TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authority

Miscellaneous

In The

Supreme Court of the United States

October Term, 1974

No. .....

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

v.

THE HONORABLE PETER J. BRENNAN,
Appellee.

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

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF AMICI CURIAE

Amici Curiae are the Commonwealth of Virginia, the State of New York, The Virginia Municipal League and the Virginia Association of Counties. The membership of the Virginia Municipal League is composed of all the cities, a substantial number of the towns and some of the urban counties in Virginia. The membership of the Virginia Association of Counties is composed of virtually every county in Virginia.

The 1974 amendments to the Fair Labor Standards Act (FLSA) are of particular concern to the states and their political subdivisions. The consequences of those amendments are both untenable and burdensome; they are in conflict with constitutional federalism.

Each such state and each of its political subdivisions, like all American states and political subdivisions, have personnel systems which regulate the wages, hours, compensable time and other personnel matters of their employees. These systems vary from locality to locality depending upon the individualized need of the locality and its citizens. Moreover, each such state and its political subdivisions, like all American states and political subdivisions, confided responsibility for the raising and allocation of public funds to their elected governing bodies. In consequence of the magnitude of the sums necessary to alter the personnel system of each state and political subdivision to conform to the 1974 amendments to the FLSA, each of the undersigned states and its political subdivisions would suffer severe financial stringency and interference with its rendering of indispensable and unique public services to its citizenry.

This case constitutes a threat to the autonomy and independent existence of state and local governments and, indeed, to the legislative power over fiscal matters that has so long endured under our constitutional system.

ARGUMENT

I.

Maryland v. Wirtz Is Not Controlling.

The court below, in dismissing appellants' complaint for declaratory and injunctive relief, felt that its decision was controlled by this Court's decision in *Maryland* v. *Wirtz,*

392 U.S. 183 (1968). *National League of Cities* v. *Brennan*, ... F.Supp. ..... (D.C. D.C. 1974); App. at 6a.[1] Not only does *Wirtz* not control the decisions of this case, it is inapposite

The issue before this Court in *Wirtz* was the constitutionality of amendments extending the FLSA to state-operated schools and hospitals.[2] The rationale, as stated by Congress, for those amendments was:

> "These enterprises [state-operated schools and hospitals] which are not proprietary, that is, not operated for profit, and engaged in activities which are in substantial competition with enterprises organized for a business purpose." S. Rep. No. 1487, 89th Cong., 2d Sess., 1966 U.S. Cong. and Ad. News 3010 (1966); H.R. Rep. No. 1366, 89th Cong., 2d Sess. 16 (1966).

This Court in *Wirtz* found that, whether defended under the above rationale or under the "labor dispute" theory, the amendments had a sufficient rational basis to withstand the constitutional attack. In so doing, the Court limited its holding:

> "Congress has 'interfered with' these state functions only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals." 392 U.S. at 193-194.

---

[1] Citations in this Brief in the form "App. ...." refer to the Appendix to the appellants' Jurisdictional Statement.

[2] 80 Stat. 831 and 832, 29 U.S.C. §§ 203(d) and 203(s)(4) (1964 ed., Supp. II).

Moreover, this Court reserved decision on the question

> "whether schools and hospitals have employees engaged in commerce.
>
> * * *
>
> Whether particular institutions have employees handling goods in commerce, cf. *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 87 L.Ed. 460, 63 S.Ct. 332, may be considered as occasion requires." 392 U.S. at 201.[3]

The court below erred in blindly applying the decision in *Wirtz* to this case. Not only did it refuse to heed the express limitations placed on *Wirtz* by this Court, it further failed to give consideration to the limited factual situation giving rise to the decisions in *Wirtz*.

> "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard to variant controlling facts." *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

Indeed, this Court in *Wirtz* recognized the necessity for examining federal statutes to ensure that they constitute a valid exercise of the commerce power of Congress: "This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States." 392 U.S. 198.

A comparison of the facts in *Wirtz* with the facts of this case makes it abundantly clear that *Wirtz* cannot be

---

[3] The Court now has occasion for deciding this question. *Iowa* v. *Brennan*, No. 73-1565, *Petition for Cert. filed*, 43 U.S.L.W. 3637.

regarded as dispositive of the issues now before the Court. The impact of the 1966 amendments to the FLSA, in terms of the number of persons affected by and the amount of funds required to comply with the Act, is miniscule in relation to the overwhelming effects of the 1974 amendments. Only 9.6% of the full-time state and local government employees work for state-operated hospitals. *Public Employment in 1973,* U.S. Dep. of Commerce, Social and Economic Statistics Admin., Bureau of the Census, 3 Table C. From this number must be subtracted the exempt executive administrative and professional employees. 29 U.S.C. § 213(1), 75 Stat. 71. Individuals employed in education represent 49.6% of the full-time state and local government employees. *Public Employment in 1973, supra,* at 3 Table C. Of that number, however, more than half are teachers who were exempted under the 1966 amendments. *Id.* at 9 Table 3; 29 U.S.C. § 213(a)(1), 75 Stat. 71.

In contrast to the 1966 amendments, the 1974 amendments extend the coverage of the FLSA to almost 11,000,000[4] non-supervisory state and local government employees. The fiscal impact of the 1974 amendments for the first year, as estimated by the Senate committee, is $128,000,000.[5] S. Rep. No. 300, 93d Cong.; 1st Sess. 26 (1973). That Committee estimated the cost for the second year to be $162,000,000. *Id.* In light of the fact that personnel costs constitute a major portion of government operating budgets[6] and that state constitutions in many instances

---

[4] *Public Employment in 1973, supra,* at .....

[5] The appellee concedes that compliance with the overtime provisions for fire and police only will cost the states and localities $27,500,000 in 1975. 29 C.F.R. § 553.

[6] Personnel costs are 80 to 85% of city operating budgets. Deposition of Mr. Pritchard at 126-127.

place limitations on the amount of debt state and local governments may incur,[7] it can be fairly stated that the 1974 amendments will effectively remove the personnel and fiscal decision making process from the states and localities and their elected representatives and vest those decisions in the United States Secretary of Labor.

This Court did not have before it in *Wirtz* a federal regulatory scheme a fraction as pervasive as that created by the 1974 amendments. That every operation of government will be affected is amply demonstrated by appellants' complaint. The factual situation before this Court in *Wirtz* pales in the face of the spector of federal control over state and local governments which will be a direct result of the 1974 amendments. In light of the facts of this case, it cannot be said that *Wirtz* is dispositive of this case.

II.

The 1974 Amendments Exceed Constitutional Boundaries.

As stated in *Wirtz,*

> "There remains, of course, the question whether any particular statute is an 'otherwise valid regulation of commerce.' This Court has always recognized that the power to regulate commerce, though broad indeed, as limits." 392 U.S. at 196.

The 1974 amendments to the FLSA clearly exceed those limits.

The primary purpose of the FLSA when it was initially enacted in 1937 was the elimination of unfair competition

---

[7] For example, the Constitution of Virginia places ceilings on the amount of debt which may be contracted by the Commonwealth, Va. Const. Art. X, § 9, and her counties, cities and towns. Va. Constitution Art. VII, § 10.

arising from substandard wages and working conditions. S. Rep. No. 884, 75th Cong., 1st Sess. 2 (1937); H. Rep. No. 1452, 75th Cong., 1st Sess. (1937). *Joint Hearings on S. 2475 and H.R. 7200 Before the Sen. Comm. on Education and Labor and the House Comm. on Labor,* 75th Cong., 1st Sess. pt. 1 at 2-3 (1937). As stated by the Court in *United States* v. *Darby*, 312 U.S. 100, 115 (1941):

> "The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which commerce flows."

The 1966 and 1974 amendments were based on the same purpose. *Wirtz,* 392 U.S. at 190 n. 13; S. Rep. No. 690, 93rd Cong., 2d Sess. 4 (1974).

The elimination of unfair competition cannot form a basis for the 1974 amendments. Those amendments improperly extended the coverage of the FLSA to state and local government employees engaged in activities which are not in competition with businesses in the private sector. While the most obvious examples of such activities are police and fire protection, the judicial system, licensing and tax collection are also included. The list is endless and encompasses the totality of government. The concept of unfair competition, when applied to the totality of state and local government activity, has no factual support.

Not only is there no basis for Congresss conclusion that unfair competition will result unless the FLSA is extended to state and local government in their entirety, the premise upon which that conclusion is bottomed, the existence of

substandard wages, is totally erroneous. All of the undersigned States pay their employees wages equal to or exceeding the minimum wage requirements of the FLSA. Indeed, the House Report on the 1974 amendments recognized that "wage levels for State and local government employees not covered by FLSA are, on the average, substantially higher than workers already covered." H.R. Rep. No. 913, 93d Cong., 2d Sess. 28 (1974). Additionally, all of the undersigned states provide either premium overtime pay or compensatory leave for employees who work more than 40 hours a week. The House Report also recognized that a great many other states provide overtime pay. "The actual impact of a 40 hour standard would have been less because a substantial proportion of the employees receive premium overtime pay." *Id.* at 29.

Both the appellee and his predecessor, Secretary Hodgson, conceded the lack of any rational basis on which Congress could extend the FLSA to all state and local government activities. As stated by the appellee,

> "I realize that the 1966 Amendments extended the enterprise coverage to employees of hospitals, nursing homes, schools, and institutions of higher learning regardless of whether they were public or private or operated for profit or not for profit.
>
> "The reason for the extension to this group of employees was that failure to cover all employees of such institutions would constitute an unfair method of competition in commerce.
>
> "However, extension of coverage to all State and local government employees is too great an interference with State perogatives.
>
> "Imposition of the Federal standard for coverage, particularly overtime, could have a disruptive impact on many State civil service systems and the additional

> costs could overburden many small governmental units." *Hearings on H.R. 4757 anr H.R. 2831 Before the Subcommittee on Labor of the House Comm. on Education and Labor,* 93d Cong. 1st Sess. 203 (1973).

Secretary Hodgson shared that view:

> "We cannot support this proposal [coverage of state and local employees]. In 1966, enterprise coverage was extended to employees of hospitals, nursing homes, schools and institutions of higher learning regardless of whether they were public or private or operated for profit or not for profit. Here the Congress took the position that failure to cover all such institutions would have resulted in failure to implement one of the basic purposes of the Act—the elimination of conditions which constitute an unfair method of competition in commerce.
>
> "But extending coverage to all State and local employees is an entirely different matter. It would certainly involve the Federal Government in the regulation of the functions of State and local governments." *Hearings on H.R. 7130 Before the Subcom. on Labor of the House Comm. on Education and Labor,* 92d Cong., 1st Sess. pt. 1 at 552 (1971); *Hearings on S. 1861 and S. 2259 Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare,* 92d Cong., 1st Sess. pt. 1 at 29 (1971).

In addition to lacking any rational basis, the 1974 amendments are at war with the fundamental concept of federalism and sovereignty embodied in and protected by the Tenth and Eleventh Amendments. If the 1966 amendments to the FLSA before the Court in *Wirtz* could be characterized as "pervasive, striking at all levels of state governments," 392 U.S. at 202 (Douglas, J., dissenting), then the impact of the 1974 amendments can only be described as overwhelming. No function of governmental activity will be

immune from their reach. In order to comply with the FLSA, State and local governments will be compelled to raise taxes, if they have the power to do so, or reduce or eliminate vital public services. Furthermore, in direct contravention of the Eleventh Amendment, *Edelman* v. *Jordan*, 415 U.S. 651 (1974), the 1974 amendments subject State and local governments to private individual and class actions in federal courts for double and, possibly, treble damages in addition to possible criminal penalties.

As was stated earlier, each of the undersigned States pays its employees wages at least equal to the minimum required by the FLSA. Each pays for overtime work or provides compensatory leave. The decision to provide such benefits is one which has been and must be made by each State. No two States are identical geographically, demographically, economically or in the needs of their citizens. Thus, the decision whether to provide certain services and the method of compensation of the employees providing those services must, of necessity, be vested in each State. To ignore this basic fact and to mandate exact uniformity, as Congress did in enacting the 1974 amendments, is to usurp the autonomy and sovereignty of the States protected by the Tenth Amendment and which has served this country so well since its creation.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

ANDREW P. MILLER
Attorney General

ANTHONY F. TROY
Deputy Attorney General

D. PATRICK LACY, JR.
Assistant Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

STATE OF NEW YORK

LOUIS J. LEFKOWITZ
Attorney General

State Capitol
Albany, New York 12224

VIRGINIA MUNICIPAL LEAGUE

Wallerstein, Goode
& Dobbins
Suite 900
Travelers Building
Richmond, Virginia 23202

VIRGINIA ASSOCIATION OF COUNTIES

C. FLIPPO HICKS, ESQUIRE
Martin, Hicks & Ingles, LTD
Gloucester, Virginia 23061

CERTIFICATE OF SERVICE

I, Anthony F. Troy, Deputy Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States hereby certify that three (3) copies of this Brief of Amici Curiae in Support of the Appellants have been served upon each of counsel of record for the parties herein by depositing same in the United States Post Office with first class postage prepaid, this the 17th day of March, 1975, as follows:

CHARLES S. RHYNE, ESQUIRE
400 Hill Building
839—17th Street, N.W.
Washington, D.C. 20006

WILLIAM J. KILBERG, ESQUIRE
DARYL J. ANDERSON, ESQUIRE
Department of Labor
14th and Constitution Avenues
Washington, D.C. 20210

THE HONORABLE EVELLE J. YOUNGER
Attorney General of California
800 Tishman Building
3508 Wiltshire Boulevard
Los Angeles, California 90010

THE HONORABLE LOUIS J. LEFKOWITZ
Attorney General of New York
State Capitol
Albany, New York 12224

All persons required to be served have been served:

ANTHONY F. TROY
Deputy Attorney General