REPLY BRIEF

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TABLE OF CONTENTS

LoneDissent.org

TABLE OF AUTHORITIES

Cases:

LoneDissent.org

LoneDissent.org

LoneDissent.org

LoneDissent.org

LoneDissent.org

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-878

NATIONAL LEAGUE OF CITIES, *et al.*,

Appellants,

v.

HON. JOHN T. DUNLOP,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF

I. SUMMARY OF ARGUMENT: THE ACT CURES NO EVIL, RIGHTS NO WRONG

This Case involves a basic fundamental shift in constitutional power. The issue arises over control of Government employees of States and local Governments.

In their briefs, Appellee and his supporting Labor Unions and Senators, insist that the impact of the Fair Labor Standards Act (hereafter "Act") and its Amendments of 1974 (hereafter "1974 Amendments") on States and Cities is so miniscule as to be insignificant.

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The District Court below found great fiscal and non-fiscal impact (App. 650).[1] At the same time, the evidence as to putative evils cured and wrongs righted is stretched so thin it does not satisfy the criteria enunciated by this Court for a significant enough nexus to commerce to establish a rational basis for regulation under the Commerce Clause. Distinct and higher criteria must be met under our system of Government, constitutional Federalism, before Congress can, as is done here, impose new and unprecedented governmental burdens and controls directly on State and local Governments.

Appellee, in his brief, refuses to apply the stiffer criteria, citing *Maryland v. Wirtz*, 392 U.S. 183. (Br. 32) It is a quantum leap from the schools and hospitals and the limited facts and Government powers involved in *Wirtz* to the totality of State and local Government powers and facts involved here, a jump in logic and argument which is only possible if one stays within the parameters of *Wirtz*. But so much more is involved here, and the majority in that case took the limited perspective there presented and did not apply the criteria of constitutional Federalism in passing on the 1966 amendments. The 1974 Amendments, by their very breadth, preclude an answer confined to *Wirtz*; rather, the answer must come from constitutional Federalism itself.

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[1] The Appellee (Br. 8n.7) argues that there were no factual findings by the District Court below. This is plainly contradicted by that Court's statement of its findings under both Rule 12 and Rule 56, Fed.R.Civ.P. (App. 652). The findings are not favorable to Appellee.

In this Brief, other briefs will be cited as follows: Brief for Appellants National League of Cities *et al.* (NLC Br.), Brief of Senators Williams and Javits (Sen. Br.), Brief of AFL-CIO (AFL Br.), Brief of CAPE (CAPE Br.), Brief of Florida Police Benevolent Ass'n (Fla. B.P.A. Br.), Brief of the States of Alabama, Colorado, Michigan and Minnesota (Ala. Br.).

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Appellee's brief asks this Court to sustain this Act as constitutional but that brief cites no evil of substance that the Act will cure. Nor does Appellee's brief cite any wrong of substance that the Act will right. Appellants' "Governmental Impact Statement" and Appellee's "Non-Impact Claims" as set forth herein establish these facts.

Disruption – which produces both large costs and a mass of confusion (Pritchard Deposition at 119-123, App. 167-169)–proceeds not from the minimum wage provisions of the Act which allegedly will increase the pay of an unidentified 95,000 out of 11.4 million employees (Appellee's Br. 16n.13), but from the new overtime and administrative provisions, the new pre-emptions and overlapping controls, decision making and other power shifts, the many new requirements set forth in the "Governmental Impact Statement", *infra.* Not even State and City experts such as Pritchard and Byrley[2] could have foreseen this; certainly the Congress did not.[3]

The Appellee admits (Br. 36) that this Court must balance the interest of the States and Cities, protected

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[2] Appellee quotes testimony from the *Hearings* on these Amendments (Br. 49 n.42) that the major component of cost owing to the 1974 Amendments is police and fire overtime. Yet, States and Cities did not realize the true impact of the 1974 Amendments until Pub. L. No. 93-259 was approved and had to be taken into account in the State and City budget process. (Pritchard Deposition at 20-21, App. 99)

[3] "The actual impact on State and local governments then, of a 40 hour standard, will be virtually non-existent", H.R. Rep. No. 913, 93d Cong., 2d Sess. 29.

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by the entire Constitution's system of Federalism, against the Congress' claim to act under its constitutionally limited powers. Appellee, however, fails to recognize the tremendous fiscal and nonfiscal impact of the 1974 Amendments on State and City Government, an impact so disruptive of our Federal system of Government that two of Appellee's predecessors in office opposed the Act. Appellee thus continues the congressional short-sightedness of recognizing only a small portion of the impact which the Act will have.

The Act's impact is important, first, because it indicates the extent to which State and local sovereignty has been destroyed, and second, because it demonstrates the minimal nature of the "problem" which the Act was designed to remedy. By confining his statistical analysis to payroll costs merely (the costs of a higher wage for an alleged 95,000 out of 1.4 million employees, and additional overtime payments), Appellee fails to take into account major factors listed in the following "Governmental Impact Statement" which revolve around four terms: duplication, uncertainty, litigation, and damage to fiscal integrity.

Under constitutional Federalism criteria, Appellants' "Governmental Impact Statement" herein, when weighed against Appellee's "Non-Impact Claims," inexorably leads to the conclusion that the Act is unconstitutional.

II. APPELLANTS' GOVERNMENTAL IMPACT STATEMENT

1. New Federal records are required for all State and City employees, including exempt employees, which

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duplicate, supersede or replace State and local law.

2. New Federal personnel processes, procedures and interpretations of uncertain dimensions replace, supersede or duplicate State and City personnel laws and civil service laws.

3. A Federal regulatory agency, the Wage and Hour Division, Department of Labor, is exercising, as of yet indeterminable supervision and controls. These replace, supersede, duplicate and confuse existing State and local personnel agencies, processes and procedures developed under State and City law.

4. New Federal civil and criminal Court enforcement actions, duplicate and exceed State Court actions now provided by State law, and by the Act itself.

5. New personnel appeals are opened to Congress under its newly claimed power to do more and more to regulate wages, hours and other employment conditions of State and City employees, replacing many such appeals now made to City councils and State legislatures.

6. Vast new "uncertainties" are created as to new Federal law interpretations of what constitutes "overtime", "compensable time", compensatory time off in lieu of overtime, "work week", "work period", "tour of duty", dual employment and hundreds of subjects already covered by State and City law.

7. "Uncertainties" exist as to the definition in §3(g) of "employ", the definition of "suffer and permit to work", who is a volunteer, and who is an exempt professional qualifying for special consideration and other areas of specialty employment.

8. With respect to the examples of "uncertainties" in 6 and 7, *supra* new Federal Court class actions are author-

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ized for double time, triple time, costs and attorneys fees plus criminal penalties.

9. With 80 to 85 percent of City budgets, a major percent (70 percent in California) of State budgets expended for personnel costs, the impact examples given in items 1 through 8 *supra* demonstrate vast costs from these power shifts, change-overs, and take-overs.

10. There are many other costly requirements which States and Cities will be forced to meet if they are subject to the Act. For example, the Health Maintenance Organization Act requires Fair Labor Standards Act "employers" to offer membership in such an organization to their employees.

11. Loss of ballot box control.

12. Aside from the enormous costs of items such as 1 through 8, *supra,* increased costs have been estimated as follows by Appellants:

a. For the 24 Cities and 10 States referred to in the Complaint – $57,000,000 initially.

b. For fire fighters in 1975 – $200,000,000.

c. For all employees of States and Cities – billions of dollars.

13. State and City debt limit, budget and tax laws may be exceeded by the costs imposed as stated above thus destroying the fiscal integrity of States and Cities.

14. Congress discriminated against States and Cities by imposing upon them awkward and unreasonable regulations designed for private industry. Congress further discriminated against States and Cities by treating Government differently from private industry and by placing all application of the Act to the Federal Government under the Civil Service Commission, an admitted disaster. See *infra* pp. 9, 43-45.

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III. APPELLEE'S NON-IMPACT CLAIMS

1. The Act would increase the total wage bill of States and Cities only an estimated 0.3 percent in 1973. (Appellee's Br. 44n.35)

2. The total wage bill increase for States and Cities would be only an estimated 0.5 percent in 1974. (*Ibid*).

3. The increase for overtime compensation only would be less than one percent. (*Ibid.*)

4. Only an alleged unidentified 95,000 State and local employees, out of 11,400,000 would be affected by the 1974 Amendments; minimum pay requirements. (*Id.* 16 n.13).

5. Due to the fact that they now have laws containing such hour and overtime payment provisions, "The actual impact on State and local Governments then of a 40 hour standard, will be 'virtually non-existent'." H.R. Rep. No. 913, 93d Cong., 2d Sess. 29.

6. " . . . Congress extended the Act's requirements . . . only after more than three years of hearings – which indicated that the impact would be small in terms of total payroll." (Brief of Senators Williams and Javits 11).

7. The estimated payroll increased costs to all Cities and States at 0.3 percent would be $128,000,000 in 1973, and at 0.5 percent would be $165,000,000 in 1974. (Appellee's Br. 44 n.35).

8. The Appellee's estimated cost of the new regulations for police and fire fighters would be $27,000,000 for 1975. (App. 596).

9. Appellee's estimates are strictly limited to payroll costs.

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10. No cost estimate is attributed by Appellee to the disruption and costs involved in shifts of administrative, Court, and legislative forums newly created by the Act.

11. Appellee does not put a price on injunctive relief, class actions for double time, triple time costs, and attorneys fees, litigation by Appellee, or criminal penalties.

12. Appellee ignores the direct conflicting statement, by the Federal Government's expert, on governmental impact of the Act on Government from its creation of "two standards governing pay and hours of work" and "double recordkeeping and double work, at an extremely high administrative cost producing negligible benefits". *See* statement of Chairman of Civil Service Commission, *infra* p. 9.

13. Appellee argues (Br. 15 n.12, 45 n.36) that revenue sharing, by returning 52 billion dollars in taxes paid by their citizens to States and Cities, pays the cost of the 1974 Amendments and somehow mitigates the admitted impact.[4]

IV. APPELLANTS' FACTS SUPPORTING GOVERNMENT IMPACT STATEMENT

1. Records

Appellee, in claiming no new or dual records are required by the Act and questioning the veracity of Governor Askew's estimate that the new recordkeeping requirements will cost Florida $800,000 (App. 576), makes the following statement:

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[4] See *infra* p. 35 n.21.

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> "The records contemplated by the Act require only the most basic kind of employment information, which the States and local governments necessarily presently maintain for their own purposes." (Appellee's Br. 47-48)

Appellee's statement is directly refuted by the Chairman of the Civil Service Commission, Robert E. Hampton, certainly an expert on Government and the Act's record requirements, in testimony he gave February 26, 1975, before the Committee on Post Office and Civil Service, U.S. House of Representatives. He testified:

> "I must report also that I have sensed among managers a feeling of mounting pressure from cumbersome, procedural-type requirements that impede the delivery of Government services. Some of these requirements, unfortunately, are imposed by legislation; legislation that neither meets nor recognizes the special circumstances of the Federal service.
>
> "The extension of the Fair Labor Standards Act to Federal employment is a case in point. It adds a new set of complex provisions to the already existing provisions of Title 5. *It creates two standards governing pay and hours of work. It results in double recordkeeping and double work, at an extremely high administrative cost producing negligible benefits.* I can well understand from this one illustration why Federal managers feel a heavy impact from across-the-board statutory and other procedures that limit the exercise of administrative discretion *for little reason.*" (emphasis added).

In fact, the disruption is greater among States and Cities because they were not favored, as was the Federal Government in §6(b) of Pub. L. No. 93-259, with an administrative mechanism preserving civil service law.

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One reason for the tremendous cost of recordkeeping required by the Act is that many Government employees who are paid annual or monthly salaries without computation of hours worked must be recorded again on an hourly system (App. 514, 517, 541, 630), often involving computer reprogramming (App. 580).

Clearly, Governor Askew and Chairman Hampton are correct and Appellee is wrong. Clearly, the shift of Government power is costly and continuing as to recordkeeping. New recordkeeping requirements alone (contained in 33 subsections of 29 C.F.R. § 516 as well as 29 C.F.R. § § 519.17, 520.7,521.8,522.7,524.10, 525.13, 530.9, 800.165, 850.3 and stayed 553.21) will create substantial additional administrative costs for all State and local Governments.

The Act (29 U.S.C. § 11(c)) mandates, and Appellee admits (Br. 47 n.39), that records must be kept even with respect to "exempt" employees. See *Mitchell v. Burgess, d.b.a. Coy Gin Co.*, 31 L.C. ¶70.178 (D. Ark. 1956); *McComb v. Consolidated Fisheries Co.*, 75 F. Supp. 798 (D.Del. 1948). This establishes beyond question a claim of congressional constitutional power to impose regulatory controls on every function of every State and every City be it executive, legislative or judicial. This refutes Appellee's claim (Br. 40) in referring to the exemptions that "Congress' sense of appropriate limits to the exercise of its power is evident in the legislation here under review". *See also* Appellee's interpretative rulings on who qualifies as exempt persons, 29 C.F.R. § 541 to § 602, which are contained in 42 pages. Placing these multitudinous interpretations down upon existing State and local law creates a mass of confusion for States and Cities. (App. 167-169). This confusion is illustrated by the differences between the Appellee and Civil Service Commission as to records.

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2. Personnel Processes, Procedures, and Interpretations

States and Cities long ago adopted fair and reasonable civil service and other personnel laws. (Complaint ¶21-31, App. 17-23) The Act supersedes or duplicates these State and City laws, causing all the "double work" problems set forth *supra* by the Chairman of the U.S. Civil Service Commission and more, for what Appellee must admit are "negligible benefits".

The Appellee plays down his 691 pages of small print interpretations (Br. 7 n.5), but in a long "introductory statement" (29 C.F.R. § 531.25 (a)) he calls them "official interpretations . . . which will guide them (i.e. the Secretary of Labor and Administrator of the Wage and Hour Division) in the performance of their administrative duties under the Act . . . ".

3. Federal Regulatory Agency

The States and Cities have civil service or personnel commissions which are in part to be superseded or replaced under the Act by the Secretary of Labor and the Administrator of his Wage and Hour Division. The voluminous interpretations and regulations issued by Appellee to date (29 C.F.R. § 500 *et seq.*) and especially the police and fire fighter regulations of December 20, 1974 (App. 592-620) demonstrate that the new regulatory regime will be making hundreds if not thousands of rulings as to the 11.4 million State and City employees. The police and fire fighter "regulations" (App. 593) provide minute rules as to these employees "by which the Administrator of the Wage and Hour Division will determine the compensable hours of work, tour of duty and work period in

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applying the Section 7(k) exemption". 29 C.F.R. § 553.2 (App. 600).

This regulation envisions continuous and detailed supervision and decisions by the Administrator.

Since Cities spend some 80 to 85 percent of their budgets, and California 70 percent of its budget, on personnel matters, the complexity, difficulty and great cost of imposing this new agency upon States and Cities is clearly established.

4. New Court Actions

Sections 16 and 17 of the Act create criminal and civil actions to enforce compliance with the Act, expressly including public agencies in its coverage. Government is exposed to new criminal penalties, new class actions for double time, triple time, costs and attorneys fees. Actions by the Secretary of Labor on behalf of State and local Government employees are authorized and Federal District Courts are authorized to issue injunctions to restrain violations.

No facts proving the necessity of imposing these provisions on States and Cities are cited by Appellee.

5. Congressional Appeals

Up to now State and City employees could appeal to their City councils or State legislatures for legislative changes in the terms and conditions of their employment. Cities and their residents had some ballot box control over the results. This shift of power to Congress, if upheld, will effectively eliminate such ballot box control as a citizen of a City or State could look only to his own district's member of Congress and Senators, and not to the other 49 State delegations.

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No more powerful instrument for centralization of Government could be devised than these 1974 Amendments to the Act, with State and local employees looking now for improvement in terms and conditions of employment to a Congress and a Federal department which can impose costs with no responsibility for the taxes to meet these costs.

6. Uncertainties

The Act uses many terms not now used in State and local laws and seemingly wipes out many practical arrangements and practices worked out by States and Cities to meet their unique needs. For example, many States and Cities provide compensatory time off for overtime worked. Salt Lake City uses that system for those who clear streets of snow by giving 7,000 hours in compensatory time off in the summer. (Complaint ¶ 53, App. 74). Other such unique arrangements are set forth in the Complaint for other Cities. (Complaint ¶ 49-77, App. 73-80). The Appellee's definitions of "overtime" (29 C.F.R. § § 778.0-778.603) are 51 pages of detailed interpretations in the area which is expected to cause Cities and States the most trouble, even though they have such fair laws on this subject now, that the increased payroll cost has been estimated at less than 1 percent. (Appellees Br. 45 n.35).

The term "compensable time" is certain to cause many problems in addition to those caused by the police and fire fighter regulations which prohibit deduction of sleeping and eating time for fire fighters on duty for 24 hours (29 C.F.R. §553.15, App. 615) while

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for all other workers who are on duty 24 hours sleeping and eating time may be deducted. (29 C.F.R. § § 785.21, 785.22). As to what constitutes "compensation", Appellee's brief admits that there are questions in this area. For example, whether the cost of uniforms is to be included as compensation is characterized as "depending upon the circumstances." (Br. 48).

Each new term used by the Act or interpretative regulations must be defined each time the Act and State and local law differ; there will be many Court cases to settle these conflicts.

7. Uncertainties as to "Employ"

The Act's § 3(g) definition of "employ" as "to permit or suffer to work" is broad enough to encompass millions of volunteers who are paid a nominal sum, often in lieu of expenses as an administrative convenience. We have developed volunteerism to its highest and best public service at the local level of Government and to a very high level, also, with respect to State Government. While volunteer fire fighters, and volunteers who help direct traffic during school hours are perhaps the largest in number, volunteer boards and commissions, nurses and thousands of other kinds of volunteers exist. While all recognize that a true unpaid volunteer is exempt, many receive nominal cost reimbursements, insurance coverage and similar payments. While State and local law definitions are largely settled due to years of using volunteers, when any of these volunteers now pass over the line from volunteer to employee is an enormous new question under the Act and Appellee's regulations.

Here the Act injects uncertainties into State and local budgetary processes which neither the statutory scheme nor the Labor Department can resolve, and which

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therefore must be decided by Courts, including this Court, on a case by case basis. Even Appellee concedes that with respect to volunteerism, "the question whether an individual is an employee or a volunteer is ultimately one for the Courts, and is not a matter for final decision by the Department of Labor" (Br. 49 n.41). It is further stated that questions of how the Act may be enforced against noncomplying States should be considered at a later time "in light of the particular form of enforcement that may be sought" (Br. 62).

8. Uncertainties Create Court Litigation

The variety of State and local Government is such that the "uncertainties" listed in items 6 and 7, *supra*, the overlapping jurisdiction and other overlapping law, interpretations and rulings will keep States and Cities busy in Court on personnel matters. As was stated in the Appellants' jurisdictional Statement, a check through the monthly publication, *Municipal Law Court Decisions*, reveals that approximately one-third of reported cases on City litigation involves personnel. The double time, triple time, attorneys fees and costs authorized by the Act will undoubtedly lead to enormous efforts to solve all personnel questions under the Act rather than under State and local law.

The costs of these were referred to in Defendant's Deposition Exhibit No. 45, a letter from Governor Salmon of Vermont: "For instance, we must hire attorneys on a contractual basis to defend the State against FLSA lawsuits which can be and are being brought by individual employees, labor unions, or the

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Department of Labor itself. I cannot reasonably estimate what these service fees might be, although $100 an hour for attorneys fees, as you know, is not uncommon in the labor relations field." (App. 580-581).

9. Inestimable Costs from Power Shift

It is difficult and well nigh impossible to put dollar costs upon the shifts in Government power, duties and responsibilities. That the costs will be great cannot be disputed. The fact that these processes, procedures, costs, actions, decisions and interpretations involve 11.4 million people in 50 States, 18,000 Cities, 3,000 Counties and thousands of special districts and the major item in their budget, refutes the contention that the costs will be "virtually non-existent" as Appellee has contended throughout his brief.

10. Costs Due to Other Legislation Encompassed In the Act

An example is the Health Maintenance Organization Act of 1973, Pub.L. No. 93-222, 87 Stat. 914, 42 U.S.C. §201 *et seq.* which requires employers covered by the Fair Labor Standards Act to "include in any health benefits plan offered to its employees . . . the option of membership in qualified health maintenance organizations". (42 U.S.C. §300e-9(a)). "Failure of any employer . . . to comply . . . shall be considered a willful violation of section 215 of Title 29 [The Fair Labor Standards Act]." (42 U.S.C. §300e-9(c)).

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11. Loss of Ballot Box Control

The loss of local ballot box control over State and local Government expenditures is arguably the single greatest impact of the Act on State and City Government. Under constitutional Federalism, the voters of each State, and the voters in 18,000 Cities, 3,000 Counties and the various special districts control their respective budgets, either directly or through the direct representatives they vote for (Pritchard Deposition at 212-219, App. 230-235). The immediate constitutional impact of this seizure of voter power is incalculable and in violation of the reserved powers of the People under the Tenth Amendment to control through their votes expenditures for local and State purposes.

A major value of our republican form of Government has been responsiveness of Government to ballot box control, especially over budgets. The guarantee of a republican form of Government includes this responsiveness to ballot box control. Now Appellee, who is not subject to local or State ballot box control, is given power over the major item in budgets of States and Cities.

Yet this fundamental impact is misapprehended in Appellee's response to Appellants' statement that under the Act, the Federal Government will control the item which constitutes "85 percent of City budgets." Appellee counters that "On the contrary . . . increased costs . . . will amount to less than two percent of total wage costs." (Br. 44). Even assuming *arguendo* increased costs were only 2 percent, the Federal Government would still be asserting present and future control over the item of personnel costs which constitutes 85 percent of City budgets.

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But more importantly, the Constitution reserves those decisions on State and City Government to the voters who live in, work in, receive services from, and pay taxes to, those Governments. The People have never given their reserved powers over these local matters to the Congress. The commerce power cannot reasonably be broadened to encompass a usurpation of these powers delegated through their votes by the People to States and Cities. And to take the next step and take away from the People their right to vote on purely local and State expenditures is a giant leap indeed.

The Tenth Amendment reserves to the People all powers not delegated by the People to Federal or State Governments.

A major power so reserved is vote power over vast changes in our constitutional system, be those changes Federal, State or local. Here the Congress has taken from the People their vote power over State and local budgets and service variety and needs, and placed that power in the Secretary of Labor, an unelected Federal political appointee, with power to do all the vast discretionary actions politically popular at the moment. Controls over the private sector to prevent substandard wages and hours are one thing, but controls of the vitals of State and local Governments are another.

A great genius of our Constitution is that new times, new problems, new actions require new examination of old language. The vast change here in removing ballot box control from local and State voters so destroys our system of constitutional Federalism as to fall under this reexamination requirement. Such a change falls under

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the Tenth Amendment's reservation of power to the People only to make such a fundamental change in Federal, State and local Government powers.

Representation in Congress was not intended to provide a substitute for this State and local ballot box control.

This major constitutional right, this ballot box control, is just as much a part of the constitutional protection of each citizen of the United States as is free speech, free press, due process and all the other great rights of the Bill of Rights.

12. Appellants' Cost Estimates

The cost figures presented in Appellants' Complaint before the Court below (Complaint ¶48-77, App. 71-82) are an attempt to illustrate the impact of the Act, not just the additional payroll dollars paid in meeting the Act's minimum wage or overtime provisions. As such, they are made in good faith by professional budget planners. To the extent that they can be ascertained by the Complaint and exhibits presented to the Court below (App. 311-585), the initial costs are estimated at $57,000,000 for 24 Cities and 10 States, and $200,000,000 initially nationwide for fire protection services alone (Complaint ¶48, App. 72). To the extent that the above Impact Statement indicates numerous areas of incalculable uncertainties, Appellants are reasonably certain of the "increased costs" to States and Cities from the items described in the above Impact Statement and that their estimate of "billions of dollars per year" is accurate (Complaint ¶148, App. 72).

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Appellee's attempt to undermine Appellants' statistics as lacking substantiation (Br. 47) merely echoes a similar attempt made during the Deposition of Mr. Allen E. Pritchard, Jr., to which Mr. Pritchard responded:

> "I don't know that I can – that I should be – should be expected to be in a position to detail every dollar for 15,000 municipalities. It's our practice over 50 years of activity to report the information the same as anybody else would that is given to us by city officials, and it's not the habit of city officials to provide this kind of information and lie about it. "I assume they know what they are talking about." (Pritchard Deposition at 77, App. 138).

In the interest of accuracy it should also be pointed out that the estimates in the Complaint were made by budget experts (Pritchard Deposition at 168, App. 201) working under Mr. Pritchard and Mr. Byrley. As Counsel for Appellee admitted:

> "We did not ask for the experts" (Pritchard Deposition at 225, App. 239).

Mr. Charles Byrley, Executive Director of the National Governors Conference, testified: "Yes, I feel quite confident that that's an accurate statement, that it's going to be in the billions." (Byrley Deposition at 21, App. 260). He testified that while he had not made those calculations, "I have people that have." (Byrley Deposition at 23, 31-33; App. 261, 267-268). Mr. Allen Pritchard, Executive Director of the National League of Cities, did not say that documentation did not exist for the billions figures, just that he himself could not "go through the calculations." (Pritchard Deposition at 233,

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App. 245). He did testify that he assumed City reports of costs to him were accurate. (Pritchard Deposition at 152-154, App. 190-191)

Anyone who examines the exhibits from Governors, Mayors, and other City officials will find they are highly credible estimates made by persons not given to the exaggeration of which Appellee accuses them. (App. 311-585).

13. State and Local Debt Limit, Budget, Tax Laws

The above described impacts combine to threaten the ability of State and local Governments to guarantee their fiscal integrity against federally imposed excess expenditures. Since State and local tax, debt and budget laws are powerless to control the Secretary of Labor, the Federal Courts, or Congress, the credit of State and local Governments can no longer be guaranteed for debt repayment. Unlike private industry, additional Government operating costs cannot simply be passed on to the consumer. The "consumer" here is all the People and these People have acted to limit the debt and tax powers of their State or local Government.

The Complaint describes examples of State and City debt, budget and tax laws which they must abide by and under which they sell their bonds by a guarantee not to exceed the limits there fixed. (Complaint ¶¶78-82, App. 82-83).

14. Discriminations against States and Cities

These discriminations are discussed *infra* pp. 43-45.

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V. A BALANCING OF THE IMPACT ON CONSTITUTIONAL FEDERALISM OF THE 1974 AMENDMENTS, AND OF THE TRIVIAL IMPACT ON COMMERCE OF STATES AND CITIES PROPOSED TO JUSTIFY THE 1974 AMENDMENTS, SHOWS THE UNCONSTITUTIONALITY OF THE 1974 AMENDMENTS

The Appellee admits (Br. 36) that this Court sits to balance constitutional Federalism against the Congress' basis for acting under the commerce power. Appellants and Appellee differ on whether the 1974 Amendments, in actual effect, "impose any policy objective upon the States or deny to them the power to choose their own objectives" (Br. 37), or the 1974 Amendments merely impose a "minor constraint" of satisfying "very minimum standards as to wages and hours." (*Ibid.*).

Appellee's failure to recognize this case as one of Government power and not just dollars dictates his argument that the 1974 Amendments do not unduly interfere with State and City Governments. The facts set forth *supra* under the "Appellants' Governmental Impact Statement" and Appellee's "Non-Impact Claims" prove Appellee's argument is without foundation in fact.

Appellee's brief assumes that States and Cities have the same status as private persons and private business under the Constitution, in doing his balancing test in resolving the questions of constitutional power here presented. Appellee assumes in his brief that the principles of constitutional Federalism under the facts of this case do not impose any limits on the commerce power. Both assumptions are erroneous.

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The questions here should not be considered in a vacuum but in the context of reality. The fact that for the first time in all history States and Cities are on the Department of Labor's list of regulated commercial industries under the Act does not make them commercial enterprises.

The power of Congress under the Commerce Clause is broad indeed when applied to private persons. States and Cities are made the objects of this Act by the Congress, and the fact that States and Cities are given by its words and by its conceptual design, in its entirety a different status from that of private persons under the Constitution must be given paramount weight in resolving the constitutional questions here involved. The Constitution is written to provide State Governments the concept status of a Government. It is not written to provide for the treatment of States under the concept status of economic or commercial entities.

We do not here challenge the nexus to commerce criteria developed in recent decades as the constitutional test for application of Federal economic regulatory control laws to private business under the Commerce Clause.

We do challenge those nexus to commerce "private business" criteria as an improper test when it comes to determining the constitutionality of applying those same Federal economic regulatory control laws under the Commerce Clause to the public's business as carried out by the States and Cities. We respectfully urge that the proper criteria and principles to be applied where governmental powers are involved are not those of nexus to commerce but those of constitutional

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Federalism which prohibit undue interference by Federal or State Governments with the governmental acts and actions of the other. From its inception until now our system of Government has recognized that Government interests and powers are different from private interests and powers. We point out that it is these principles of constitutional Federalism which are the historic bases of the continued exemption by Congress of States and Cities from Federal economic regulatory control laws under the Commerce Clause, including in the past the Act here under challenge. These principles have been held by this Court to prohibit Federal or State acts which overly hamper or curtail governmental acts or actions of the other Government. The commerce power is not greater than other powers, such as the power to tax, which have been held to be subject to the principles of constitutional Federalism. All the reasons present in those cases so holding are here. When the balancing test is applied to the facts in this case the commerce power is clearly limited by constitutional Federalism. That a shift of Government power to control wages and hours and other employment terms and conditions of State and City employees from States and Cities to the Federal Government is an important shift of Government power cannot be disputed. Neither can one reasonably conclude that such a shift is not an undue interference with a vital power of State and City Government. Two Secretaries of Labor, one Federal Commission and one President so concluded. (NLC Br. 19-22).

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1. The Impact of the 1974 Amendments on States and Cities is not Limited to Money Spent, But Involves a Fundamental Change in Government Power, in Violation of Constitutional Federalism

We are here concerned with all three areas of governmental power in our Nation: the powers of the Federal Government, the powers of the State Government, and the powers of the People. Up until now the People in each State, through their votes for their legislature or in referendums, and in each City, through their Council, Town Meeting, or referendums, have been able to decide through this ballot box control upon the services they need, which are usually unique and varied, and then decide upon taxes to meet the costs of those service needs. The costs are chiefly for personnel. And while the People battle to keep taxes low, the record of fair wages and hours for State and City employees as presented in this case demonstrates that this system works well.

Under the Act we now have a shift in power from the People's State and local ballot box to the Congress where the People of each State or City cannot expect the attention to their unique and varied local and State needs or tax problems. Members of Congress represent other States and Cities which have their own unique and varied needs and problems.

The effect of this shift in power from the people to the Federal Government allows the imposition of increased costs for State and City personnel by the Congress, the Secretary of Labor, or the Federal Courts free from ballot box control by the People in the States and Cities. This shift of power violates the con-

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stitutional reservation of power to the People contained in the Tenth Amendment. This nullification of the People's power must be considered in the balancing of power in deciding this case. See *Berman v. Parker*, 348 U.S. 26, 33.[5]

The Federal Government has been able to avoid the interference with its laws[6] which the 1974 Amendments impose on State and City Governments.

While the Civil Service Commission avoids confusion and denudation of Title 5 of the United States Code, State and City Constitutions, laws and personnel practices are subject to the vicissitudes of the Fair Labor Standards Act.

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[5] The Court in *Berman* analogized the power of Congress over the District of Columbia to that of a State over its own affairs. 348 U.S. at 31-32.

[6] For the approach of the Federal Government in preserving its fiscal integrity, see 40 Fed. Reg. 8189 (Feb. 26, 1975), where the Department of Housing and Urban Development declares its relationship with City Governments with rent control legislation:

"[24 C.F.R.] §**403.2 Rental charges.**

"The Department will generally not interfere in the regulation by local rent control boards of rents of unsubsidized projects with mortgages insured or held by HUD. However, HUD will assert exclusive jurisdiction over the regulation of the rents of such a project when the delay or decision of a local rent control authority jeopardizes the Department's economic interest in the project."

The 1974 Amendments do not provide any safeguard for the "economic interest" of States and Cities.

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The Civil Service Commission, not the Appellee here, administers the Fair Labor Standards Act's coverage of Federal Government employees. (See NLC Br. 24.) The Civil Service Commission is able to preserve Federal employee law[7] in a way States and Cities are not able to follow. Appellee's failure to promulgate regulations which take into account the unique nature of Government and the extent of the confusion regarding non-police and fire personnel are shown by the detail of the police and fire regulations. (See NLC Br. 25.) Without such guidance for most employees, City and State Governments risk class actions for double and triple damages, other penalties, costs and attorney fees.[8]

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[7] For example, the Act's treatment of "bona fide executive, administrative, or professional capacity," 29 U.S.C. §213(a)(1), creates confusion among States and Cities and conflicts with State and City laws and practices. In order to avoid this conflict and to preserve Federal Civil Service law and practice, the Civil Service

> ". . . Commission will determine these exemptions for most classes of General Schedule and Federal Wage System employees, and will issue criteria for agency determination on other positions." Brown, *Fair Labor Standards and the Public Sector,* 15 Civil Service Journal (No. 1, Jul.-Sep. 1974) 33, 34.

[8] Senator Williams underscored this uncertainty and risk in the debate on the 1974 Amendments (quoted at AFL Br. 19):

> "Where the purpose is not employment but voluntary service, the incidentals will not necessarily carry these individuals from the volunteer service into employment. *It would depend on the facts.*" 119 Cong. Rec. S14055 (daily ed., July 19, 1973) (emphasis added).

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The Appellee argues (Br. 49 n. 41) that questions of coverage of the Act are for the Courts. In this way, he attempts to avoid Appellants' challenge to the 1974 Amendments as a usurpation of "ballot box control" by the People of elected State and City Government officers.

However, 29 C.F.R. §531.25 states that

> "On matters which have not been determined by the courts, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (Skidmore v. Swift, 323 U.S. 134).
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> * * *
>
> "The interpretations of the law contained in this subpart are official interpretations of the Department of Labor with respect to the application under described circumstances of the provisions of law which they discuss. The interpretations indicate, with respect to the methods of paying the compensation required by sections 6 and 7 and the application thereto of the provisions of section 3(m) of the Act, the construction of the law which the Secretary of Labor and the Administrator believe to be correct and which will guide them in the performance of their administrative duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. Reliance may be placed upon the interpretations as provided in section 10 of the Portal-to-Portal Act (29 U.S.C. 259) so long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect. For discussion of

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section 10 of the Portal-to-Portal Act, see Part 790 of this chapter."

It is in this light, and in light of *Skidmore* that this Court must consider the Appellee's admission (Br. 7 n. 5) that only a small part of 29 C.F.R. Parts 500 to 860 (excluding Part 553 which has been stayed by this Court, Nos. A-553 and A-556, Oct. T. 1974) even remotely concerns State and City Governments.

Senators Williams and Javits argue (Sen. Br. 13) that "the Federal Government has become the dominant fiscal partner while the 'work' of government is carried on primarily at the state-local levels." That the Senators (and the Appellee) can argue this concept of revenue sharing as somehow supporting the constitutionality of the 1974 Amendments shows a fundamental misunderstanding of the effect these Amendments have, not only on the expenditure of money, but on State and City Government decision-making. The "work of Government" of States and Cities under constitutional Federalism should be free of undue Federal interference.

2. Against This Violation of Constitutional Federalism, The Appelle Must Show a Compelling Nexus of State and City Government to Interstate Commerce.

Against the disruption to constitutionally protected Federalism, must be balanced[9] the claims of the

[9] Appellee is able to argue against the imposition of a higher-than-rational basis test (see NLC Br. 96-108) in this case, only that Federalism is not a "specific Bill of Rights protection" (Sec. Br. 59). Aside from ignoring the language of *United States*

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Congress and of the Appellee of a nexus to commerce of the Government activities and operations of States and Cities.

Because the Federal Government, in contrast to State Governments,[10] is a Government of limited powers, *United States v. Cruikshank,* 92 U.S. 543, 551, the higher-than rational basis requirement must relate to the constitutional source of Federal power. In order to sustain the 1974 Amendments against their violation of constitutional Federalism, this Court must find a compelling nexus to commerce.[11]

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v. Carolene Products Co., 304 U.S. 144, 152 n. 4, quoted (Br. 59) immediately above this argument, that a higher test might be triggered by any of the first *ten* amendments, Appellee fails to recognize that Federalism is embodied in the entire Constitution, and is the basis even of the limited Federal powers of Article I, including the commerce power, Art. I, §8, cl. 3.

[10]See *Lake Shore & M.S.R. Co. v. Ohio,* 173 U.S. 285, 291; *Giozza v. Tiernan,* 148 U.S. 657, 661.

[11]Challenged State laws must be supported by a compelling Government interest. *Dunn v. Blumstein,* 405 U.S. 330, 342. However, no Federal Government interest can afford power not provided by the Constitution. There is no Federal "general welfare" power. C.f. *Hoke v. United States,* 227 U.S. 308, 323. Even an emergency cannot create Federal power. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 629 (Douglas, J., concurring).

In *Railroad Retirement Board v. Alton R. Co.,* 295 U.S. 330, 371, the Court thus explained the relation between the limited commerce power and the general welfare:

> "The power to prescribe a uniform rule for the transportation industry throughout the country justifies the modification of common law rules by the Safety Applicance Acts and the Employers' Liability Acts

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The Appellee proposes as a nexus to commerce supporting the 1974 Amendments, the following: (1) that State and City Governments use goods imported from other States (Br. 13-15); (2) that States and Cities " 'collect taxes and spend money for a variety of purposes' " (Br. 15, quoting S. Rep. No. 690, 93d Cong., 2d Sess. 24); (3) that labor disputes involving States and Cities affect the flow of commerce (Br. 15-18); (4) that States and Cities compete with private industry (Br. 20) and with each other (Br. 21); (5) that States and Cities employ people (Br. 22-24), thus "implicating" (Br. 24) States and Cities in congressional policies of stimulating the economy (Br. 24) welfare reform (Br. 25, 27-28), unemployment assistance (Br. 26), and revenue sharing (Br. 28).

In this list of "a sufficient effect on interstate commerce" (Sec. Br. 12), the Appellee confuses the effect on commerce of the congressional remedial

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applicable to interstate carriers, and would serve to sustain compensation acts of a broader scope, like those in force in many states. The collateral fact that such a law may produce contentment among employees, – an object which as a separate and independent matter is wholly beyond the power of Congress, – would not, of course, render the legislation unconstitutional.*** The act with which we are concerned seeks to attach to the relation of employer and employee a new incident, without reference to any existing obligation or legal liability, solely in the interest of the employee, with no regard to the conduct of the business, or its safety or efficiency, but purely for social ends."

Therefore, the "compelling" test for Federal legislation concerns the power of Congress to act, i.e., whether the activities of State and City Governments in paying substandard wages have a compelling nexus to and burden on interstate commerce.

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legislation with the nexus to commerce of the activities of State and City Government.[12] Unless State and City Governments affect commerce in a compelling way, Congress may not act at all to affect and remedy commerce through legislation.[13]

This is shown by activities of Congress to remedy some of the ills Appellee cites as a pretext for the 1974 Amendments here challenged.[14]

The goal of increasing public employment was addressed by Congress in the Emergency Jobs and Unemployment Assistance Act of 1974,[15] Pub. L. No.

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[12]"The duty of a government to afford protection is limited always by the power it possesses for that purpose." *United States v. Cruikshank,* 92 U.S. 543, 549.

[13]"For who are a free people? Not those over whom government is reasonably and equitably exercised, but those, who live under a government so constitutionally checked and controuled, that proper provision is made against its being otherwise exercised." John Dickinson, *The Letters of a Pennsylvania Farmer* (Nov. 1767).

[14]C.f. Sen. Br. 12:

"The fact that Congress authorizes and appropriates the funds for such assistance demonstrates both its concern for the budgetary problems of State and local governments and its awareness of the ability of such governments to meet the increased expenditures which the Act's coverage might entail."

[15]Section 101 of the Act inserts the following section, in relevant part, in the Comprehensive Employment and Training Act of 1973, 29 U.S.C. §801 *et seq.*:

"FINANCIAL ASSISTANCE

"Sec. 602. (a) The Secretary shall enter into arrangements with eligible applicants in accordance with the provisions of this title in order to make financial

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93-567, 88 Stat. 1845; and the goal of reducing the effect of unemployment on purchasing power was addressed by Congress in the Emergency Unemployment Compensation Act of 1974,[16] Pub. L. No. 93-572, 88 Stat. 1869. The same Congress which enacted the usurpatious 1974 Amendments to the Fair Labor Standards Act, produced legislation dealing with problems which the Appellee – but not the Congress – declares to have been the basis for the 1974 Amendments to FLSA, but which legislation does not

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assistance available for the purpose of providing transitional employment for unemployed and underemployed persons in jobs providing needed public services, and training and manpower services related to such employment which are otherwise unavailable, and enabling such persons to move into employment not supported under this Act.

"(b) Not less than 90 per centum of the funds appropriated pursuant to this title which are used by an eligible applicant for public service employment programs shall be expended only for wages and employment benefits to persons employed in public service jobs pursuant to this title."

[16]The Act provides in relevant part:

"FEDERAL-STATE AGREEMENTS

"Sec. 102. (a) Any State, the State unemployment compensation law of which is approved by the Secretary of Labor (hereinafter in this Act referred to as the 'Secretary') under section 3304 of the Internal Revenue Code of 1954 which desires to do so, may enter into and participate in an agreement with the Secretary under this Act, if such State law contains (as of the date such agreement is entered into) a requirement that extended compensation be payable thereunder as provided by the Federal-State Extended Unemployment Compensation Act of 1970. Any State which is a party to an agreement under this Act may, upon providing thirty days' written notice to the Secretary, terminate such agreement."

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violate constitutional Federalism in the way the 1974 Amendments to FLSA do.

The District Court below found that States and Cities covered by the 1974 Amendments do not compete with private industry. (App. 650)[17] C.f. *Wickard v. Filburn,* 317 U.S. 111, 129.[18] Thus, the Appellee is constrained to argue that

> "The Court's finding of a rational basis for the congressional action in *Maryland* [*v. Wirtz*], however, was not based on a finding of competition between public and private employers." (Br. 19).

Appellee ignores this language from the opinion in *Wirtz,* 392 U.S. at 194:

> "... 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."[19]

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[17]These functions, in part, are listed in Complaint ¶16, App. 16.

[18]Appellee's argument (Br. 21) that States and Cities compete with each other, has nothing to do with the question whether States and Cities, each of which operates intrastate, are in or affect interstate commerce sufficiently to justify Federal regulatory intervention.

[19]See also NLC Br. 18, quoting from S. Rep. No. 1487, 89th Cong., 2d Sess., 2 U.S. Code Cong. and Adm. News 3010 (1966); and NLC Br. 20.

Of course, the equation by the Court in *Wirtz* of private industry with Government was constitutional error, an error repeated by the Appellee, the labor union and other *amici* in this case. See, e.g., Fla. P.B.A. Br. 7, citing as controlling here, *United States v: Darby,* 312 U.S. 100, 124.

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Furthermore, the District Court below doubted whether, without this competition, the result in Wirtz would obtain. (Tr. Dec. 30, 1974 at 97-98).[20]

Appellee refers to *Maryland v. Wirtz,* 392 U.S. 183, 201 (Br. 14) as supporting the argument that a nexus to commerce is shown by States' and Cities' importation of goods.[21] Whether this is a rational or compelling nexus for *this* legislation must be considered with reference to the Fair Labor Standards Act. Section 3(i) of the Act, 29 U.S.C. § 203(i), a provision which predates both *Wirtz* and the 1974 Amendments defines "goods"[22] to exclude:

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[20]The Transcript, not part of the Appendix in Nos. 74-878 and 74-879, is of the District Court's hearing on Plaintiffs National League of Cities, *et al.*'s Application for a Preliminary Injunction, and Defendant Secretary's Motion to Dismiss.

[21]The Appellee in this regard argues (Br. 15 n. 12, 45 n. 36) that purchases by States and Cities are affected by revenue sharing and again that "some of this cost will be borne by the federal government whose aid to State and local governments far exceeds any possible cost of compliance." (Br. 45). Such an argument, that the Federal Government can regulate State and City Government so long as it supplies the dollar cost of regulation, finds no support in the decisions of this Court. Appellee's argument subsumes the question whether the regulation, with or without Federal aid, is constitutional. So, the Court in *Oklahoma v. Civil Service Commission,* 330 U.S. 127, 136, spoke of "the condition that the limitation on the right to receive the funds complied with the Constitution." A Government cannot condition aid on the recipient's abjuration of a constitutional right. *Frost & Frost Co. v. Railroad Comm.,* 271 U.S. 583, 594; *Speiser v. Randall,* 357 U.S. 513, 518; *Sherbert v. Verner,* 374 U.S. 398, 404.

[22]"Goods" is essential to the definition of "Enterprise engaged in commerce or in the production of goods for commerce" in §3(s), 29 U.S.C. §203(s).

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". . . goods after their delivery into the actual physical possession of the ultimate consumer thereof . . ."

This Court, therefore, is asked to repeat the mistake of the Court in *Wirtz*, that is, to find as a constitutionally sufficient nexus to commerce for remedial legislation the very fact situation which that remedial legislation exempts from coverage.[23]

3. Appellee's Showing of a Nexus to Commerce Is Trivial; Both the Appellee and the Congress Use This Triviality in an Attempt to Minimize the Impact of the 1974 Amendments.

The "compelling" test, and the Federal interference with Government here challenged, requires that these 1974 Amendments be justified as remedying the specific evil cited as a nexus to commerce. To justify interference with Government, this "minimum wage" Act can stand only upon a compelling showing[24] that (1) State and City Governments pay wages of less than $1.90 per hour[25] in a substantial degree; and (2) these substandard wages substantially affect interstate commerce.

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[23]*Maryland v. Wirtz* expressly left the "ultimate consumer" question open, for a case-by-case determination. See NLC Br. 27-28, quoting *Wirtz*, 392 U.S. at 201. See also NLC Br. 114, citing *Iowa v. Brennan*, No. 73-1565, pending certiorari before this Court.

[24]This compelling showing is not assisted by the usual presumption of constitutionality of legislation. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4.

[25]This is the remedial level of the 1974 Amendments on their effective date, May 1, 1974.

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Appellee's incidents of commerce are properly considered by this Court only to the extent that the purported nexus to commerce is addressed by the congressional legislation. The Fair Labor Standards Act forces an increase in wages;[26] it can be supported only by the activities of States and Cities whose alteration by the 1974 Amendments will increase wages.[27]

In *Gulf Oil Corp. v. Copp Paving Co.*, 95 S. Ct. 372, 43 U.S.L.W. 4059, 4063, this Court considered an argument as resting "on a purely formal 'nexus' to commerce."[28] Calling this an "irrational way to proceed," the Court said:

> "The justification for an expansive interpretation of the 'in commerce' language . . . would require courts to look to practical consequences, not to

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[26]For States and Cities, the increase is principally from overtime rather than from the minimum wage provisions, casting further doubt on the constitutional rationality of this "minimum wage" legislation's 1974 Amendments.

[27]The position of Senators Harrison A. Williams and Jacob K. Javits as *amici curiae* is that Congress well considered the impact of the 1974 Amendments and found it to be "small in terms of total payroll". (Sen. Br. 11). To the extent that the 1974 Amendments did not affect Government payrolls, it was not a rational solution to whatever effect those payrolls have on interstate commerce. Taking the Briefs of the Appellee and the Senators together, this Court is asked to conclude: (1) that State and City Government payrolls greatly affect commerce, thus authorizing legislation whose effect on these commerce-affecting payrolls would be slight. In sum, the 1974 Amendments are sought to be preserved by pointing out their ineffectiveness.

[28]As stated by the Court, this nexus to commerce was that: "the highways are instrumentalities of interstate commerce; therefore any conduct of petitioners with respect to an ingredient of a highway is *per se* 'in commerce.' " *Ibid.*

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> apparent and perhaps nominal connections between commerce and activities that may have no significant economic effect on interstate markets." *Ibid.*

In *Liggett Co. v. Baldridge,* 278 U.S. 105, 112-114, the Court invalidated a State statute requiring that drug stores be under the management of a registered pharmacist. The Court conceded the State's power to act to protect the public health, but found no "real and substantial relation" to this goal in the remedial means chosen. See also *Weaver v. Palmer Bros. Co.,* 270 U.S. 402, 415.

Against the Appellee's *pot pourri* of economic argumentation, not all of which can serve as a nexus to commerce authorizing this congressional legislation,[29] must be set the bases of the Fair Labor Standards Act of 1938 (see NLC Br. 15):

> "The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumen-

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[29] C.f. Sen. Br. 18:

> "It may be added that where a Congressional enactment based on the commerce power is directed, as here, at the overall health of the national economy – a matter inseparable from interstate commerce – then all activities which significantly affect that objective necessarily have sufficient relationship to commerce to be within the ambit of that power."

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> talities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. The Congress further finds that the employment of persons in domestic service in households affects commerce." c. 676, §2(a), 52 Stat. 1060, 29 U.S.C. §202(a) (1970).

To conform to traditional notions of the commerce power, Appellee must show in today's State and City Government "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." This the Appellee does by citing (Br. 16) the existence of 409,000 State and City Government workers receiving substandard wages. Appellee does nothing to refute the point made earlier (NLC Br. 23) that all but 95,000 of this figure were covered by the Act prior to the 1974 Amendments. In fact, both the Appellee (Br. 43) and Senators Williams and Javits so admit (Sen. Br. 4). Furthermore, the source of the 95,000 figure is "[Labor] Department estimates" without reference to any basis in fact. H.R. Rep. No. 913, 93d Cong., 2d Sess. 28.

As a nexus to commerce, Appellee is left with less than 1% of the 11.4 million State and City Government workers. No showing has been made that any work stoppage by Government employees was attributable to

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a failure to pay the FLSA's wage scale. Senators Williams and Javits (Sen. Br. 14) admit there is none.

The Senators (Sen. Br. 15 n. 10) and Alabama *et al.* (Ala. Br. 10 n. 6) find comfort in the existence of strikes among Government workers, as reported in *Work Stoppages in Government, 1972.* Nowhere in this pamphlet are strikes attributed to Government's failure to pay the minimum wage.[30] In fact, the pamphlet attributes the longest strikes to union recognition and security, *Id.* at 1, questions unrelated to wages.

Furthermore, Appellee contradictorily argues (Br. 48 n. 40) that "the dollar impact of the minimum wage requirements would not be 'substantial'."[31] The lack of a substantial effect of the congressional remedy on wages destroys the rationality of Congress' action designed to alleviate evils emanating from substandard wages.[32] Without a substantial or compelling nexus to the wages paid to State and City Government workers, the 1974 Amendments to the Fair Labor Standards Act cannot be supported under the Commerce Clause.

4. Such a Trivial Nexus to Commerce Cannot Support the Unconstitutional 1974 Amendments as an Exercise of a Limited Congressional Power.

Federalism is merely paid lip service in the Appellee's "balancing". (Br. 36). This Court, however, has given

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[30]The minimum wage, as prescribed by the Act, is $3952 per year ($1.90 per hour for 52 weeks of 40 hours).

[31]See also Sen. Br. 7, quoting S. Rep. No. 842, 92d Cong., 2d Sess. 19 and H.R. Rep. No. 913, 93d Cong., 2d Sess. 28.

[32]See Sen. Br. 8, citing an increase in the Government wage bill from this remedial legislation of 0.3%.

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due regard for the balance between the Constitution's Federal system and the exercise of a power by the Federal Government.

The balance between constitutionally protected Federalism and congressional legislation under one of the limited powers of Article I of the Constitution, has been struck in tax cases,[33] in regulatory cases and in cases impinging on the fiscal integrity of States and City Governments. Each line of cases is discussed below.

The relationship of noninterference between Federal and State and City Governments is implied from the whole of the Constitution. See *Collector v. Day*, 11 Wall. 113, 123-124; *Graves v. New York*, 306 U.S. 466, 477-478; *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 269. Indeed, the only provision of the Constitution empowering congressional action affecting Government is the Guaranty Clause, Art. IV, §4. Even under the Guaranty Clause, State decisions and procedures implementing "ballot box control" by the People have been upheld. See *Coyle v. Smith*, 221 U.S. 559, 567; *Pacific States Tel. & T. Co. v. Oregon*, 223 U.S. 118 (upholding initiative and referendum).

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[33]How little the Appellee (Br. 23) and the Congress (S. Rep. No. 690, 93d Cong., 2d Sess. 24) thought out the fundamental and unique position of Government of States and Cities is shown by the attempt to show as a State and City activity affecting commerce, the collection of taxes. Upon this reasoning, the Federal Government would be empowered to establish the tax rates and tax laws of each State and City. C.f. Appellee's Br. 39.

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The gravamen of the tax immunity cases is: who writes the check to pay the tax.[34] If a State or City writes the warrant, the tax is unconstitutional unless

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[34]A failure to recognize this fact explains statements such as that at CAPE Br. 17:

> "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."

Earlier (CAPE Br. 5) these unions quote from *Maryland v. Wirtz* and argue thus:

> " '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, the present appellants' polemics are also 'not factually accurate.' "

Putting these arguments together, CAPE would urge this Court, in following *Helvering v. Gerhardt,* that, if the salary of a Government officer is taxable or regulable, argument that the Federal Government may not constitutionally tell that Government officer how to discharge his Government duties, is foreclosed. C.f., Appellee's Br. 40, AFL Br. 8, Ala. Br. 16. This reasoning is refuted even by *Gerhardt* itself. 304 U.S. at 420.

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the Government involved can be "looked through".[35] See NLC Br. 56, quoting from *Mayo v. United States,* 319 U.S. 441, 447. This reasoning applies to taxes which are nondiscriminatorily applied to Government and industry alike.

The 1974 Amendments to the Act are discriminatory.[36] While a small private industrial enterprise does not come under the Act unless it has gross sales of $250,000 per year, 29 U.S.C. §203(s) (1970),[37] a small State or City Government, with tax receipts under

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[35]The Government was "looked through" in *New York v. United States,* 326 U.S. 572, 581, and 587 (Stone, C.J., concurring). See NLC Br. 68. See also NLC Br. 64, citing *South Carolina v. United States,* 199 U.S. 437, and *Ohio v. Helvering,* 292 U.S. 360. The essence of the decision in *New York* is the finding of "an enterprise in which the State sells mineral waters in competition with private waters." 326 U.S. at 581. In this case, the District Court found an absence of such competition with private industry. (App. 650).

[36]In *New York v. United States,* 326 U.S. 572, 583-584, a tax was upheld as applied to States with these words:

> "[We] find no restriction upon Congress to include the States in levying a tax exacted *equally from private persons* upon the same subject matter." (emphasis added).

[37]Section 203(s) defines an "enterprise engaged in commerce or in the production of goods for commerce" as one ". . . and which –

> "(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separatively stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969 is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated);"

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$250,000 comes under the Act by virtue of §203(s) of the Act, Pub. L. No. 93-259, §6(a)(5)(E), 88 Stat. 60, (NLC Br. 5a), which by the definitional stroke of the congressional pen seeks to overcome any constitutional limitation on Federal power:

> "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce."

In answer to Appellants' argument (NLC Br. 118) that Government police and fire personnel are treated by 29 C.F.R. §553.15 less favorably than private employers under 29 C.F.R. §785.21 regarding the treatment of sleeping and eating time as hours worked on a shift of exactly 24 hours, Appellee indicates (Br. 50 n. 43 at the last sentence continued on page 52) that disadvantaged Government police and fire personnel can conform to the private rule. Appellee fails to point out that this requires Government to forsake the §7(k) treatment of police and fire (raising the threshhold of hours per week triggering overtime to 60) of which Appellee makes so much (Br. 7 n. 5).

Therefore, Government is not treated by the Fair Labor Standards Act as fairly as private industry. The reasoning of *New York v. United States* cannot support the application of the Act to any Government activity.

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Moreover, the reasoning of *Maryland v. Wirtz,* 392 U.S. at 193-94[38] cannot control this case.

Government is defined by the Act as an "enterprise engaged in commerce"[39] without limitation or justification, a burden not imposed on private industry.

Apart from the discriminatory aspect of the 1974 Amendments, State and City Government cannot constitutionally be regulated by the Act, upon the reasoning of the tax cases. Under the Fair Labor Standards Act, wage checks, including those for unpredictable overtime, are drawn on Government. This was not the case in *Helvering v. Gerhardt;* Appellants have shown that the detriment, the undue interference from the 1974 Amendments is more than "so speculative in its character and measurement as to be insubstantial." *Gerhardt,* 304 U.S. at 421.

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[38]"Congress has 'interfered with' these state functions only to the extent of providing that when a State employs people in performing such functions [operating State schools and hospitals] it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals."

See "Governmental Impact Statement", *supra* pp 4-6, 8-21.

[39]C.f., this response of the majority in *Maryland v. Wirtz* to the fears of the dissenting Justices, 392 U.S. at 196 n. 27:

"The dissent suggests that by use of an 'enterprise concept' such as that we have upheld here, Congress could under today's decision declare a whole State an 'enterprise' affecting commerce and take over its budgeting activities. This reflects, we think, a misreading of the Act, of Wickard v. Filburn, supra, and of our decision."

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The same balancing has been performed in regulation cases, and bankruptcy cases (discussed in Section VI, *infra*). In these cases, as well as the tax cases, undue interference with Government has been avoided. Such is the duty of this Court in this case.

VI. THE APPELLEE'S EXEGESIS OF *MARYLAND V. WIRTZ* CANNOT IMPEL THIS COURT TO FOLLOW *WIRTZ* AS A PRETEXT TO ABROGATE CONSTITUTIONAL FEDERALISM.

The decision in *Maryland v. Wirtz,* 392 U.S. 183, is indispensable to Appellee's argument.[40] Yet the analysis of *Wirtz* and in *Wirtz* is defective in its failure to

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[40]See, e.g., CAPE Br. 4. In an effort to foreclose consideration of the interference with Government wrought by the 1974 Amendments, CAPE argues (CAPE Br. 6):

> "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."

This reasoning would absolve the Congress from the requirement of having any factual basis at all for legislation. In fact, this is what Congress has done in the 1974 Amendments in failing to show (1) that any more substantial percentage than an alleged unidentified 95,000 out of 11.4 million State and City Government employees (0.83%) receive wages less than FLSA's remedial standard and (2) that any labor disruption at all arose because of Government workers' failure to receive FLSA's standard of $3,952 annually ($1.90 per hour for 52 weeks of 40 hours).

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consider the uniqueness of Government. (See NLC Br. 26-29.)

In contrast, this Court has considered the uniqueness of Government in both regulatory and bankruptcy cases.

Mr. Justice Holmes speaking for the Court in *Johnson v. Maryland,* 254 U.S. 51, 55-56, analyzed Government, as the Court in *Wirtz* failed to do:

> "The cases upon the regulation of interstate commerce cannot be relied upon as furnishing an answer. They deal with the conduct of private persons in matters in which the states as well as the general government have an interest, and which would be wholly under the control of the states but for the supervening destination and the ultimate purpose of the acts. Here the question is whether the state can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States."

See also, *Gillespie v. Oklahoma*, 257 U.S. 501, 505; *Miller v. Arkansas*, 352 U.S. 187, 190.

The First Circuit, in *Souza v. Travisono,* 43 U.S.L.W. 2402 (Mar. 11, 1975) discussed the unique nature of the State as payer of attorneys fees:

> "The district court erred, however, in awarding fees at the rate of $60 per hour, based on

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> affidavits of two prominent local attorneys citing returns of $60 and $70 per hour as reasonable. This is not a case in which the attorneys sold their services to a private client willing to pay the market price. The Rhode Island taxpayers, who will ultimately bear the burden, have had no opportunity to pass on either the extent of the services or on the fees."

The reasoning of the bankruptcy case *Ashton v. Water District*, 298 U.S. 513, 530 (see NLC Br. 74), a case preserving the fiscal integrity of State and local Government, must be applied in this case. Undue interference with Government cannot be ignored, as it was in *Wirtz*, as "matters outside judicial cognizance." 392 U.S. at 194 n. 22.[41]

The language in *Wirtz*, 392 U.S. 183, 193-94, that:

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

is contradicted, upon reason and due consideration of the unique nature of Government, by this Court's statement in *Employees v. Missouri Public Health Dep't*, 411 U.S. 279, 286:

> "It is one thing, as in *Parden*, to make a state employee whole; it is quite another to let him recover double against a state. Recalcitrant private employers may be whipped into line in that manner. But we are reluctant to believe that

[41] See Appellee's Br. 44.

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> Congress in pursuit of a harmonious federalism desired to treat the States so harshly."

The accommodation of State and Federal Government interests should be no different where the Congress has spoken than where the Congress has been silent. See *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 548.

The AFL-CIO argues (AFL Br. 9) that the history of the effect of the 1966 amendments to the Act, since the decision in *Maryland v. Wirtz,* shows the innocuousness of the 1974 Amendments. This reasoning ignores these facts.

Hospitals and schools do not legislate, tax, license or adjudicate. Their powers are limited. Hospitals and schools offer too narrow a perspective of State and City Government for an over-all evaluation of impact of the Act upon the whole of State and local governmental powers.

Any absence of a flood[42] of litigation following the 1966 amendments to the Act is explained by the regularity and certainty of employment of nonexempt school and hospital employees. For other State and City Government employees, newly covered by the 1974 Amendments, flexibility and "stylized operations" (Pritchard Deposition at 123, App. 169) are the norm. Furthermore, most schools and hospitals are run by special districts rather than the States and Cities themselves. This creates a much smaller "enterprise" than do the 1974 Amendments in declaring an entire State or City to be an enterprise. Only with the 1974 Amendments is Justice Douglas' fear (as restated by the

[42]But c.f., *Brennan v. Board of Education*, 374 F. Supp. 817, 819 (D. N.J. 1974) (22 suits against the New Jersey Board of Education under 29 U.S.C. §206(d)).

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majority in *Wirtz*) realized: "Congress could under today's decision declare a whole state an 'enterprise' affecting commerce and take over its budgeting activities." *Maryland v. Wirtz,* 392 U.S. at 196 n. 27. Finally, employee suits were inhibited by this Court's decision in *Employees v. Missouri Dep't of Public Health,* 411 U.S. 279. Congress, in the 1974 Amendments, specifically "overruled" this decision. See NLC Br. 130 n. 102.

CONCLUSION

Appellee, and the *amici curiae* supporting the 1974 Amendments, repeat the mistake of *Maryland v. Wirtz* in their failure to distinguish Government from industries in commerce. An Act which usurps the ballot box control accorded the People throughout the Constitution (and which the Federal Government is charged to guarantee), presents a case about Government not about commerce.

The Appellee and the senatorial and labor union proponents of the 1974 Amendments can point to no constitutionally sufficient nexus to commerce of the wage practices of Governments to justify these remedial wage Amendments. Even without reference to the unconstitutional abrogation of our shared Federal system of Government, the 1974 Amendments cannot stand as commerce legislation. Consideration of the impact on Government *qua* Government, of superseding debt and tax constitutional provisions, of undermining the administrative, adjudicatory and fiscal integrity of Government and investor confidence in Government, added to

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the dollar cost of these 1974 Amendments to the People as taxpayers, reinforces the conclusion that the 1974 Amendments are irrational as remedial legislation and impels their invalidation. If States and Cities can constitutionally be treated as mere "enterprises" engaging in commerce, our cause must be judged hopeless. But they are Governments, not enterprises; by definition they function in the public interest, not as private entities.

To conclude that *Maryland v. Wirtz* is controlling would be to create a preeminence for the commerce clause that borders on omniscience, without one shred of evidence in our constitutional history that the commerce power was so enshrined.

This is a commerce power case in the sense that Congress waved that rationale before itself in attempting to justify this legislation. It is not a commerce power case when viewed in its totality. The myopic view which *Maryland v. Wirtz* took in looking only to the commerce power must be broadened to include the entire structure of Federalism encompassed by the Constitution. Appellants, by their action herein, request a reaffirmation of constitutional doctrines more deeply rooted than the recent doctrine of *Maryland v. Wirtz*. These doctrines have for over 200 years guaranteed independent State and local governmental operation, thereby assuring balanced Federal-State governmental

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cooperation. Nothing in the 1974 Fair Labor Standards Act Amendments should be allowed to obliterate that bicentenarian cooperation.

Respectfully submitted,

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