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

SUPPLEMENTAL BRIEF FOR APPELLANTS ON REARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 74-878 and 74-879

THE NATIONAL LEAGUE OF CITIES, *et al.*,

Appellants,

v.

HON. WILLIAM J. USERY, JR.
Secretary of Labor of the United States,

Appellee.

The State of CALIFORNIA,

Appellant,

v.

HON. WILLIAM J. USERY, JR.
Secretary of Labor of the United States

Appellee.

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

SUPPLEMENTAL BRIEF FOR APPELLANTS ON REARGUMENT

STATEMENT

Sometime in August 1975, Appellants were notified that Appellee intended to file a Supplemental Brief herein. We believe *Fry v. United States*, 421 U.S. 542, the Solicitor General's intended Brief and the importance of this case to the future of the fiscal integrity of States and Cities all warrant and require this Supplemental Brief by the Appellants. We believe it provides facts–irrefutable facts–that the intrusions of this Act into State and local governmental policy violate the great principles of Federalism as contained both throughout the Constitution of the United States and in the Tenth Amendment to the Constitution. The Act impairs the integrity of the States and Cities and their ability to function effectively in a Federal system.

This Court, speaking through *Fry v. United States*, 421 U.S. 542, 547 n.7 said that the Tenth Amendment:

> "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a Federal system."

In his oral argument on April 16, 1975, in this case Solicitor General Bork made the following concession:

> "I think if this Court ever sees that States are being deprived of political autonomies so that they are no longer vital policy-choosing and policy-making centers, this Court can say the value of Federalism is being impaired and strike down the statute involved." Tr. at 41.

There remain then but two questions to be here decided. Is the budgetary-expenditure function a vital power of State and local Governments? Is that power being impaired by the Act here questioned, thereby

destroying State and local governmental integrity or ability to function effectively in a Federal system?

The first question answers itself. It must be remembered that the activity regulated by these Labor Act Amendments is the payment of wages to government employees, that is, the administration of tax revenues. There is no greater power which government has than its power to tax, to appropriate its resources, to issue bonds, to expend money and to maintain a balanced budget, thereby insuring fiscal integrity. Without this fiscal integrity State and local Governments are unable to function. Fiscal integrity is the cornerstone of governmental integrity.

The second question, one of fact, is best appreciated by examining the reports of Cities themselves. As this brief clearly indicates, the budgetary-expenditure function of State and local Governments is being drastically intruded upon, impacted and impaired by the Act's 1974 Amendments. It is being imminently impaired by the effects here described. It is also being prospectively impaired for present and future citizens by the effects here described. Further, the total impact of this Act threatens to have an incremental effect on the already existent State and local Government fiscal crisis, which could force the default or total decline of some of these Governments.

For example, the City of Chicago, in what it styles a modest estimate, sees the increased cost for fire and police services alone, owing to the Labor Act Amendments, at $100,000,000.00 per year. Other Cities make similar estimates, as their reports–presented here–show.

The Postmaster General reports that the impact of the Act on the Postal Service alone is about $25,000,000.00 annually and may result in the

necessity of reopening negotiations with one of the postal craft unions. (Letter of Postmaster General Benjamin F. Bailar, dated Jan. 5, 1976).

The Attorney General's Office of Indiana found in a 1974 estimate of police and fire overtime alone for the State's Cities, Towns and Special Districts that the additional cost would be $29,426,813.14. This figure does not include Counties, which provide a great deal of additional protective services. After more than two years, this figure has undoubtedly increased substantially.

The Metropolitan Government of Nashville and Davidson County, Tennessee, states that audits and investigations will tie up thousands of man hours:

> "It is difficult to estimate the increased costs. The original estimates that we furnished you probably would be low. One of the serious impacts that we have is that if the Department of Labor is investigating complaints and conducting audits of the operations and the wage records, etc. of the Metropolitan Government, thousands of man hours will be spent by employees of the Metropolitan Government working with the inspectors and investigators of the Wage & Hour Division."

The Act will also mean the elimination of compensatory time altogether:

> "Our budget only provides a certain amount for salaries. Quite often when an employee is required to work over time, we have been giving the employee compensatory time. If we are covered by the Wage & Hour Law, this will be practically eliminated." (Letter from Director of Law Milton H. Sitton, dated Feb. 6, 1976).

As the Argument section of this Brief shows, beyond the Labor Act's impairment of State and City integrity, there is neither a compelling need nor nexus to interstate commerce in States and Cities to support these Amendments.

I.

THE MOST HIGHLY INFORMED AND QUALIFIED ORGANIZATION OF CITIES AND CITY OFFICIALS, ESTIMATES THE COST OF THE 1974 LABOR ACT AMENDMENTS TO CITIES OVER 10,000 POPULATION ALONE, AT OVER $1,000,000,000.00 PER YEAR.

The most complete attempt to determine the true cost of these 1974 Amendments on Cities had been made by the International City Management Association. The ICMA and its Executive Director Mark E. Keane in the regular course of business receive more budget and personnel information from Cities (over 10,000 population) than any other organization.

Certainly the ICMA knows more about the effect of overtime costs on Cities than does the Congress. The Congress' Background Materials on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., 220 (cited in the Appellee's Brief at 16 n. 13), and the House Report (No. 93-913 at 28-19) show that the Appellee's estimate of cost of $128,000,000.00 is based *only* on minimum wages. It does not include overtime payments at all. The House Report's estimate of 1% cost increase owing to overtime was based on a survey by the Appellee of *scheduled workweeks* of State and City employees made in 1970. (H.R. Rep. No. 913, 93d Cong., 2d Sess. 28). The language of the Report shows how simplistic was this survey, and makes clear that the overtime consequences of joint employment, volunteers, seasonal compensatory time, and other City innovations cannot have been considered by the Appellee in 1970 and the Congress in 1974:

"The Department concluded:

> Long workweeks were most prevalent among employees in the public safety activity, which includes police and fire departments. A fifth of the public safety employees worked over 40 hours and they comprised half of the employees on long weekends. Public works was also significant in this regard, employing 27 percent of the workers on long weekends.
>
> During the survey week, only 2.3 percent of total nonsupervisory man-hours in State and local governments represented hours worked in excess of 40. If a 40-hour Federal overtime standard were in effect at the time of the survey, the premium pay required for these hours would have approximated one percent of the weekly wage bill. The actual impact of a 40-hour standard would have been less because a substantial proportion of the employees receive premium overtime pay." H.R. Rep. No. 913, 93d Cong., 2d Sess. 29 (1974).

This clearly shows, beyond doubt, that the evidence relied on by the Congress and the Appellee is absolutely worthless in its failure to consider the impact of the Labor Act's overtime on City and State employment practices, not just scheduled workweeks. It is shocking that such evidence would be the basis of legislation as damaging to Cities as these Labor Act Amendments.

The ICMA, City management experts, considered these City innovations ignored by the Appellee and on which the Act's overtime provisions have the greatest effect; ICMA helped pioneer them. The facts determined by ICMA from reports by City managers who are responsible for City budgets and City personnel are accurate. ICMA's determination is that the cost of the Labor Act Amendments here challenged, to Cities over 10,000 population alone, will be *over one billion dollars* ($1,000,000,000.00) *per year*. The actual cost might be even higher. (See Statement Section I.B. *infra*).

Mr. Keane's letter to this effect is set forth as the Appendix to this Brief.

No Congressional legislation in 200 years has so upset, disrupted or affected States, Cities and Counties as this Act. Counsel have been flooded with information and illustrations of dire consequences. How to deal with this vast amount of material has presented a major problem as already overlong briefs have been filed. But Counsel do feel they have a duty to this Court to at least present a sampling of the latest material that has been pouring in. We believe it illustrates the gravity and nature of the Act's intrusions impairing the governmental acts and services of the States, Cities and Counties. Some information was intentionally requested by Appellant National League of Cities and the International City Management Association after the Solicitor General's notice of his Supplemental Brief in an attempt to develop an organized presentation of this impairment of State and City Government functions by the Act.

On August 27, 1975, the National League of Cities and the International City Management Association sent a joint letter to the City Managers of all Cities across the country with a population greater than 10,000 requesting:

> "1. Any information regarding *actions* you have *taken* in implementing or preparing to implement the provisions of the Act [Fair Labor Standards Act] ; and
>
> 2. Any *documents, studies,* or *research* you have prepared in examining the cost of implementing FLSA.
>
> We need as much written documentation as you can provide, both in the form of formal and informal reports."

Hundreds of responses have been received. The City managers' own direct and expert assessments best describe the immediate impairment of State and local Government which this Act will effect. They draw up the budgets of Cities and carry out the public services there provided for. The facts reported by City officials and presented herein[1] show how damagingly false is the Solicitor General's opinion that the Labor Act here challenged is "a law which does not oust a State policy but merely says choose your own policies, there is going to be a slight additional cost in standard working conditions." Tr. Oral Argument, April 16, 1975, at 54. By like distraction, the Solicitor General would have advised that Jason's voyage to Crete was not arduous because he was given a choice between the rock of Scylla and the whirlpool of Charybdis.

The facts assessed and reported by Cities show a great increase in cost, forcing drastic curtailment of services, because of the dire financial situation of today's Cities. The Solicitor General hypothesizes and assumes the effect of the Labor Act on City policies.[2]

---

[1] The facts reported and assessed by City officials charged under State law with coping with these Labor Act Amendments are summarized in the text of this Brief. Quotations from City officials are set forth in footnotes; these were chosen merely as examples of Cities' responses describing the policy curtailment the Labor Act forces on them. These reports from Cities are intended to supplement for the Court the facts already reported by Cities and States in the complaint (App. 6-42), depositions (App. 86-310) and exhibits thereto (App. 311-587).

[2] Unsupported assertion is the very basis for Cities' inclusion within the Labor Act. The *ipse dixit* of Pub. L. No. 93-259, § 6(a)(5)(E), adding 29 U.S.C. § 203(s)(5) states: "The employees of . . . a public agency shall for the purposes of this subsection be *deemed* to be employees engaged in commerce. . . ." (Emphasis added).

Those who operate Cities report the actual effect of the Labor Act on their Cities, and the City policies, desirable to City and employee alike, which must be foregone, without choice by the City and its citizens.

II.

THE EFFECT OF THE 1974 LABOR ACT AMENDMENTS IS TO IMPAIR BOTH THE FISCAL INTEGRITY OF STATES AND CITIES AND THEIR ABILITY TO FUNCTION EFFECTIVELY.

A. To Preserve Local Personnel Policymaking And Be Penalized Therefor With New And Unique Overtime Rules Required By The Labor Act, When Most Cities Have Their Own Rules Adapted To Their Unique Needs, Is Unreasonable And Prohibitively Costly.

The first computation by many Cities was the cost in dollars of doing what the Solicitor General suggests is possible and easy under the Labor Act: comply with no changes or minimal changes in City services. The response of Cities shows how wrong the Solicitor General is. The cost of compliance is tremendous. This cost is entirely overtime payment as distinguished from minimum wage payment. For example, the small City, Burbank, California, estimates a progressively increasing Labor Act cost for fire service until in 1979 the annual cost for fire service alone attributable to the Labor Act, is $1,000,000.00. Similarly, the estimate of the City of

Los Angeles, California, for police and fire alone, for the first year alone, is $8,650,000.00.[3] Other estimates

[3] Burbank, California, reports:

"The Proposed Rules for Police and Fire Personnel under the amended Fair Labor Standards Act present a totally untenable situation for the City of Burbank. Specifically, the problems would arise with Fire personnel. I have attached a copy of a report prepared for the purpose of defining the financial obligations in the next four years of the Act's implementation. The dollars of extra cost, at best, are conservative and in summary are most staggering:

CY 1975–$31,294 additional overtime cost
CY 1976–$59,149 additional overtime cost
CY 1977–$163,889 additional cost for overtime and extra personnel
CY 1978–$920,000 approximate additional costs for extra personnel

"This means that over the next four years, Burbank citizens must bear the brunt of an additional $1,174,000 for increased cost of fire operations and not realize one cent more of additional fire protection for their property. Following the four-year period, the added taxpayer cost will exceed $1,000,000 *each year* for an increase of 43.5 people, as well as continuing overtime. These are costs which apply to one relatively small community (87,000 people) of the many thousands across the country. It is totally unrealistic to even think of the taxpayer burden in the United States if these costs are applied in all communities in the fifty states. It is further unrealistic to think that Congress conceived of this financial burden when the 1974 FLSA amendments were enacted." (Letter of Management Research Officer Edward V. Easter, dated September 12, 1975.)

Los Angeles, California, reports:

"The City has not implemented the provisions of the Fair Labor Standards Act for Fire and Police sworn personnel. If the provisions of the Fair Labor Standards Act are made applicable to these personnel, we estimate that the cost to the City for the 1975-76 fiscal year will be approximately $8,650,000. This estimate is based upon current staffing and manning levels." (Letter of February 13, 1976 from C. Erwin Piper, City Administrative Officer.)

of increased costs for fire service alone range to an increase of 40%.[4]

The estimates[5] of cost of compliance with the Labor Act are in stark contrast to the Solicitor General's

[4] Carmel, Indiana reports:

"The town of Carmel has 24 full-time firemen who in a 28 day period work regular hours as follows:

Two Crews .....216 hours
One Crew .....240 hours

In addition to these regular 24-hour shifts the crew due to report for work the next day reports in to man the stations when those on duty are called out on a fire or first-aid run. On a large fire all off-duty men necessary are called out. These firemen are assisted by nine non-paid volunteer firemen who are mostly available evenings and weekends.

"Should the NLC lose their suit now before the Supreme Court, it would necessitate the Town of Carmel adding 40% more manpower, plus eliminating the off-duty men manning a station when on duty firemen were on a call. Our 1976 budget for firemen's salaries is $316,442.00. To increase the manpower 40% would add $126,576.80 to the budget. In Indiana the tax rate is frozen, therefore, that portion of available funds will cause other operations of government to be cut back. This is a most serious problem in Indiana, as nearly all communities already have problems caused by inflation with no way to take care of the increasing costs." (Letter of Town Manager Neil B. Schmeltekop, dated September 3, 1975.)

[5] Phoenix, Arizona, reports:

"...the additional costs in general employment services, other than public safety, is $100,000 per year based on converting compensatory time to over-time pay.

"...our budget and research staff estimates that these additional costs can be met only by reduction of government services;" (Letter of Employee Relations Specialist Frank D. Wanto, dated September 10, 1975.)

Milwaukee, Wisconsin:

"Even in so small an operation as our Treasurer's Office, with only 40 employees, in one three-month period an expenditure of over $14,000 was made that was not made in the year previously, because of the Fair Labor Standards Act. Satisfactory arrangements for compensatory time off

(continued)

less-than-1% figure for increased overtime cost owing to the Labor Act. Brief for Appellee, 44 n. 35. They rebut

(footnote continued from preceding page)

had previously been worked out between the employees and the City, to the satisfaction of both." (Letter of City Personnel Director Robert C. Garnier, dated September 15, 1975.)

Des Moines, Iowa:

"Our police and fire budgets would increase approximately $70,000 each if the FLSA was applied. Since the State of Iowa imposes a mill limit and we are operating at that limit, our only alternative would appear to be layoff of public safety personnel and/or reduction of service in other areas." (Letter of Asst. Employee Relations Director Kevin J. Burt, dated September 10, 1975.)

Alton, Illinois:

"This has cost approximately $3,160 per month for the first five months of the fiscal year. This will mean a 4.5% increase in the total payroll over last year when overtime was paid only for call-outs, with compensatory time for extra shifts. Again computer programming changes have been and still are a problem. We now have two hourly rates for salaried personnel in this department—one for regular overtime and one for call-outs. This can only lead to a complete re-evaluation of the entire department at a major cost to the taxpayer, particularly if the decision should be to change to a straight 40-hour workweek. An additional $200,000-$250,000 would be required for payroll for more personnel or one of the five firehouses now in operation might be closed." (Letter of City Comptroller Rita H. Schoeffel, undated.)

Adel, Georgia:

"The implementing of the provisions of the Act have resulted in the loss of a great deal of control in the various departments. Under present conditions it appears the City will have to increase its labor cost (based on present salary schedules) another 16 or 17% within the next year." (Letter of City Manager William F. Pierce, dated December 23, 1975.)

Athens, Tennessee:

"First, the costs of implementing the reduced working hours for firemen will cost the City approximately $75,000.00 more per year for the increase in men in order

(continued)

his contention (Br. 50) that fire service overtime figures will be overstated by failing to account for the § 7(k) treatment available for police and firefighters' hours. As

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(footnote continued from preceding page)

to reduce the hours worked. This may not seem like a large sum of money, but it certainly is to a smaller city. By having to pay for this increase in salaries, we have had to postpone purchase of a new pumper truck (one of our old trucks has passed the 20 years limit). We feel we are spending this extra money without substantially improving fire protection." (Letter of City Manager M. G. Isbell, dated September 12, 1975.)

Corvallis, Oregon:

"In summary, enforcement of FLSA would cost the City of Corvallis approximately $50,000 if we could afford it. Since our budget cannot absorb this additional expenditure, it will result in a reduction of service levels primarily from elimination of overtime, volunteers, student interns and educational development of current employees." (Letter of Asst. to City Manager Steven C. Burkett, dated September 9, 1975.)

Union City, Tennessee:

". . . the amount of $80,593 is the actual impact on our payroll if we had continued our operation that was in force in 1973 with current adjusted salaries." (Letter of City Manager W. D. Frizzell, dated September 5, 1975.)

the report of Los Altos, California, shows,[6] as of January 1, 1976, §7(k)'s 232 hours in a 28-day period[7] will no longer permit a 56-hour week of 24-hour shifts, the most popular and efficient[8] fire schedule now in use throughout the Nation.

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[6] Los Altos, California, reports:

"The greatest impact of this law will be in the operation of our fire department, and the major areas of concern are as follows: Reduce fire suppression workweek to 54 hours—this appears to be the most ridiculous aspect of the law. The predominant workweek for firefighters in California is the 56-hour week on a 24-hour shift basis, and this fits neatly into a 3 shift per nine day cycle. This work arrangement is beneficial to the taxpayers and is quite popular with the fire personnel as evidenced by their opposition where communities have implemented a 40-hour workweek. There is no 24-hour schedule that accommodates the 54-hour week, and we would have to let people off for 2 hours at odd hours of the day, creating a shortage of emergency personnel at those times or pay 2 hours overtime per week to every man. Estimated annual cost for this overtime is $34,600 (for a small department serving 40,000 population)!" (Letter of Chief Administrative Officer S. George Sanregret, dated September 11, 1975.)

[7] Pub. L. No. 93-259, § 6(c)(1)(B).

[8] University Park, Texas, reports:

"An illustration of the costs that cannot be measured is the fact that certain emergency crews are no longer manned during the graveyard shift, from midnight to 8 a.m. in the morning. We now handle all emergencies during that time period on a call-out basis. But obviously the graveyard shift did more than take care of emergencies; they also did certain maintenance items which now are done in a less comprehensive manner or not at all." (Letter of City Manager Leland Nelson, dated September 4, 1975.)

B. The Confusion Of Applying An Act Designed For Commercial Business Enterprises To City Government Makes It Impossible For Cities To Estimate Completely The Cost Of Compliance Which The Labor Act Would Impose On Them.

The computation by Cities of the cost of complying with the Labor Act has been hindered by the vagueness of the standards of the Act and the Appellee's regulations.[9] The Appellee has never applied this Act to Cities. The Congress in passing the 1974 Amendments did not consider the limitless varieties of City employment policies and classification, which do not fit the Act's private-industry scheme. The result has been

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[9] Martinsville, Virginia, reports:

"With respect to this No. 2 on the attached form, a listing of those felt to be exempt was made, but there obviously remains the chance that bureaucratic interpretation and review of our list of exemptions might cause the City to have too few or too many classified as exempt all because of the complexity of the regulations." (Letter of City Manager Thomas B. Noland, dated September 3, 1975.)

such confusion[10] among Cities in attempting merely to plan compliance with the Act as shows the complete inappropriateness of the Act to Cities. For example, most State employees in California are on a 30-day pay cycle. The Labor Act's 28-day cycle, § 7(k), forces dual recordkeeping for fire and police, a tremendous and inestimable administrative and computer cost.

This tremendous confusion (which, by forcing conservative City decisions to avoid the risk of the Act's penalty provisions, exacerbates City financial

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[10] Kirkland, Washington, reports:

"One of our serious concerns is the apparent interpretation variances between local Department of Labor offices. Our people have made different statements to us from those in California which are both a little different than in Florida." (Letter of Director of Fire Services Robert H. Ely, dated September 5, 1975.)

Signal Mountain, Tennessee:

"The attachments are in chronological order. A significant thread that you will observe, running through the entire file is a lack of sound information upon which to base budgets, and the need to anticipate the outcome of any litigation concerning the rulings. There has been a need to prepare for almost any eventuality, and to budget accordingly, hoping that we had budgeted reasonably." (Letter of Town Superintendent Lovell J. Morris, Jr., undated.)

Thomasville, Georgia:

"The determination has been made to the best of our ability what employees are exempt—if anyone really knows. It seems that so called experts in this field cannot give any direct answers.

"The overall outcome of these regulations represent chaos to most cities in that a single department would have to be implemented to do nothing but try to interpret these rules and regulations." (Letter of Exec. Secretary to City Manager Elizabeth Prance, undated.)

troubles)[11] itself produces a cost of complying with the Labor Act: the necessity of new and larger personnel staffs.[12] Cities must become further bureaucratized in order to deal with the bureaucrats in Washington who are, by the Labor Act, given control of City personnel practices.

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[11] St. Louis, Missouri, reports:

"From the overall standpoint, the major impact of the FLSA, of course, is the increased cost at a time when the City of St. Louis is faced with an already bleak fiscal outlook. The additional drain on the City's revenues caused by the imposition of the Act must inevitably result in cuts in vital municipal services. The most severe impact of the Act from the point of view of individual managers and supervisors is the detailed, complex and inflexible regulations relating to implementation of the Act. These regulations, of course, have been designed for and are based on the Department of Labor's experiences in the private sector. In my opinion, the regulations do not meet the needs of either employees or management in the public service." (Letter of Chief of Classification and Compensation Thomas Sehr, dated September 10, 1975.)

[12] Iola, Kansas, reports:

"In addition, we have experienced no small amount of confusion in seeking to comply with the law, since we are a relatively small organization and do not have a full-time personnel officer. Addition of such an officer would add approximately $10,000.00 to $12,000.00 to the cost listed above." (Letter of City Clerk V. C. Perkins, dated September 5, 1975.)

Corvallis, Oregon:

"The frustration of setting up new and more complex paperwork systems in order to ensure compliance with the law is almost equally damaging in the service reductions." (Letter of Asst. to City Manager Steven C. Burkett, dated September 9, 1975.)

C. The Labor Act's Overtime Requirements Will Not Have The Effect Of Spreading City Employment. The Effect Will Be To Reduce City Employment And City Services.

Since the dollar cost of avoiding changes in City policies was determined to be so great, and because of spending limits on Cities,[13] Cities evaluated reductions and eliminations in services to equal the increased costs in overtime required by the Labor Act. Cities are not able to hire additional employees to avoid overtime payment under the Labor Act. The cost of new employees has become prohibitive. For example, the State of Connecticut reports that fringe benefits increased 17% while salaries increased 5%, with a 10% further increase in fringe benefits expected in fiscal 1976. *Municipal Finance Officers Association Newsletter,* Feb. 1, 1976, at 1-2. This report shows how fair and generous are City and State personnel policies, and that the Labor Act is not needed by them. Cities and States are not able to pay additional amounts in overtime premium. The only alternative is to reduce

[13] Union City, Tennessee, reports:

"We have cut many of our services in order to avoid excessive overtime—normal workweek of 45 hours has been cut to 40; the Fire Division was cut from 72 hours per week to 54, etc. We have not added additional personnel to take care of the change in schedules, therefore in the case of Union City, it has been a cut in services to the public. We had no choice, we simply do not have available funds to continue the service as previously offered." (Letter of City Manager W. D. Frizzell, dated Spetember 5, 1975.)

services.[14] This means immediate increases in fire insurance rates for homeowners, businesses and Cities themselves. (See Section III.B *infra*).

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[14] Rockford, Illinois, reports:

"Since the Fair Labor Standards Act went into effect in 1974, it has made it necessary that we change our operating structure for the clerical, blue collar workers, Police Department and Fire Department. It has always been a policy of this City to allow all help to work overtime when needed and either take overtime pay at the rate of time and one-half or compensatory time at the rate of time and one-half. This option has always been left to the employee. This made an arrangement that was satisfactory to the City and also to the employees as they worked when we needed them and they took compensatory time off at such a time when work was slack. This, of course, has caused a necessitated increase in the expenditure of wages.

"In order to make up the deficit caused by this expenditure, an order was issued by the Mayor that a hiring freeze would go into effect so that the cost can be made up. This then cut down the amount of services made available to the public due to the shortage of personnel in the various departments." (Letter of Personnel Director M. Paul Pirrello, dated September 12, 1975.)

For example, elimination of compensatory time off in Milwaukee would force the City to curtail drastically all police protection for four (4) months.[15]

D. The City Policies Which Must Be Altered In Compliance With The Labor Act Are Efficient, Economical, Adapted To City Needs And Agreeable To City Employees.

The City employment policies which become prohibitively costly under the Labor Act, are designed to

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[15] Milwaukee, Wisconsin, reports:

"In the first two quarters of this year, our City employees worked a total of 30,000 hours of overtime which was compensated at time and one-half compensatory time off; 20,000 hours of that was worked by our Police department and had the Fair Labor Standards Act been in effect, all of this would have had to have been paid in cash, causing an additional cash outlay in excess of $200,000 above and beyond the present $1,400,000 cash overtime outlay to the Police Department alone. As of the first of September, the Police Chief told the City Council that he had expended all of the cash appropriated for overtime for the fiscal year 1975, and requested of the Council in excess of a half a million dollars for overtime for the remainder of 1975. Due to the financial bind the City of Milwaukee is in, the Council was obliged to refuse this request. The Chief must, therefore recompense this overtime in compensatory time off. If the City were operating under the Fair Labor Standards Act in its Police Department at the present time, police protection for the City of Milwaukee would have to be curtailed for the next four months—even more than it will have to be curtailed as it is. In other words, police protection for the City would have to be reduced by approximately 36,000 hours for the next four months." (Letter of City Personnel Director Robert C. Garnier, dated September 15, 1975.)

serve local Governments and their people, yet treat their employees fairly. They must be eliminated under inflexible law and regulations designed since 1938 only for private commercial enterprises. These City policies are often collectively bargained-for by employees. Cities report their employees are upset by their elimination.[16]

[16] Vacaville, California, reports:

"The opposition to placing local government under the provisions of the Act comes not only from the City but from all four of our employee associations! This to me is a clear indication that the resistance is not merely a matter of administration against it, but rather local government and its employees saying we wish to determine our own work rules, hours and conditions of employment through the traditional meet and confer process. We do not want or need Federal mandates to govern such things." (Letter of Asst. City Manager John Wyro, dated September 4, 1975.)

East Lansing, Michigan:

"We have done away with 'compensatory time', much to the chagrin of our employees who 'resent' the Federal Government telling them what is in their best interests, when they had no input, either through request or collective bargaining." (Letter of Asst. City Manager A. T. Carney, dated September 11, 1975.)

Elimination of these policies, a necessity under the Labor Act, saps morale among employees and reduces their sense of contributing to their home City.[17]

1. Compensatory time off, desired by both Cities and City employees, is effectively prohibited by the Act.

Compensatory time off is applied in situations which have no counterpart in private industry. Real property

[17] Martinsville, Virginia, reports:

"I think my objection to this whole set up is epitomized in the statement of one of our police officers who, upon being advised of these overtime regulations, said, in so many words, 'I object to being told that I can not volunteer my professional service to my employer at any time I may wish to do so over and beyond my regular duty hours, for the good of the department.' " (Letter of City Manager Thomas B. Noland, dated September 3, 1975.)

Sanford, Florida:

"Perhaps the most damaging result of this law being imposed on the small cities was the effect it had on the attitude of the employees. Whereas, before we saw an attitude of cooperation and willingness to contribute their own time and efforts to the betterment of the community and the taxpayers, we now see an attitude in some of the employees of, 'This isn't my job.' and, 'I don't have to work over 40 hours.' etc." (Letter of City Manager W. E Knowles, dated September 12, 1975.)

Monterey Park, California:

"The City employees view the elimination of the opportunity to accumulate compensatory time off as an actual loss of an employee benefit. Employee morale has declined as a result of the FLSA inflexible system of extra duty time compensation." (Letter of City Manager Gerald C. Weeks, dated September 10, 1975.)

assessment,[18] as well as snow removal (App. 457-461), and parks and recreation,[19] are seasonal. Above-normal workloads,[20] which unlike in commercial enterprises

[18]Eau Claire, Wisconsin, reports:

"Being a small City, we must operate with a very limited number of personnel. In order to better serve the public, additional hours are required of personnel at critical periods of time. An example of this is our Assessor's Office. The City Assessor is required by law to meet certain deadlines. This requires additional hours in the spring and less hours in the fall. If we must increase our staff sufficiently to meet the spring needs, we will have excess personnel in the fall. Use of overtime to answer the problem becomes very expensive. Individuals were hired under a situation where they would be allowed to accrue time and take off at a later time. If this practice is discontinued, some of our best employees may look elsewhere for employment." (Letter of Personnel Officer Everett Foss, dated September 11, 1975.)

[19]Oshkosh, Wisconsin, reports:

"The greatest problems encountered were the result of being required to pay time and one-half for hours worked over forty (40) rather than accumulating compensatory time. This problem was most markedly demonstrated in such highly seasonal areas as parks, golf course, bridgetending, etc. In past years, these activities had a workweek in excess of forty (40) hours during the warmer months and were paid comp time for hours over forty. The 'comp time' was then taken off during the colder months when activity in these departments declined. This arrangement had been worked out through the collective bargaining process and was found to be beneficial to both union and management." (Letter of Director of Personnel Norbert W. Sratos, dated September 3, 1975.)

[20]East Lansing, Michigan, reports:

"Our direct costs have increased due to the overtime requirements of after-hour work (which the cities must depend upon for meetings and peak-load built-in requirements of elections, tax billings and proper servicing of the public)." (Letter of Asst. City Manager A.T. Carney, dated September 11, 1975.)

cannot be delayed or smoothed out, have been ameliorated by compensatory time off, which is preferred by City and employees alike.[21]

Seasonal compensatory time off is only one area in which the Solicitor General's blithe assertion that the Labor Act does not force policies on Cities is so demonstrably false. To suggest that Cities have a realistic choice to pay overtime for the 24-hour days of 7-day weeks when snow removal crews must be on stand-by is ludicrous.

Compensatory time off has been one economical State and City policy to pay these employees back. The employees desire compensatory time; unless given within 7 days, Act § 7(a)(1) (or police or fire work period, § 7(k)), the Labor Act forbids it.

2. Volunteerism, unique to Government, is inhibited for City employees by the Act. Because the Act requires overtime for much of this voluntary activity, Cities must eliminate it.

The spirit of volunteerism is inhibited by these Labor Act Amendments. Every City has myriad volunteer boards and commissions, forming a highly participatory democracy. The reports of Cities[22] show how the

[21] See, e.g., report of Los Altos, California, note 6 *supra.*

[22] Englewood, Colorado, reports:

"In the Library, which does not open until 8:30 A.M., many employees who arrive early out of habit would answer incoming calls prior to the starting of work with no thought of compensation. To avoid compliance problems all except exempt personnel were told not to touch a phone prior to 8:30 A.M. even if it went unanswered. The Library also had to hire a fulltime bookmobile driver where before firefighters took turns on their days off driving the vehicle. They afforded the Library a steady and dependable source of drivers but because of the Fair Labor Standards Act, this could no longer be done unless we wanted to pay on an overtime basis.

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inflexible, private commercial enterprise rules of the Appellee under the Act, and of the Act itself, inhibit the spirit of civic dedication of City employees, just as they force Cities to eliminate the services volunteered by their employees. The "suffer or permit to work" standard, 29 U.S.C. § 203(g), cannot be applied to Government in any sensible way. But the Act applies it;

(footnote continued from preceding page)

"The City also has the prospect of doing away with its Cadet program, which is a work and educational program geared for recent high school graduates to see if they are interested in police work as a career. The Fair Labor Standards Act brought us under the Age Discrimination Act and we could no longer restrict age for entry to the program. The regional office gave us a ruling that the program is not an apprenticeship and we, therefore, could have a sixty-four year old cadet." (Letter of City Manager Andy McCown, dated September 10, 1975.)

Tigard, Oregon:

"Several activities would be terminated in the area of public relations programs, as most of these are conducted by off duty personnel as a community service, and are non-paid activities. In addition to this activity, many special details are conducted on a volunteer basis, and again are non-paid activities; all of which are job related and a valuable service to the community." (Letter of Chief of Police R.B. Adams, dated September 5, 1975.)

Brewer, Maine:

"The portion of the law in regards to suffer or permit to work would be a great burden on an administration to control on a twenty-four hour day seven days a week basis. Since there would be people who are so dedicated that they would possibly be in and work even when they should not be. A good example would be an off-duty police officer on a day off stops and assists another officer at an accident scene even though he was not ordered to or really needed. This would, I feel, be suffering or permitting to work. Also, this could be abused and again hard to control." (Letter of Chief of Police David P. Koman, dated September 4, 1975.)

and the Appellee says the cost of doing so does not affect the Act's validity. (Brief for Appellee, 44).

The Labor Act discourages training and self-improvement by City employees. Cities report that these programs cannot be continued[23] under the Labor Act's all-inclusive "suffer or permit to work" standard.

This sapping of the volunteer spirit produces inestimable costs and losses,[24] making City predictions of the impact of the Labor Act less terrible than the reality must be.

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[23]Wichita, Kansas, reports:

"We previously required law enforcement personnel to complete certain college credits in Police Science courses. As a result of FLSA, we have had to remove this mandatory requirement to avoid overtime costs. Completion of these college credits is now on a voluntary basis for police personnel." (Letter of City Manager Ralph Wulz, undated.)

Brewer, Maine:

"This again could result in great budget increases--it would stop dedication to job by personnel as they would not be allowed to give free time when they wished. Training could not even be given on a voluntary basis after work hours as overtime would be applicable. This could have a great impact if training had to be reduced because of increased cost–it would hurt officers' capability and performance." (Letter of Chief of Police David P. Koman, dated September 4, 1975.)

Vacaville, California:

"Other changes have taken place–an important training program in the Police Department has been discontinued because it was set up on a voluntary basis. In that this is job related, the City would be required to pay the overtime pay portal-to-portal, a cost it cannot incur." (Letter of Asst. City Manager John Wyro, dated September 4, 1975.)

[24]Newport News, Virginia, reports:

"The FLSA rules and regulations regarding the use of volunteer workers resulted in a loss of their utilization, reflecting a reduction in services for which it is difficult to establish a monetary value." (Letter of City Manager W.E. Lawson, Jr., dated September 15, 1975.)

3. Joint employment is many Cities' greatest problem under the Act. The problem is caused by the Act's definition of an entire Government as a commercial enterprise.

Many City employees work for one City department for pay and for another on a voluntary basis; this is common in Cities with volunteer fire departments. In Cities of all sizes, coaches, athletic officials, counselors and other volunteers often are employed by other City departments. If an entire City Government can rationally be called a commercial enterprise, and the Act's §3(s) "deems" each City to be one, then these voluntary hours are counted to trigger overtime for the compensated hours. City reports[25] show the variety and

[25]White Bear Lake, Minnesota, reports:

> "Our greatest concern is its impact on joint employment in the areas of public safety. White Bear Lake is a community which relies heavily on a Volunteer Fire Department to meet its fire safety needs. As explained in the enclosed letter to Mr. Peter Brennan, Secretary of Labor, the Act directly affects two of our employees in the Fire Department and has caused the City to reconsider the practice of allowing joint employment. In the long run, this may cause us to lose two experienced firemen who hold leadership positions in our Fire Department. We do not believe this to be the intent of the act and would hope for a favorable court ruling."

The letter to former Secretary Brennan from White Bear Lake states:

> "Our fire department currently members fifty volunteers who receive four dollars an hour for time spent on fire calls. The proposed law affects two of the volunteers who are presently employed by the City in our Public Works Department. In both cases, the effects of the overtime provision would require us to pay them at a rate approximately double the present four dollar an hour standard compensation.
>
> Economic conditions will not allow us to increase the hourly rate for the entire department and in fairness to the majority of the volunteers we would be forced to forbid regular City employees from participating as volunteers. In

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flexibility of this joint employment arrangement, which will be ended under the Act.

(footnote continued from preceding page)

a community of our size, the volunteer fire department serves a vital, public function and we can see no reason why any City employee should be excluded from joining." (Letter of City Manager G. Stevens Bernard, dated December 17, 1974.)

Sanford, Florida:

"The Fair Labor Standards Act had a definite effect on the use of volunteers. The City of Sanford had three or four employees who participated in the City recreation program as volunteer coaches or athletic directors. These people were forced to resign or to stop this activity until we had a clarification on the Fair Labor Standards Act rules from the Department of Labor. We have yet to fully resolve this issue." (Letter of City Manager W.E. Knowles, dated September 12, 1975.)

Vicksburg, Mississippi:

"The municipal water and gas department employed firemen on their off-days to read meters. This enhanced their income, which they needed, and provided the city with meter readers. Again, wage and hour stops them—even though these same men can work elsewhere."

"*Outside Duty For Police Officers:* The minimum per hour pay for off-duty work has been raised to the time-and-one-half rate, thereby making the services of police officers for private patrol duty out of the reach of most organizations, schools, etc. formerly using police personnel." (Letter of Mayor Nat W. Bullard, dated September 8, 1975.)

North Syracuse, New York:

"Our main objection is the effect the FLSA has on our ability to manage. With a government our size, relationships are very close. Our employees have always been salaried and have agreed to work whatever hours are needed to get the job done. Time off is given as needed to compensate for extra time spent and there were no problems. With FLSA, a need for extra time has to be weighed against cost, and bickering between employees and department heads over this issue has hurt morale and productivity. The rule against dual employment means that those who are taking small extra jobs with the Village over and above their full-time positions, have had to be terminated." (Letter of Village Clerk-Treasurer Richard B. Schwab, dated September 5, 1975.)

4. The Labor Act penalizes Cities' progressive pay policies by using them to compute the overtime base.

Not only does the Labor Act force Cities to reduce rather than spread employment, it also discourages progressive City compensation policies. For example, longevity pay must be included in the base pay from which overtime is computed under the Labor Act; this discourages longevity pay, a tool used by Cities to retain experienced employees.[26] 'Incentive programs will

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[26]Westminster, Colorado, reports:

"We currently pay our City employees, except Firefighters, overtime at time and one half for work in excess of forty (40) hours in a seven (7) day period. The time and one half is calculated from a base monthly wage and does not include our longevity pay. Under FLSA regulations defining how to calculate overtime we would have to add longevity pay to the calculation. This one aspect of FLSA will cost this City about *$2000–$3000* per year and with inflation it will be a continuing additional cost.

* * *

"Our City compensation policies have been well thought out and we feel they make sense as a whole. The decisions on our current compensation policies would have been structured differently, e.g., we would take another look at longevity, we might organize position responsibilities differently. The regulations and requirements of the FLSA can penalize a City with updated fair compensation policies. For instance many cities don't have longevity pay, on call pay, standby pay, bonus pay and hence their compensation is lower. Knowing that overtime has to be paid based on these costs it is doubtful any city would adopt these practices." (Letter of Personnel Officer Alan P. Miller, dated September 15, 1975.)

no longer be workable;[27] the Act thus will deprive Cities of an antidote for waste and inefficiency.

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[27]Sumter, North Carolina, reports:

"Another important loss to the City would be the Incentive Program which is presently used in our Sanitation Department. Under this program sanitation crews are assigned certain residential areas to pick up each day. If the crew finishes early they go home early; if they finish late they work late. At certain times of the year the workload increases and the hours of the week will probably exceed forty hours making overtime cost necessary. In this case according to law, the City would have to pay overtime at time and one half. However, the law does not take into account the fact that most of the time the employees are working less hours because they finished their routes early. Thus, the effect of the FLSA Law would be to discourage employees from their maximum performance and encourage poor performance in an effort to work overtime hours thus making a greater salary." (Letter of Personnel Director Edward D. Lofton, dated September 5, 1975.)

Charlotte, North Carolina (compliance study):

"Another serious problem created by the FLSA concerns the 'task system' now being used in the Sanitation Division. Whenever a sanitation crew finishes a route, that crew is allowed to go home. In most cases this system results in less than 40 hours of work in a workweek although employees are paid for 40 hours. These employees are paid at one and one-half their base salary rate for all hours worked in excess of 40. The Wage and Hour authorities are contending that the City may not compensate these employees based on 40 hours per week but rather we must base this compensation on the average workweek for the department. For example, in determining the overtime compensation rate prior to the FLSA, an employee's weekly salary rate could be divided by 40 to get the hourly rate. The time and one-half rate was derived from this hourly figure. Under the FLSA the Wage and Hour authorities are contending that since the Sanitation crews only work an average of 35 hours per week, for example, the weekly pay rate must be divided by 35 to determine the hourly rate for computing overtime pay." (Enclosure to Letter of City Manager David A. Burkhalter, dated September 15, 1975.)

5. Students and interns no longer can learn from the Cities; the Labor Act treats them as employees.

The use of interns[28] and students[29] is a common practice of Cities. A living civics lesson, the practice benefits the interns and students more than the City. The Labor Act, by making participation in these programs fully compensable (and fully overtime compensable), penalizes both the Cities and the students and interns.

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[28]Holden, Massachusetts, reports:

"Interns and administrative assistants working with the Town Manager frequently attend night meetings without compensation leaving latitude for compensatory time off. Requiring compensation for these individuals working in the Town Manager's office would assuredly result in the demise of the internship program in Holden." (Letter of Town Manager William A. Kennedy, Jr., dated September 4, 1975.)

East Lansing, Michigan:

"We have closed the door on volunteer or internship programs due to the possible penalty of having to pay for their services in the future, possibly on a back-pay basis." (Letter of Asst. City Manager A.T. Carney, dated September 11, 1975.)

[29]Los Altos, California, reports:

"We maintain a 'student fireman' program at our campus fire station and employ nine college students who make their home at our station while attending school. This program is beneficial to all concerned, especially the students, and would be drastically modified and probably eliminated if we had to comply with provisions of the FLSA for all of the standby hours (sleeping, studying, etc.) while these students are in the fire station. Estimated increased cost for full compliance without modification to the program is $16,200 annually." (Letter of Chief Administrative Officer S. George Sanregret, dated September 11, 1975.)

E. Under The Act, Federal Agencies And Federal Courts Replace City Commissions, State Agencies And State Courts In Reviewing City Employment Policies.

Under the Commerce Clause as perceived by the Congress in these 1974 Amendments and the Solicitor General in this case, where purchase of goods can serve as a pretext for any regulation at all, a case is presented similar to that found ridiculous by The Chief Justice of the United States recently in assessing Federal diversity jurisdiction:

> "... diversity cases have no more place in the federal courts in the second half of the 20th century, and surely not in the final quarter of this century, than overtime parking tickets or speeding on the highways simply because the street or highway is federally financed. This is important because diversity cases represent ¼ of the civil cases in district courts each year. To shift these cases from 400 federal district judges to more than 4,000 judges in state courts of general jurisdiction will impose no undue burden on the states. In any event, non-federal cases must be decided under state law and can best be handled by state judges. They are at least as familiar with that law as federal judges. Appeals in such cases can better be reviewed by those state judges than federal judges from other states. If we really believe what is the subject of so much rhetoric about returning government to the people and to the states, it would help if we had legislative action to match the rhetoric."[30]

Federal duplication of State Court review of State and City employment scheduling makes no more sense;

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[30]Address of The Chief Justice of the United States Warren E. Burger to the American Bar Association, February 15, 1976, at 5.

yet that is what the Labor Act requires. It is obvious that employees will use the Federal forum in preference to the State forum, also available under §16(b) of the Labor Act. This is true because of the Act's providing class actions, costs, attorneys' fees, criminal penalties and assistance in any actions from Labor Department employees. The State Courts do a fair and reasonable job, as over half of their City litigation, according to City lawyers, involves personnel matters. Since personnel costs represent 85% of budgets, this is to be expected. These budget costs will not lessen, but will increase with the Federal takeover under this Act. The Federal Courts and this Court, then, can expect to receive the perhaps one-third to one-half of State Court cases involving Cities which concern employment matters.

When these cases come into Federal Courts, and the Federal Courts order State legislatures and City Councils to appropriate monies to pay the increased wage bills attributable to the Labor Act, the public outcry will parallel the response to Federal Court orders to spend $250,000 to repair and renovate Boston high schools to accommodate busing.[31] 'That Federal Courts may be disposed to order the appropriation of monies – even deficit spending, forbidden by most State Constitutions, which would become subservient under the Supremacy Clause to the Federal Labor Act – rather than to permit States and Cities to reduce services in order to balance budgets, is shown by recent Federal Court orders defining adequacy of service and requiring its provision, in jails and hospitals.[32] 'Unlike

[31] *U.S. News and World Report*, Jan. 19, 1976, at 29, 30.

[32] *Id.* at 32, 33.

these school, jail and hospital cases, however, the Federal Courts under the Labor Act will be ordering City budgets not even for the purpose of insuring a minimum wage – Appellants have shown that States and Cities already pay much more than that under State law – but to require unnecessary overtime payments provided by the Labor Act through unique rearrangements and new definitions of employment.

This Federal Court interference with State and City internal management conflicts with this Court's decision in *Rizzo v. Goode*, 44 U.S.L.W. 4095 (Jan. 21, 1976), which was "substantially in agreement" with claims that a Court-ordered plan for handling complaints about police misconduct "represents an unwarranted intrusion by the Federal judiciary into the discretionary authority committed to [the Mayor, Police Commission and other City officials] by State and local law to perform their official functions." *Id.* at 4096.

The prospect of class actions under the Labor Act is not chimerical. *Souder v. Brennan*, 367 F. Supp. 808 (D.D.C. 1973), is such a recent action.[33] The Act, 29 U.S.C. § 16(b), permits, in addition to back wages, "liquidated damages" for these class actions in amounts equal to unpaid wages. This penalty in the guise of liquidated damages is, therefore, unlimited. For employees who are given compensatory time (even at their preference), this wages-plus-overtime-times-penalty formula results in triple-time payments by Cities.

The tenor of Labor Department enforcement of the Labor Act against States and Cities is reflected in a

[33]The class was "the Superintendent of each non-Federal facility for the residential care of the mentally ill and/or mentally retarded, and the chief executive officer or officers of the supervising state agency for mental health and/or mental retardation." 367 F. Supp. at 809.

report of the 1974 annual meeting of the National Association for Mental Health (quoting from the April 1975 issue of *Hospital and Community Psychiatry*). There, the aftermath of the *Souder* case, *supra*, was discussed:

> "Despite lingering questions, the [Labor Department] spokesman stated flatly that a 'patient cannot volunteer to work without pay,' adding that the Labor Department planned to enforce the regulations vigorously and had assigned 'more than a thousand investigators' to see to it that institutions complied with the law, and he said that "if patients were not paid for their work, they could sue for double the amount of back wages plus costs.'" Lebar, Worker-Patients: Receiving Therapy or Suffering Peonage?, 62 ABAJ 219 (February 1976).

If this Labor Department spokesman had also promised class actions, attorneys' fees, costs, and criminal penalties, he would have completed the list of unprecedented sanctions of the Labor Act. Not even the Clean Air Act of 1970, whose sanctions imposed on States (injunctive relief, receivership, civil contempt, and requiring States to allocate funds to finance EPA-ordered undertakings) were forbidden in *Brown v. EPA*, 521 F.2d 827, 831 (9th Cir. 1975), had this panoply including criminal penalties, *Ibid.*

III.

THE LABOR ACT BY ITSELF IMPOSES DEBILITATING COSTS ON STATES AND CITIES. ITS HARMFUL EFFECT IS MAGNIFIED BY THE CURRENT FISCAL CRISIS OF CITIES AND STATES.

The Act, in today's fiscal climate, makes States' and Cities' hard choices worse. This is true, however States and Cities respond to fiscal pressures.

Mayor Walter Washington of the District of Columbia recently stated that when faced with a choice between reduction of City services, the firing of District employees or new taxes for District residents, he would look for the additional money first in the existing budget by cutting or eliminating programs. The greater expense of the employees retained by the City – owing to the Labor Act – requires greater reductions in programs and services.

Other Cities would make different choices. For example, Mayor John Poelker of St. Louis recently stated how he balances the budget when his City's receipts fail to meet expenditures:

> "Well, from time to time we accomplish this by putting a freeze on hiring for the rest of the year in an effort to reduce the anticipated expenditures of the last 3 or 4 months. That is probably the most effective way of getting through a shortfall in revenue because between 80 and 85 percent of local government budgets are related to either salaries or fringe benefits, and the only way you can really attack the shortfall in revenues is by reducing the number of people." Hearings before the Subcommittee on Economic Stabilization of the House Committee on Banking, Currency and Housing, 94th Cong., 1st Sess., at 1529 (Oct. 1975).

Here, the greater expense of retaining City employees – owing to the Labor Act – means fewer will be retained or hired, and fewer services rendered, with existing services curtailed. (Pritchard Deposition at 226-33, App. at 240-45).

So, Governor Mills Godwin of Virginia has said, "I do not see how we can make any further cuts of a substantial nature in our budget without laying off some state employees and reducing salaries." Despite a five percent cut in State spending and a twenty million dollar reduction in State public education aid, the State will face a deficit at the end of the current biennium this June. *Washington Post*, Jan. 3, 1976, D-3.

Furthermore, some of the measures proposed as a means to bridge the fiscal gap would be of no use if the 1974 Amendments were in effect. For example, it has been suggested by the Chairman of the Board of Supervisors of Fairfax County, Virginia, that:

> "Many employees could be cross trained to do jobs other than those they currently hold, which in many cases will eliminate the need to hire new people and will also reduce the risk of layoffs!" *Washington Post*, Jan. 1, 1976, F-3.

Complicated joint employment regulations under the Act, 29 C.F.R. § 791, would prohibit or severely restrict any advantages to be gained from this suggestion.

The primary effects described thus far, are only part of the total impact of this Act. There are larger and longer-term consequences which flow from the reduction or elimination of services, cutbacks in personnel or even from increases in the overall salaries of some employees. As will be here demonstrated, these secondary effects, which often have the capacity to extend into the future, long after an immediate fiscal crisis has passed, further impair the functioning of State and local Governments.

A. The Quality And Quantity Of State And City Government Services Are Factors In Determining Their Credit Rating. This Act Reduces Both, With Great Damage To Both Cities And Citizens.

Of course, in creating potential retroactive liabilities, the 1974 Fair Labor Standards Act Amendments always have the capacity to adversely affect the basic financial and debt data of a City, (see Section III.C *infra*) thus directly influencing an individual Government's credit rating. Since a poor current credit rating bears repercussions for the term of indebtedness, this impact may be felt for as much as twenty years into the future. And with the Act in effect, no City or State can sell its bonds or securities with the current required certifications. There is no way a City, County or State can certify that all governmental agencies which can affect their credit have approved the bonds, the Labor Department having the last word under the Act on City budgets. *See* Appellants' Brief, at 33.

In addition to debt ratios, a State or local Government's credit rating is influenced by the quality and quantity of governmental services provided. As stated by the Report of the Twentieth Century Fund Task Force on Municipal Bond Credit Ratings:

> "Besides . . . basic financial and debt data, the [rating] analyst also considers the economic and social factors:
>
> * * *
>
> The character of a community plays a vital part in its overall evaluation. What are the educational attainments of its residents? What percentage of its homes are owner-occupied? Is there evidence of civic pride, of active community programs for recreation and cultural activities, etc.?

> In examining the indebtedness of a community, weight must be given to its past record: its current indebtedness and future financing needs. Does it have a sound capital improvement program? What is its schedule of debt retirements? Is its borrowing margin within legal debt limitations, etc.?" *The Rating Game,* Report of the Twentieth Century Fund Task Force on Municipal Bond Credit Ratings (1974) at 79.

Recent evidence indicates that the bond market is already being closed to some Governments, and greater distrust of government financial operations is sure to follow in wake of the recent New York City crisis:

> "The following table shows what has happened to yields and prices on the 15 high-grade bonds in Standard & Poor's municipal-bond average over recent months:

	Yield to Maturity	Price per $1,000
March 5	6.43%	$729
April 16	6.69%	$708
May 14	6.73%	$703
June 25	6.82%	$695
July 30	6.95%	$684
August 6	7.03%	$677"

> *U.S. News and World Report,* August 18, 1975 at 12.

The effects of these higher interest rates were recently outlined as follows:

> "When interest rates skyrocket, many communities are prevented from borrowing altogether.
>
> * * *
>
> "The unavailability of necessary capital at reasonable interest rates has had major consequences for the economic recovery which some say is occurring at the present time. Debt financing is used to construct needed public facilities – schools, roads,

> mass transit facilities, libraries, hospitals. If the necessary capital is not obtainable through the issuance of municipal bonds, then these needed public facilities do not get built. They get indefinitely postponed. In inflationary times, this means skyrocketing costs which must ultimately be borne by the taxpayer. Moreover, capital improvements projects are needed now – not three years from now – to stimulate economic activity. Construction of public facilities is an effective anti-recession tool." Statement of Mayors Landrieu and Poelker, Hearings before the Subcommittee on Economic Stabilization of the House Committee on Banking, Currency and Housing, 94th Cong., 1st Sess., at 1488 (Oct. 1975).

Furthermore, while under the Act's 1974 Amendments key personnel decisions are no longer in the hands of publicly accountable local leaders, State and local citizens still control much of the revenue-raising of the Governments. They have recently used that control to tighten the purses of local Governments:

> "Voters have been rejecting bond issues by sizeable margins since 1972, but this year they turned down an overwhelming 93% of the dollar amount of proposed issues. This is well up from the 54% rejection rate in 1974 and even the 68% rate of 1973, the letter points out." *The Weekly Bond Buyer,* Dec. 22, 1975 at 3 (quoting the December Economic Letter of First National City Bank).

Thus, reduction in services or personnel leads to a poor bond credit rating, reducing government resources and closing the bond market through inability to pay the necessarily higher price for bond dollars. Local Governments are also precluded from bond markets through citizen austerity triggered by poor credit

ratings. This inability to raise revenue forces further cutbacks in services with a further decline in credit reputation. The cycle here depicted is the classic model of a declining City. To the extent that the Fair Labor Standards Act is creating all of the primary effects described in Section II, *supra,* it is a major contributor to this cycle. Constantly, reference is made in financial circles to the changes effected by this Act of ultimate control over State and local budgets by Federal control and the uncertainties thereby created.

B. Reduction In Fire Services Leads To Further Deterioration In Local Government Through Deficient Fire Protection Ratings, Increasing Costs of Homeowner As Well As City Insurance.

Similar to an adverse impact on State or local Government credit ratings, is the adverse impact which the Act has upon a locality's fire insurance rating. Allen Pritchard, Jr. of the National League of Cities described this impact during his deposition in the Court below:

> "Well, there is a system known as the fire insurance rating system.
>
> * * *
>
> "When a city tries to determine how much it is going to invest in fire equipment, how many men it is going to put on a pumper, how many hours they are going to work, what kind of investment they make in training, all of those things have to be put on the scale and weighed against what kind of costs are going to be approved for the community as a whole in terms of insurance ratings." Pritchard Deposition 186-87; App. 213-14.

This rating is determined according to standards published by the Insurance Services Office (ISO) which, before enumerating over 12 pages of detailed regulations on fire department staffing alone, states generally:

> "In order to provide reasonable protection, it is necessary that the department have competent leadership; that an adequate number of engine and ladder companies be established and properly located; that these companies be well manned and suitably equipped; and that members be properly trained so they are able to perform their duties effectively. An inadequacy in one or more of these elements adversely affects efficiency and the department's capability in fire suppression." Insurance Services Office, *Grading Schedules For Municipal Fire Protection,* New York (1974) at 24.

Many fire departments, unable to fully fund extensive restructuring of schedules and other Labor Act requirements, have had to reduce personnel (*supra,* at n. 13, 14) delay equipment purchases (*supra*, at n. 5) or eliminate training (*supra,* at n. 22, 23). The result will be an increase in deficiency points under the ISO system. This poorer rating reflects not only a more hazardous area within which to live but also one in which, due to higher insurance rates, it is more expensive to live. It reflects a less proficient fire department and a less desirable community, all due to this Act if it goes into effect.

All of these matters worked out by experience and need on the local level are by the Act suddenly thrown into utter confusion with damage to the people themselves as well as to States and local Governments.

C. The Act's Requirements Dictate An Upward Restructuring Of All Employee Wages.

Another secondary effect stems from increased payroll costs which must be paid because of requirements other than minimum wages under the Act. A major concern is the requirement that overtime be compensated by cash only, thus eliminating compensatory time off. Act § 7(a)(1). A "ripple effect"[34] takes place as increased monetary compensation for some covered workers leaves them making more than their exempt supervisors. This places a further squeeze on already strained State and local budgets when supervisors must also be given increases in salary.

A similar "ripple effect" takes place every time the Congress, the Department of Labor or some Federal Court decides for the first time to include within the Labor Act some heretofore exempt employee, like volunteers, interns, etc. For example, in the recent case of *Souder v. Brennan,* 367 F. Supp. 808 (D.D.C. 1973) it was held for the first time that patients in local mental hospitals were covered under the Act. A recent article describing the effects of this holding on St. Elizabeth's Hospital states:

> " . . . it has incited a bit of jealousy among regular employees who are not entitled to the free meals or free medical care that most patients get." "St. E.'s Patients Now Receive Minimum Pay," *Washington Star,* December 1, 1975, B-6.

The probability of such ripple effects along with higher payroll costs has led some States to curtail or discontinue work therapy programs.

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[34]Pritchard Deposition 10-11; App. 92.

A "ripple effect" may also result where employers may no longer include fringe benefits[35] as part of compensation. This was a practice under some existing State and local Civil Service laws (*supra* at n. 26). Now, since the fringe benefits are protected by contract, they may not be reduced. However, under the Fair Labor Standards Act, neither may they be counted as compensation (29 CFR § 548). The result is a raise to some employees giving them more total compensation (including fringes) than their supervisors. The "ripple effect" then spreads this increase throughout the entire pay scale structure.

D. The Act's Harmful Impact May Result In The Bankruptcy Of Some Local Governments, As A Former Appellee Here Admits.

The tremendous costs that will have to be incurred as a result of the extension of the Fair Labor Standards Act to State and local Governments will surely intensify existing chronic fiscal ailments, the dual pressures of inflation and recession, and the population shifts into and out of localities causing severe budget adjustment problems. This was recognized by Secretary Brennan, formerly the Appellee here. *See,* Appellants Brief 20-21.

Because the expense of providing necessary services has risen dramatically due to inflation, and revenues have simply not kept pace,[36] any policy tending to raise

[35] "The area in which public employees have had the most conspicuous success is in fringe benefits, particularly pensions," "Public Employees Get High, Low Pay," *Washington Post,* September 3, 1975, A-6. See Section II. C, *supra.*

[36] *See, e.g.,* Joint Statement of Ellmore C. Patterson, Chairman of the Board, Morgan Guaranty Trust Co. of New York, David Rockefeller, Chairman of the Board, The Chase Manhattan Bank N.A., Walter B. Wriston, Chairman of the Board, First National City Bank, Hearings on S. 1833, S. 1862, S. 2372, S. 2514 and S. 2523 before the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess., at 650 (1975).

operating expenses still more could force Cities into short term borrowing that the money markets can now ill support, and that might begin the rollover process that so severely damaged New York City.

"Short term debt has been the cause of nearly every credit collapse in recent times," Brenton W. Harries, President, Standard & Poors Corp., Speech before National League of Cities, December 1975. Its occurrence can easily lead to those symptoms common to Cities "on the brink of Financial trouble." *See,* Advisory Commission on Intergovernmental Relations, *City Financial Emergencies: The Intergovernmental Dimension* (1973).

Even if Cities do not borrow, the choices forced upon officials mean less government per tax dollar, no matter what course they pursue. The options are to either raise taxes or reduce services.

The urban exodus of persons and industry into surrounding suburbs has placed a severe strain upon the Cities, lowering their tax bases while leaving a large population of poor persons demanding expensive services behind.[37]

The other side of the urban exodus is the suburban influx requiring suburban communities to provide expensive government facilities and services to waves of new citizens. The budgetary problems occasioned by this surge of population are attested to in decisions

[37]Congressional Budget Office, New York City's Fiscal Problem: Its Origins, Potential Repercussions, and Some Alternative Policy Responses, Senate Hearings *supra* 509, 525; Statement of Moon Landrieu, Mayor of New Orleans, La., Senate Hearings *supra* at 554; Statement of Mayor Landrieu, Hearings before the Subcommittee on Economic Stabilization of the House Committee on Banking, Currency and Housing, 94th Cong., 1st Sess., at 1479-80 (Oct. 1975).

involving growth control. See, e.g., *Oakwood at Madison, Inc. v. Township of Madison,* 117 N.J. Super. 11, 283 A.2d 353 (1971); *Golden v. Planning Board,* 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291, *appeal dismissed,* 409 U.S. 1003 (1972).

The 1974 Amendments would not only increase State and local deficits. They would add further burdens to all those Cities now facing, in addition to the problem of decay and exodus, or of influx and need for intensive development of new services, the severe strains placed upon them by a less-than-healthy economy.

IV.

FEDERAL CABINET AND SIMILAR OFFICIALS HAVE, SINCE THE FIRST ARGUMENT IN THIS CASE, DECRIED EVEN LESS DEBILITATING FEDERAL INTRUSIONS INTO STATE AND CITY POLICY-MAKING.

Appellants here add to the previously quoted oppositions to the Act of two Secretaries of Labor (Appellants' Brief at 19-21) and one Presidential veto (Appellants' Brief at 24-25) the following statements by Federal officials in complaint of Federal intrusions into State and City policymaking.

In argument (April 16, 1975) in this case, the Solicitor General admitted:

> " . . . Congress does not have the same freedom under the commerce power to regulate activities of States and cities as it does those of private businesses." Tr. 38-39.

A similar attitude toward the unique role of State and local Governments has been expressed numerous times by members of the Federal Executive branch of Government. For example, Attorney General Levi has stated:

> "The issue [of constitutional Federalism] is whether it is permissible or appropriate for the Congress to intrude upon such State sovereignty as is left by requiring State agencies and employees to perform as though they were Federal instruments or employees, or as though the Federal Congress were the State legislature and possessor of the State's sovereignty." Testimony before the Senate Commerce Committee concerning S. 354, June 5, 1975.

Former NLRB Chairman Edward E. Miller expressed a similar view to the House Labor Subcommittee on the subject of national pre-emptive collective bargaining legislation for State and local Government employees:

> "[S]tate laws and the agencies administering those laws have, in many instances, developed different views with respect to bargaining units than those applied by the NLRB in the private sector. . . . [I]f all of this experimentation, legislation, and administration tailored to the need of the specific states is to be discarded through pre-emption and no cession whatever, in favor of traditional private sector standards as to appropriateness of units, it would in my view constitute a draconian measure which would unwarrantedly ride roughshod over the needs and desires – and the experience – of many states." G.E.R.R. (No. 611) at B-9.

The present NLRB Chairman Betty Southard Murphy, in a letter to the same subcommittee indicated that the issues presented by national pre-emptive collective bargaining legislation are similar to and

related to the 1974 Fair Labor Standards Act Amendments:

> "As you are undoubtedly aware, however, the enactment of such a change [amendment of NLRA to include State and local Governments] may present a constitutional issue inasmuch as the United States Supreme Court recently heard oral argument on April 16, 1975, on whether the amendments to the Fair Labor Standards Act . . . were constitutional." G.E.R.R. (No. 610) at B-2.

In like manner, members of the Executive branch have recognized the importance of State and local fiscal autonomy. As Secretary of the Treasury William E. Simon stated:

> "Federal control of fiscal and financial affairs at the local level presents grave practical and philosophical difficulties. This is not a dispute between liberals and conservatives, but rather simply a question of the right of citizens to be governed by their duly elected local leaders rather than by Federal bureaucrats.
>
> * * *
>
> "Each political subdivision in this nation has unique needs. And each is led by people selected for the job by an electorate which believed that such people could best translate the needs of the community into effective governmental decisions. Yet any program of financial assistance would require bureaucrats in Washington to supervise these decisions and reverse them if necessary, irrespective of the wishes of the local electorate. It is one thing to regulate a corporation. Under our democratic system, it is quite another to supervise and control the affairs of local governments." House Hearings, *supra*, at 1853, 1857.

V.

AT THE SAME TIME, THE CONGRESS AND APPELLEE HERE HAVE CONSIDERED EVEN MORE DEBILITATING LABOR ACT PROVISIONS FOR STATE AND CITY GOVERNMENT.

Two examples of the invasion which this Federal presence would make on State and local autonomy are presented by H.R. 10130, 94th Cong. 1st Sess. (1975), and the recently effective amendments to 29 CFR § 541. H.R. 10130 would further amend the Fair Labor Standards Act, increasing the minimum wage to $3.00 per hour, paying overtime at a rate of two and one-half times regular pay and automatically tying future pay hikes to rises in the consumer price index. The passage of this bill into law would require the immediate enactment of additional State and local appropriations irrespective of the availability of funds[38] and without the exercise of one State or local ballot.[39]

The recent amendments to 29 CFR § 541, 40 Fed. Reg. 7091 (Feb. 19, 1975), raise wage requirements

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[38]Even the imminency of bankruptcy is no defense to liability under the Act. See Annotation, 24 ALR Fed. 920 (1975) and cases cited therein.

[39]Where there is local control, Governments may bargain with employees to reach settlements amicable to both. For example, in a recent wage settlement with the Wisconsin State Employees Union, the inability of the State to meet all Union wage increase demands led to great Union strides in non-economic issues such as full time Union stewards, strengthened seniority provisions and additional holidays. G.E.R.R. (No. 625) at B-17 (Sept. 29, 1975). No minimum requirement of the Fair Labor Standards Act may be altered by agreement between employer and employee.

needed to partially exempt personnel as either executive, professional or administrative. The result is either broader coverage under the Act, resulting in additional overtime expenses for heretofore partially exempt personnel, or the need of an automatic raise to these professional, executive and administrative personnel in order to maintain their partial exemptions.

This is a policy decision of the Labor Department mandated without the consideration of one elected official and without the approval of one constituent. Any State or local Government who did not "rubber stamp" this Federal mandate by acquiescent budget appropriation would be subject to class actions, become liable under the Act for judgments, including costs, and attorneys' fees and criminal penalties.

SUMMARY OF ARGUMENT

On the same day this case was set over for reargument, this Court established the parameters of the test to be applied to the facts of this case. *Fry v. United States,* 421 U.S. 542.

As in *Fry,* the outcome of this case depends on a balancing of the existence of any compelling national need for national legislation, and the adverse impact on States and Cities of that national legislation.

The Appellee here is caught in the dilemma of at once trying to show that the Labor Act will produce almost no change in States' and Cities' personnel spending and in their policies, while trying to show that the Labor Act was enacted under Congress' perception that great changes were needed to upgrade substandard personnel conditions among State and City Government employees.

This problem was not presented to the national legislation's defenders in *Fry;* there the national Act saved money for the States, and was disruptive only the way the Bankruptcy Act is disruptive of those who would be generous before just.

From the time of the argument of this case (April 16, 1975) to the time of the filing of this Supplemental Brief, States and Cities have reported their further assessment of the tremendous damage the 1974 Labor Act Amendments will impose on them. Even now Cities are not able to assess the full impact on their budgets and on the integrity of their State law systems, of having City budget decisions made by Federal Courts under a statute which provides for damages which with liquidated damages can equal triple-time (especially in the often-used compensatory-time situation), costs, attorneys fees, criminal penalties and employee class actions. The Stay issued December 31, 1974, 419 U.S. 1321, has prevented *pendente lite* such a massive intrusion (by all but the most obtuse and obdurate of the Appellee's enforcement officers who presently seek to enforce the Act as applied to all State and City employees except police and firefighters). During the same time, Federal cabinet officers have admitted the problem of Federal interference in State and City Government decisionmaking.

Each of these considerations makes more imperative the preservation of our 200 year old Federal system by declaring unconstitutional the 1974 Amendments to the Labor Act.

In *Fry,* this Court declared that the Tenth Amendment:

> "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 421 U.S. at 547 n. 7.

While in *Fry*, the balancing of the interference to the Federal anti-inflationary scheme of the State of Ohio's decision to spend money in an amount twice the Federal plan, dictated the upholding of the Federal (Economic Stabilization) Act; in this case, the Federal scheme requires States and Cities to pay money for unnecessary overtime and requires the duplication of employee personnel and Court administration, thus promoting inflation. The congressional basis for bringing all of State and City Governments within the Labor Act was not subminimum wages: the Congress admitted that less than 1% of the employees of these Governments to be included under the Act were paid less than the proposed Federal minimum wage and never identified even these. Congress made no showing that these 1% have struck over wages under the Federal standard. The effect of these 1974 Labor Act Amendments, as reported by States and Cities since April 1975, has been in overtime required by the Act. Because of higher recruitment,[40] training and pension costs,[41] the para-

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[40] One of the greatest concerns of States and Cities in recruitment of employees is the Federal standards of the 1972 Amendments to Title VII of the Civil Rights Act of 1964; unlike the 1974 Labor Act Amendments which are based only on the Commerce Clause, these 1972 Civil Rights Amendments are grounded on the Fourteenth Amendment.

[41] The Congress is presently conducting hearings (H.R. 9155, 94th Cong., 2d Sess.) to determine whether coverage of all State and City pension plans is permissible under the Commerce Clause.

doxical effect of the Labor Act has not been to spread government employment, but to increase the cost to taxpayers of government employees and, because of State and local law limits on increasing these employee costs, to reduce government employment and government services.

Thus the Labor Act interferes with State and City Government decision-making in the same expressly unconstitutional manner as that at which Attorney General Levi, Secretary Dunlop, formerly the Appellee here, Chairman Burns, Secretary Simon and President Ford have recently expressed abhorrence.

ARGUMENT

I.

UNDER THE COMMERCE CLAUSE TEST OF *FRY*, THE ADMISSIONS OF THE APPELLEE HERE SHOW NO SUFFICIENT COMMERCE EFFECT OF STATE AND CITY WAGE-PAYING TO JUSTIFY THEIR REGULATION UNDER THE LABOR ACT.

In *Fry v. United States,* 421 U.S. 542, decided the same day as reargument was ordered in this case, the nexus to commerce cited by the Court was the potential of States to grant wage increases in excess of the national Government's scheme.[42] And this was the very State activity which the national scheme upheld in *Fry* addressed. *Fry's* citation to *Maryland v. Wirtz,* 392

[42] "[G]eneral raises to State employees could inject millions of dollars of purchasing power into the economy and might exert pressure on other segments of the work force to demand comparable increases." 421 U.S. at 547.

U.S. 183, is limited by the facts of *Fry*, as this Court said, 421 U.S. at 548.

In this case, there is no correspondence between the State and City activity cited as affecting commerce and the activity regulated by the Labor Act. By his reliance entirely on State and City activities *other* than the payment of subminimum wages – the target of the Labor Act – to support that Act, the Appellee here follows the Congress in admitting that the Labor Act as applied to States and Cities bears no proper or rational relation to the Commerce Clause power of Congress.

The Appellee admits States and Cities do not pay below the minimum wage fixed by Congress. Although in his Brief at 16 n. 13, the Appellee tries to include as justification for the 1974 Amendments some State and City employees previously covered, he admits there that Congress could cite only 95,000 (out of 11,400,000) State and City employees paid under the 1974 Amendments' minimum.

We await the Appellee's identification of even these 95,000. None of the States and Cities named as Appellants pay subminimum wages; and we candidly doubt that the 95,000 exist as the Appellee claims.[43]

For these few employees, the nexus to commerce claimed by the Appellee is that their strikes burden the flow of goods across State lines.[44] Br. at 13, citing *Maryland v. Wirtz*, 392 U.S. at 195. Yet the Appellee's own document, *Work Stoppages in Government 1972*[45]

[43] Cape Girardeau, Missouri (Complaint ¶13-14; App. 15) pays over the Labor Act's minimum for hours actually worked by its firemen.

[44] The Appellee also argued, Br. 25, that raising wages to the Labor Act's standard would reduce welfare claims.

[45] Cited in the Brief of Senators Williams and Javits as *Amici Curiae* at 10 n. 15.

shows that few strikes by State and City employees were over wages under the Labor Act's standards.

With no creditable evidence of State and City strikes over wages below the Labor Act's standard, the Appellee turned to other activities of States and Cities – none of which is the object of the Labor Act – as the "nexus to commerce": that States and Cities *purchase* goods produced in other States (there was no contention that States or Cities *sell* goods interstate),[46] including containers, furniture and printing (Br. 13-15); that these purchases generate jobs in the private sector (Br. 23); that States and Cities operate airports and other facilities which compete with private facilities (Br. 20); and that States and Cities compete with each other for investment and population (Br. 21).[47] None of these grounds will pass the *Fry* test of a nexus to commerce, because they are not the wage-paying activity which is regulated in States and Cities by the Labor Act and none have been shown to have been curtailed by strikes over subminimum wages of Government employees.

Mr. Justice Cardozo, dissenting in *Carter v. Carter Coal Co.*, 298 U.S. 238, 328, said: "The [commerce] power is as broad as the *need* that evokes it." (emphasis added).

The necessary corollary is that Congress must demonstrate[48] the need for commerce power legislation.

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[46]A recent Florida Federal Court case found municipal sanitation workers do not have even the nexus to commerce required by the Act since they are the "ultimate consumers" of the trucks and gasoline they use. *Brennan v. Industrial America Corp.*, 371 F. Supp. 1164 (M.D. Fla. 1974).

[47]Citation to *United States v. Darby*, 312 U.S. 100, cannot support this ground since Darby Lumber sold and shipped interstate, the lumber produced with substandard wages.

[48]This demonstration must be specific where the Federal-State balance is altered. *United States v. Bass*, 404 U.S. 336, 349.

Congress cannot rest on a showing that States and Cities are involved in interstate commerce, or on the Appellee's showing here, e.g.:

> "Finally, as large scale employers, public agencies are implicated in all of the other Congressional policies underlying the 1974 Amendments, including the stimulation of the economy by additional consumer spending, the creation of new jobs by spreading employment and the reform of the welfare system." Br. 11.

Rather, the Congress must demonstrate that specific State and City employees are subject to a condition which the Labor Act corrects or improves; Congress further must demonstrate that this *labor condition* affects interstate commerce (not merely that States and Cities by purchasing goods affect interstate commerce). And Congress must demonstrate these two connections substantially rather than minimally.[49]

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[49] In *Carter*, Mr. Justice Cardozo also said:

> "The underlying thought is merely this, that 'the law is not indifferent to considerations of degree.' A.L.A. Schechter Poultry Corp. v. United States, supra, concurring opinion, p. 554. It cannot be indifferent to them without an expansion of the commerce clause that would absorb or imperil the reserved powers of the states. At times, as in the case cited, the waves of causation will have radiated so far that their undulatory motion, if discernible at all, will be too faint or obscure, too broken by cross-currents, to be heeded by the law. In such circumstances the holding is *not directed* at prices or wages considered *in the abstract, but at prices or wages in particular conditions.* The relation may be tenuous or the opposite according to the facts. Always the setting of the facts is to be viewed if one would know the closeness of the tie." *Id.* at 327-328 (emphasis added).

In this case, neither the Congress nor the Appellee has identified any of the 95,000 State and City employees whose receipt of wages less than the Labor Act's standard is claimed as justification for the Act's 1974 Amendments. Nor has the Congress or the Appellee shown that any of these 95,000 "ghosts" has ever gone on strike. Nor has the Appellee shown that such strikes, if any, were over wages below the national standard or that any such strikes so shut down a City as to curtail its purchases.

II.

IF THE APPELLEE IS CORRECT THAT THE 1974 LABOR ACT AMENDMENTS HAVE LITTLE EFFECT ON CITIES, APPELLANTS ARE CORRECT THAT THERE IS NO RATIONAL NEED OR RELATION OF THESE AMENDMENTS TO COMMERCE.

The Court in *Fry* reasoned that, even if a nexus to commerce were shown, interference with governmental functions of State and Cities might be sufficiently great to invalidate Federal legislation. 421 U.S. 547n.7.

The Congress and the Appellee here must also demonstrate that the Labor Act's amelioration (of a commerce-crippling labor condition among States and Cities) itself does not cripple States and Cities. To rebut the possibility that the cure is worse (under Federalism) than the (Commerce) disease, they must show not only a *large* impact of these 95,000 "ghosts' " strikes over low wages – none of the three elements of which have they

shown; they also must show a *small* dislocation of the wage-raising Labor Act on States and Cities.[50]

This Court is asked to uphold the 1974 Amendments because of the Appellee's claim that they do not affect States and Cities greatly. Appellants ask: why, then, were they needed in the first place?

Fry did not present this problem, since the Federal scheme there upheld *prevented* States and Cities from spending in an inflationary and damaging manner. Such restraint on spending is precisely the interest of States and Cities here. It must be if they are to retain their fiscal integrity.

CONCLUSION

The 1974 Labor Act Amendments cannot be upheld under the standard of *Fry v. United States*. The Congress and the Appellee here have not identified any State or City employees receiving wages below the Labor Act's standard. Of the 95,000 unidentified "ghosts" Appellee claims to be so paid, neither the Congress nor the Appellee has shown any to have struck their Government employers over these wages. Such a showing of need for the Labor Act by States

[50]The Appellee attempts to do this by showing revenue sharing payments to States and Cities. (Br. 44-45). The Appellee can hardly assert that revenue sharing is the national Government's paying for its regulation of States' and Cities' budgets, since the Federal taxes, which form the fund from which revenue sharing payments are made, inhibit the use of State and City taxes which otherwise could be applied to offset the Labor Act's tremendous cost.

and Cities, such a nexus to interstate commerce, is required under *Fry*.

In any case, the over $1,000,000,000.00 cost of these Amendments (Appendix hereto) so harms States and Cities, so dictates State and City policy as a practical matter, that these Amendments cannot be squared with the Federalism principles enunciated in *Fry*, 421 U.S. 547 n. 7, and *Maryland v. Wirtz*, 392 U.S. 183, 196 and n. 27.

The decision of the District Court below should be reversed with directions to grant the declaratory and permanent injunctive relief prayed for in the Complaint.

Respectfully submitted,

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APPENDIX

International City
Management Association
Washington, D.C.

February 20, 1976

Charles Rhyne, Esq.
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Washington, D.C.

Dear Mr. Rhyne:

The director of the ICMA Urban Data Services (which collects more data about local government than any other organization with the exception of the U.S. Bureau of the Census) has at my request reevaluated the financial implications of the 1974 amendments to the Fair Labor Standards Act. It is almost impossible to accurately forecast the total cost for all of state and local government. However, based on our survey data, we expect the cost to cities over 10,000 population for police and fire only to approximate $792 million. We can with some confidence therefore state that for all cities it will impose additional costs in excess of one billion dollars per year to meet the full requirements of the Act for all employees. This includes only the personnel costs and does not include the significant indirect costs involved in court actions, fire insurance, and other hidden and indirect costs.

Sincerely yours,
/s/ Mark E. Keane

Mark E. Keane
Executive Director