perceived that the 1966 regulation "overwhelm[ed] state fiscal policy" (392 U.S. at 203), we think the States, which receive substantial federal funds, seriously exaggerated the fiscal consequences of the 1966 amendments, and appellants herein have repeated that performance. In any event, we believe that the sounder view is that taken in the opinion of the Court in

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[21] It is characteristic of the League's use of precedent that it cites the *California* case for the proposition "that State immunity from Federal taxation is 'implied from the nature of our federal system'" (NLC Br. 67), but omits to mention that the Court promptly thereafter held that "there is no such limitation upon the plenary power to regulate commerce" (297 U.S. at 185). So too, in invoking the Tenth Amendment the League cites *Hopkins Savings Association* v. *Cleary*, 296 U.S. 315, 337. But in the sentence immediately following that quoted at NLC Br. 108, Mr. Justice Cardozo was careful to point out:

> "We are not concerned at this time with the applicable rule in situations where the central government is at liberty (as it is under the commerce clause when such a purpose is disclosed) to exercise a power that is exclusive as well as paramount." (*Id.* at 338).

Employees v. *Missouri Public Health Dept.,* 411 U.S. 279, 284:

> "Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States." *Id.*

CONCLUSION

We have discussed *Maryland* v. *Wirtz* and its antecedents at considerable length, not because we believe that Mr. Justice Harlan's opinion requires exegesis, but out of respect for this Court's apparent decision, in denying the Motion to Affirm, to reexamine the question there decided. But we are confident that on such reexamination this Court will conclude that the result in *Maryland* v. *Wirtz* was not only correct, but unescapable, given the relationship between the United States and the States as established by the Supremacy Clause, and described by Mr. Justice Holmes at the very outset of his legal analysis in *Sanitary District,* 266 U.S. at 425:

> "This is not a controversy between equals."

The judgment of the District Court should be affirmed.

Respectfully submitted,

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