Nos. 82-1951 and 82-1912

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, and AMERICAN PUBLIC TRANSIT ASSOCIATION,

Appellees.

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, and AMERICAN PUBLIC TRANSIT ASSOCIATION,

Appellees.

On Appeals from the United States District Court for the Western District of Texas

BRIEF FOR THE AMERICAN PUBLIC TRANSIT ASSOCIATION

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QUESTIONS PRESENTED

1. *National League of Cities v. Usery*, 426 U.S. 833 (1976), held that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act interfere with an essential attribute of state sovereignty and therefore constitutionally cannot be applied to integral activities in areas of traditional governmental functions. Are publicly owned local mass transit services integral activities in areas of traditional governmental functions, thus precluding the application of these federal statutory provisions to them?

2. Did *National League of Cities* find unconstitutional so much of Congress' intended coverage of state and local governmental functions by the minimum wage and overtime compensation provisions of the Fair Labor Standards Act that it is unwarranted to apply these requirements to publicly owned local mass transit systems without new congressional enactment?

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BRIEF FOR THE AMERICAN PUBLIC TRANSIT ASSOCIATION

STATEMENT OF THE CASE

The sole issue in this case is whether local publicly owned mass transit services are integral activities in areas of traditional state and local governmental func-

tions. For this Court has already decided that the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981) ("FLSA"), fixing minimum wages and overtime compensation interfere with an essential attribute of state sovereignty and therefore may not be applied to state and local government employees performing such functions. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

The relevant facts are:

1. The City of San Antonio established a publicly owned local mass transit system in 1959.[1] In 1978, appellee, the publicly owned San Antonio Metropolitan Transit Authority ("SAMTA") acquired the assets of the transit system from the city and now provides local public transit services to the city and most of Bexar County, Texas. SAMTA, a political subdivision of the State of Texas, according to state law, is "exercising public and essential governmental functions." Tex. Rev. Civ. Stat. Ann. art. 1118x § 6(a) (Vernon Supp. 1982). SAMTA provides bus service to the entire community at fares which cover only 25 percent of operating expenses. In addition, bus service is provided at reduced fares for school children, the elderly and the handicapped, and some downtown service has been provided free of charge. A local sales tax provides substantial revenues to meet operating expenses. Acquisition of the system by the city in 1959 and by SAMTA in 1978 was financed entirely by public bonds; no federal funds were used.

2. The publicly owned state and local transit agencies that will be affected by this decision are maintained by substantial state and local taxes to provide essential public services and an infrastructure that facilitates public

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[1] Facts concerning local transit in San Antonio are drawn from the Affidavit of Wayne M. Cooke, General Manager, San Antonio Metropolitan Transit Authority, R. 196-203.

movement throughout the community.[2] They are not operated for profit. Employees of these systems, nevertheless, have achieved—primarily through collective bargaining—almost the highest wages of any state and local government employees.[3] The average wage of employees of these agencies is $9.01 per hour.[4]

3. This case arises out of a dispute between the States and the federal government that has ensued since 1966, when Congress, acting pursuant to its Commerce Clause powers, amended the Fair Labor Standards Act, ch. 676, 52 Stat. 1060 (1938), attempting for the first time to include a limited number of state activities within its coverage.[5] Although the FLSA was enacted in 1938, it was not until 1961 that Congress extended the minimum wage requirements to *private* transit employees. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72. In 1966, Congress for the first time extended some FLSA coverage to public as well as private providers of schools, institutions, hospitals, and some employees of local mass transit.[6] The practical implications for local publicly owned transit

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[2] *See infra* pp. 16-20.

[3] U.S. Department of Commerce, *Public Employment in 1982*, Table 4 at 12 (1983).

[4] U.S. Department of Labor, *Union Wages and Benefits: Local Transit Operating Employees*, Table 2 at 4 (1981). *See also* Amalgamated Transit Union, Research Department Bulletin 5 (Nov. 1983).

[5] The only provisions of the FLSA at issue in this case are the minimum wage and overtime compensation requirements that were addressed in *National League of Cities v. Usery*, 426 U.S. 833 (1976); contrary to federal appellant's implications, Brief for Federal Appellant ("U.S. Br.") 2 n.2, 3 n.5, 44, the child labor provisions are not at issue.

[6] Local mass transit was described as "street, suburban or interurban electric railway, or local trolley or motorbus carrier[s]" subject to state or local regulation, Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102, 80 Stat. 830, 831. Street

were limited because the 1966 amendments specifically exempted most transit employees—operators, drivers and conductors—from the overtime compensation provisions of the Act, Pub. L. No. 89-601, § 206, 80 Stat. 830, 836. In 1974, after this Court's decision in *Maryland v. Wirtz*, 392 U.S. 183 (1968), had upheld the FLSA's coverage of some state activities, Congress, which reasonably would have assumed that it had unlimited power under the Commerce Clause to apply the FLSA to all state employees, further amended the statute to cover almost all employees of state and local governments in areas where private employers were already covered. *See National League of Cities*, 426 U.S. at 838-39. Only at this time did Congress seek to phase in over a two-year period the provision in the statute most troubling to public transit systems, the overtime requirements for private or public transit operators. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 21(b), 88 Stat. 55, 68.

State and local governments successfully challenged the 1974 amendments in *National League of Cities*. This Court held that the FLSA wage and hour provisions cannot be applied constitutionally to most activities of state and local governments. Expressly overruling *Wirtz*, the Court cited several examples of the numerous state activities affected by its decision, but did not specifically include or exclude publicly owned local mass transit services.

4. Federal appellant first indicated its intent to apply the FLSA to publicly owned local mass transit services over three years after *National League of Cities* was decided, in a letter to a transit union dated September 17,

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electric railways are a form of local transit as are trolleys and buses. Historically they have not been part of the national main-line railroad system, unlike commuter railroads, *see* American Public Transit Association, *Transit Fact Book* 72 (1981) (*"Transit Fact Book"*).

1979.[7] SAMTA learned of the letter and filed suit on November 21, 1979 seeking a declaratory judgment that the proposed application of the FLSA was unconstitutional.[8] On December 21, 1979, the Department of Labor ("DOL") formally amended its FLSA regulations—without any public notice or comment—to assert that local publicly owned mass transit agencies do not perform integral operations in areas of traditional governmental functions and therefore are subject to the FLSA. 44 Fed. Reg. 75,630 (1979); 29 C.F.R. § 775.3(b) (1983).[9]

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[7] Letter from the Deputy Administrator of the United States Department of Labor to the Amalgamated Transit Union (September 17, 1979), R. 163-66.

[8] While this is the only case involving this issue in which a declaratory judgment against the federal government was sought, the issue has been raised in other federal appellate courts. *Compare, e.g., Molina-Estrada v. Puerto Rico Highway Auth.*, 680 F.2d 841 (1st Cir. 1982) (concluding that the FLSA may not be applied to a state highway and transit authority) *with Alewine v. City Council of Augusta*, 699 F.2d 1060 (11th Cir. 1983), *petitions for cert. filed*, 51 U.S.L.W. 3884 (U.S. June 3, 1983) (No. 82-1974), 52 U.S.L.W. 3141 (U.S. Aug. 17, 1983) (No. 83-257), *and Kramer v. New Castle Area Transit Auth.*, 677 F.2d 308 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 786 (1983) (concluding that the FLSA may be applied to local publicly owned mass transit systems). *See also Dove v. Chattanooga Area Regional Transp. Auth.*, 701 F.2d 50 (6th Cir. 1983) (reversing grant of summary judgment for transit agency and remanding for further proceedings); *Scholz v. City of LaCrosse*, No. 82-2890 (7th Cir. April 11, 1983) (order granting stay of proceedings pending this Court's ruling in these consolidated cases).

[9] DOL listed along with publicly owned local mass transit the following state owned functions to which it believes the FLSA applies: off-track betting corporations, generation and distribution of electric power, provision of residential and commercial telephone and telegraphic communication, production and sale of organic fertilizer as a by-product of sewage processing, production, cultivation, growing or harvesting of agricultural commodities for sale to consumers, and repair and maintenance of boats and marine engines for the general public. 29 C.F.R. § 775.3(b) (1983). The regulations also state that the FLSA should *not* be applied to public libraries and museums. 29 C.F.R. § 775.4(b) (1983).

The American Public Transit Association ("APTA"), the members of which include most publicly owned local mass transit systems, intervened. Federal appellant also counterclaimed on behalf of SAMTA's employees for back pay [10] and injunctive relief. An employee, Joe G. Garcia, intervened.

The district court granted SAMTA's and APTA's motions for summary judgment on November 17, 1981, ruling that local public mass transit systems (including SAMTA) are "integral operations in areas of traditional governmental functions under the decision of the United States Supreme Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976)." Appendix to Jurisdictional Statement for Federal Appellant ("U.S.J.S.") 23a. Appellants here appealed directly to this Court pursuant to 28 U.S.C. § 1252 (1976). The Court vacated the judgment and remanded the case "for further consideration in light of [the later-decided] *Transportation Union v. Long Island R. Co.*, 455 U.S. 678 (1982) [("*LIRR*")]." *Donovan v. San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982).

5. After further briefing and oral argument, the district court found that its previous conclusion that "operation of a public transit system is a governmental function entitled to Tenth Amendment immunity," was fully consistent with this Court's decision in *LIRR* and reentered judgment for SAMTA and APTA. U.S.J.S. 2a.[11]

6. Appellants again appealed to this Court pursuant to 28 U.S.C. § 1252 (1976).

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[10] The FLSA authorizes the Secretary of Labor to seek back pay for employees and liquidated damages in an equal amount for up to three years if an employer did not compensate employees in the manner established by the FLSA. 29 U.S.C. § 216(c) (1976 & Supp. V 1981).

[11] The court's order of February 14, 1983 was withdrawn and reentered effective on that date on February 18, 1983 to correct typographical errors.

SUMMARY OF ARGUMENT

National League of Cities held that the FLSA minimum wage and overtime compensation provisions—the specific provisions at issue here—may not be applied consistently with the Tenth Amendment to "integral portion[s] of those governmental services which the States and their political subdivisions have traditionally afforded their citizens," 426 U.S. at 855. This Court found that these wage and hour determinations are " 'functions essential to [the States'] separate and independent existence' . . . so that Congress may not abrogate the States' otherwise plenary authority to make them." *Id.* at 845-46. *See also EEOC v. Wyoming*, 103 S. Ct. 1054, 1061 n.11 (1983) (reconfirming holding of *National League of Cities* that "[o]ne undoubted attribute of state sovereignty is the States' power to determine [wages, hours and overtime compensation for employees carrying] out governmental functions").

In subsequent decisions, this Court has addressed Tenth Amendment challenges to Congress' exercise of Commerce Clause power in statutory contexts other than the FLSA. In each case it distinguished the federal statutory provisions at issue in *National League of Cities*, consistently reaffirming that the FLSA wage and overtime provisions cannot constitutionally be applied to integral operations in areas of traditional functions of state and local government. *EEOC*, 103 S. Ct. at 1060; *FERC v. Mississippi*, 456 U.S. 742, 758-59 (1982); *LIRR*, 455 U.S. at 685; *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 287-88 (1981).

I. The only remaining issue in this case not expressly resolved by *National League of Cities* is whether local publicly owned mass transit services are "integral operations in areas of traditional governmental functions." 426 U.S. at 852.

Among these "important governmental activities," *id.* at 847, specifically identified in *National League of Cities*, are fire and police protection, sanitation, parks and recre-

ation, public health, schools, and hospitals, *id.* at 851, 855. Federal appellant has added museums and libraries. 44 Fed. Reg. 75,630 (1979); 29 C.F.R. § 775.4(b) (1983). The list, however, is "not an exhaustive catalogue," and there are in addition "numerous line and support activities" within the protected area. 426 U.S. at 851 n.16. The court below determined that local publicly owned mass transit, like the other functions enumerated by this Court, is a protected activity "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *Id.* at 851.

A. From the inception of the Republic, one of the basic purposes for which communities have organized themselves into governments has been to provide a local transportation infrastructure. *See Molina-Estrada*, 680 F.2d at 845-46. As transportation technology has evolved, and as urban areas have become more congested (thereby necessitating that people join together to share transportation), the means by which state and local governments have met this transportation responsibility also has changed. In addition to the management of streets and highways, states and their political subdivisions have become the predominant providers of local mass transit services. About 90 percent of local transit revenues, total transit miles, and passenger trips are attributable to publicly owned local mass transit systems. Affidavit of Stanley G. Feinsod, Executive Director, Policy and Programs, American Public Transit Association ("Feinsod Affidavit") ¶ 4, R. 177. Local public transit systems serve the transportation needs of the entire community, including low-income residents, who constitute 80 percent of mass transit riders.[12] Such riders depend on public transit for access to jobs and to public health, education and other vital governmental services. Even community

[12] This figure represents riders with an income of $15,000 or less. Urban Mass Transportation Administration, U.S. Department of Transportation, *Moving People, An Introduction to Public Transportation* 35 (1981).

residents who are neither poor nor regular transit riders benefit from the reduced traffic congestion, increased safety, cleaner air, and more rational and efficient land use that public transit makes possible. To attain these community-wide benefits, local publicly owned mass transit is provided as a public service and not for pecuniary gain; state and local assistance contributes 40 percent of operating revenues nationwide. *Transit Fact Book* 45. Fares provide only about 40 percent of such revenues, *id.*, and are substantially reduced for the elderly and students. *See infra* text accompanying note 20.

States increasingly have provided public mass transit because it is a service that "their citizens require," *National League of Cities*, 426 U.S. at 847, not to compete with private providers, but rather to contribute to a balanced local transportation infrastructure that is responsive to changing urban needs and public welfare demands. The planning, construction and operation of public transit facilities and services—from subway lines to bus routes—is an integral part of the local planning process and the management of streets and highways, which the States overwhelmingly "have regarded as integral parts of their governmental activities." *Id.* at 854 n.18.

B. Appellants argue that, although local mass transit has become a pervasively public function, this has not been true for an adequate historical period to qualify as a "traditional governmental function." *See* U.S. Br. 11, 16-20, 24-25, Brief for Appellant Garcia ("G. Br.") 15-17. This Court, however, has rejected such a "static historical view of state functions generally immune from regulation." *LIRR*, 455 U.S. at 686. Local mass transit, moreover, began to evolve into a public function of state and local governments early in the century when several major cities adopted this means of supplementing their transportation infrastructure shortly after transit technology was developed and the problems of urbanization began to emerge. Later in the century, fueled by an

expansive federal highway program, many middle class riders turned to the automobile and life in the suburbs, thus radically altering the transportation requirements of urban communities and accelerating the shift toward public provision of local mass transit services to meet these changing needs.

II. Failing to distinguish this case from *National League of Cities*, appellants unsuccessfully attempt to create a novel issue by invoking the authority of federal statutes other than the FLSA.

A. Appellants cite a few federal labor laws in an attempt to show that failure to apply FLSA requirements to local public transit systems would result in an unconstitutional erosion in an area of traditional federal regulatory authority within the meaning of *LIRR*. That case, however, involved a distinct and unique federal statutory scheme comprehensively regulating the national railroad network, both private and public, for nearly a century. *See infra* p. 28. Local mass transit, in contrast, has always been the primary responsibility of state and local governments and thus subject to comprehensive state statutory regulation. Furthermore, the federal statutes cited by appellants are general labor laws that apply to almost all private activities, including the private counterparts of activities expressly immunized in *National League of Cities*. Appellants cite, for example, the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981) ("NLRA"), which applies to private schools, hospitals, and transit systems, but exempts public schools, hospitals, and transit systems.

B. Appellants next attempt to distinguish local public mass transit from the activities expressly protected by *National League of Cities* by claiming an extraordinary federal interest in this particular local public service by virtue of federal funding under the Urban Mass Transportation Act, 49 U.S.C. §§ 1601-1618 (1976 & Supp. V 1981) ("UMTA"). But this Court has unanimously held

that Congress did not intend through UMTA "to create a body of federal law applicable to labor relations between local governmental entities and transit workers." *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 27 (1982). And similar programs of "cooperative federalism" enabling states to provide important public services exist for most of the activities cited in *National League of Cities*. Because of its greater revenue raising ability, the federal government has become a primary source of funds for virtually all essential state activities, *e.g.*, health, schools, sanitation, and law enforcement. It would be a confusion of the respective functions of each level of government in our federal system to conclude that the reach of Commerce Clause power over the States is commensurate with the federal ability to raise and spend monies. In fact, appellants seem to be urging this Court to imply that Congress properly exercised such broad Commerce Clause power in a statute passed pursuant to Congress' Spending Clause power. Such an implication of congressional intent goes well beyond implying conditions in federal grants to states, something this Court expressly identified as a threat to the federal system in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981).

III. In any event, since *National League of Cities* struck down most of the intended coverage of state and local governments by the FLSA wage and overtime compensation requirements, the statute may not now be read to allow coverage of a small class of public employees without subsequent amendment. *See Sloan v. Lemon*, 413 U.S. 825, 834 (1973).

ARGUMENT

I. *National League Of Cities* Determined That The Fair Labor Standards Act Minimum Wage And Overtime Compensation Provisions May Not Be Applied To Integral Activities In Areas Of Traditional State And Local Governmental Functions.

As its subsequent decisions have made increasingly clear, this Court in *National League of Cities* has conclusively determined all but possibly one of the requirements for invalidating application of the FLSA to local publicly owned mass transit.[13] *See LIRR*, 455 U.S. at 684 n.9; *Hodel*, 452 U.S. at 287-88. In *Hodel*, this Court articulated the criteria that must be applied:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

452 U.S. at 287-88 (citations omitted; emphasis in original). The Court also noted:

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[13] *National League of Cities* was founded on an analysis of the limitiations imposed by the Tenth Amendment and our system of federalism on the otherwise legitimate exercise of congressional Commerce Clause powers; therefore, federal appellant cannot sidestep the constitutional issue here merely by declaring that the UMTA and the FLSA reflect the congressional belief that local mass transit has an "interstate impact" and that "[b]ecause of the direct impact of transit service on interstate commerce the FLSA may constitutionally be applied to public transit employees." U.S. Br. 46-47.

> Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission.

Id. at 288 n.29.

National League of Cities has already decided, first, that application of the FLSA to the States and their political subdivisions regulates the "States as States," 426 U.S. at 845. Second, it decided that the FLSA's regulation of minimum wage and overtime compensation for state and local employees addresses a matter that is an "undoubted attribute of state sovereignty." *Id.* Furthermore, as this Court recently confirmed in *LIRR*, *National League of Cities* has decided the fourth point, the balance between the federal and state interests, *see* 426 U.S. at 852-53; *see also id.* at 856 (Blackmun, J., concurring), and has determined that the nature of the federal interest advanced in the FLSA was not "so great as to 'justif[y] State submission.'" *LIRR*, 455 U.S. at 684 n.9 (quoting *Hodel*, 452 U.S. at 288 n.29).

Finally, the first aspect of the third requirement—whether the States' compliance with the federal law would "*directly impair their ability 'to structure* integral operations in areas of traditional governmental functions,'" *Hodel*, 452 U.S. at 288 (citation omitted; emphasis added)—is also resolved for this case by *National League of Cities.* There, this Court held that applying the very same FLSA provisions to integral operations in areas of traditional governmental functions would "*impermissibly interfere*" with an essential attribute of state sovereignty, leaving little of the "States' 'separate and independent existence,'" 426 U.S. at 851 (citation omitted; emphasis added).[14] *National League of Cities*

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[14] Contrary to federal appellant's suggestion, U.S. Br. 43-45, when this Court in *National League of Cities* asked whether imposi-

has already established that federal displacement of the States' prerogative to establish wages and overtime compensation for employees engaged in areas of traditional functions would impair the States' " 'ability to function effectively in a federal system,' " *id.* at 852 (citation omitted).

As this Court reaffirmed in *EEOC*, "*National League of Cities* held that 'there are attributes of sovereignty attaching to every state government which may not be impaired by Congress' and that '[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work and what compensation will be provided where these employees may be called upon to work overtime.' 426 U.S. at 845." 103 S. Ct. at 1061 n.11. Thus, *National League of Cities* has decided part of the final test, leaving unresolved only whether local publicly owned mass transit is an integral part of a traditional function of state and local government.[15] The court below correctly answered in the affirmative.

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tion of a federal regulation would endanger the States' "separate and independent existence" it called for an evaluation of the effect on state sovereignty of the FLSA's displacement of state policy choices regarding wages and hours. It did not call for consideration of whether the States' provision of certain services, *e.g.*, transit; parks, or hospitals, is essential to the States' "separate and independent existence," *id.* As the Court reaffirmed in *EEOC*, "application of the federal wage and hour statute to the States threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking." 103 S. Ct. at 1062 (citation omitted). It is this encroachment that threatens state sovereignty; *National League of Cities* does not require a showing that state sovereignty is threatened if a state does not provide, for example, public hospitals, parks, museums, libraries or transit.

[15] This issue, in keeping with the explicit suggestion of the federal government in that case, was not addressed by the Court in *LIRR*. *See infra* note 38.

A. Publicly Owned Local Mass Transit Is An Integral Activity In An Area Of Traditional State And Local Governmental Functions.

As the district court concluded, the provision of publicly owned local mass transit services is as integral to the public responsibility of state and local government as are "fire prevention, police protection, sanitation, public health, and parks and recreation," *National League of Cities*, 426 U.S. at 851, and schools and hospitals, *id.* at 855, which, while "obviously not an exhaustive catalogue," *id.* at 851 n.16, this Court has held are "typical" examples of the "numerous line and support activities which are well within the area of traditional operations of state and local governments," *id.*[16]

A city's transportation infrastructure contains transportation routes which, like the veins and arteries of the human cardiovascular system, provide the paths for the lifeblood of its object, facilitating circulation and nourishing those areas the lines reach. If any are blocked, the area they serve--or sometimes even the entire object—

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[16] While distinctions can be drawn between publicly owned local transit and the activities enumerated in *National League of Cities*, and "[w]hile there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected [in *National League of Cities*], each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." *National League of Cities*, 426 U.S. at 855 (footnote omitted). Lacking any constitutionally significant basis for distinguishing local publicly owned transit services from other essential public services expressly protected by *National League of Cities*, Appellant Garcia urges this Court to limit the reach of immunity from FLSA coverage to law enforcement officers, G. Br. 23, which presumably would eliminate Tenth Amendment immunity for most employees of schools, hospitals, parks, recreation and so forth. But this Court more thoughtfully has sought to isolate for exemption from the FLSA those areas of governmental services that are "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851.

deteriorates and dies. A local transportation network is thus essential to the life of any community, and the management of such a network is one of the sovereign purposes for which state and local governments exist.

These governments have regarded the use of publicly owned local mass transit as an integral and often essential means of performing this traditional governmental function.[17] Buses and subways are necessary to transport middle and lower income people to work—people who cannot afford an automobile or city-center parking fees. Buses or subways are necessary to transport children to integrated schools across town or the single high school in a rural school district. Buses or subways are necessary to enable senior citizens at a reduced fare occasionally to go to a department store or downtown cafeteria. Buses or subways are necessary to bring people to work or shop in a redeveloped neighborhood so that businesses are willing to locate there and residents willing to buy and renovate homes. Even for persons who are not regular riders, public transit is necessary to relieve traffic congestion and foster safe streets and a more livable environment. The life of communities is, and always has been, entirely dependent on publicly provided means of movement between home, work and shops and, in urban areas in particular, this dependency has long meant providing local mass transit services as well as providing streets and roads. Public mass transit therefore is an integral part of a traditional—indeed critical—function of state and local government, which is at least as important to the health and survival of a community as are

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[17] Indeed, federal appellant acknowledges as much, U.S. Br. 29-30, by quoting the director of the Atlanta Region Metropolitan Planning Commission as stating that local government officials believe that in addition to highway programs their communities must have "a completely balanced transportation system" which includes public mass transit. *Cf. Molina-Estrada,* 680 F.2d at 845.

the functions expressly protected in *National League of Cities.*[18]

For this reason, public transit agencies are organizationally integrated or closely coordinated with other essential local governmental services such as street and traffic management, public works, land use planning and zoning—often under the umbrella of a common city department or regional authority. Feinsod Affidavit ¶ 11, R. 183-86. Decisions about where, how and when to condemn land to build a subway line or urban expressway, or where to place a bus stop, traffic light, pedestrian overpass or bus route, are the kinds of "core state functions" that local governments were created to perform. *EEOC*, 103 S. Ct. at 1060. Similarly, the budgeting of local transit agencies is an important part of a local government budget. *See, e.g., Subway-Surface Supervisors Association v. New York City Transit Authority*, 44 N.Y.2d 101, 111, 375 N.E.2d 384, 389, 404 N.Y.S.2d 323, 329 (N.Y. 1978) (transit system is performing a governmental function because of the "intertwinement" between its finances and the city's). To serve people in a local community dependent on inexpensive transportation, general and special state and local tax revenues provide much of the financial support for local public mass transit.[19] Feinsod Affidavit ¶ 8, R. 178-80. Reduced fares

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[18] Federal appellant would dismiss the finding of the court below that publicly owned mass transit is a traditional governmental function by contending that some of the same reasoning could be applied to the Long Island Rail Road, a state-owned passenger railroad. U.S. Br. 20-21. For the reasons stated *infra* p. 27-30, such an approach would ignore the completely local nature of public mass transit, as distinguished from the Long Island Rail Road, which this Court found was an integral part of the interstate rail network and thus had been subject to comprehensive, uniform national regulation for nearly 100 years. *LIRR*, 455 U.S. at 687-90.

[19] Indeed, some states simultaneously combat transit costs and air pollution through funding transit with motor vehicle fuel taxes. *See, e.g.*, Cal. Const. art. 19, § 1; Tex. Rev. Civ. Stat. Ann. art. 1118x § 8 (Vernon Supp. 1982).

are provided for students and the elderly, *id.* ¶ 9B, R. 181-82,[20] and fares are kept low in the face of rising costs, making transportation accessible to the poor and the low and middle income workers, *id.* ¶ 9A, R. 180.

As the court below found, referring to *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979):

> Public transit benefits the community as a whole, . . . is provided at a heavily subsidized price[,] . . . [and] cannot be provided at a profit[, and therefore is provided] for public service, not for pecuniary gain. [Thus] government is particularly well suited . . . [and, in fact,] is the only component of society that can provide the service.
>
> Finally, government today is the primary provider of transit services.

U.S.J.S. 16a.

Appellants' attempt to characterize local publicly owned transit as a "business enterprise," which is the express premise for all the arguments made by Appellant Garcia, *see, e.g.*, G. Br. 6, is absolutely erroneous. State and local governments do not provide transit services in order to compete with the private sector in a profit-making activity.[21] Instead they have responded to the community-

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[20] *See also, e.g.*, Mass. Gen. Laws Ann. ch. 161A, § 5(e½)-5(e¾) (West 1976 & Supp. 1983).

[21] Federal appellant argues that states provide transit services as "market participants" rather than "as a traditional and essential element of state sovereignty." U.S. Br. 22-24 & note 23. This dichotomy is falsely applied for two primary reasons. First, *National League of Cities* does not require that the state service, *e.g.*, transit or sanitation, be an essential element of state sovereignty, but rather that the state decision to be preempted, *e.g.*, setting wages and hours, be such. *See supra* p. 13. Second, while *White v. Mass. Council of Constr. Employers*, 103 S. Ct. 1042 (1983), found that a limitation on state activity imposed by the Commerce Clause—that states may not unduly burden interstate commerce—is not applica-

wide need for this service regardless of its commercial viability. In *Jackson Transit Authority*, 457 U.S. at 17, *quoted in* U.S. Br. 26-27, this Court acknowledged the congressional finding that communities should "continue to receive the benefits of mass transportation despite the collapse of the private operations," thereby recognizing that public transit services are not revenue-raising ventures but are provided for public benefit. APTA is unaware of any publicly owned local transit system that does not have to draw on its local tax base to meet its costs. Feinsod Affidavit ¶¶ 6-8, R. 178-79.

Fares which provide only about 40 percent of transit operating revenues [22] do not offer much prospect for the survival of public transit in the competitive environment federal appellant desires. *See* U.S. Br. 13-14, 47-48. Nor do such user fees distinguish local public transit from other functions of government expressly protected in *National League of Cities*.[23] User fees often recover some of the operating costs of sanitation systems, public hospitals,

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ble when states act as market participants, this should not affect the States' Tenth Amendment immunity. Indeed, state and local governments did not enter into provision of transit services as market participants; they are not competing for profitable business with the private sector, but instead have assumed an important public function the private marketplace cannot provide.

[22] *Transit Fact Book* 45. The remaining operating revenues are derived principally from state and local assistance, which constitutes 40 percent of such revenues, as contrasted with federal operating assistance which constitutes only 17.3 percent. *Id.* It is beyond doubt that states do not provide transit services to "engag[e] in business activities which have as their aim the production of revenues in excess of costs." *See Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 418 n.1 (1978) (Burger, C.J., concurring).

[23] *See also* Urban Mass Transportation Administration, U.S. Department of Transportation, *Financing Transit: Alternatives for Local Government* 228 (1979).

parks and recreational facilities and even public schools.[24] Sometimes such charges finance a greater share of the costs of such traditional public services than do public transit fares.[25]

That the provision of public transit services is an integral governmental function is further demonstrated by the extensive disruption to community life that would result if state and local government were unable to structure routes and schedules as they believe best. "[P]articularized assessments of actual impact" of federal regulations, of course, are not necessary since it is the State's policy choices that are constitutionally protected. *National League of Cities*, 426 U.S. at 851. "The determinative factor . . . [is] the nature of the federal action, not the ultimate economic impact on the States." *FERC*, 456 U.S. at 770 n.33 (quoting *Hodel*, 452 U.S. at 292 n.33). The FLSA overtime requirements, however, do have a direct impact on the ability of state and local governments to choose how to structure routes, employee work hours, service schedules, record keeping and compensation.[26]

For example, the FLSA requires overtime payment of time-and-one-half the "regular rate" for hours worked over forty hours per week, which is computed in accord-

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[24] *See Mueller v. Allen*, 103 S. Ct. 3062 (1983) (some public schools also charge tuition or user fees).

[25] For example, the Federal Water Pollution Control Act, 33 U.S.C. § 1284(a)(4)-(b)(1) (1976 & Supp. V 1981), requires states receiving sewage treatment plant and areawide waste treatment management grants to recover from industrial users the full cost of the federal grants attributable to treatment of their waste and from other users the full cost of maintenance and operation of treatment facilities.

[26] *See, e.g., Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. 303 (1965) (testimony of C. Cochran).

ance with a federal statutory formula. 29 U.S.C. § 207(a) (1976); 29 C.F.R. § 548 (1983). Unlike the private sector, state and local governments cannot decide on strictly economic terms whether to minimize costs under this requirement by hiring more employees,[27] or by designing routes and work schedules to reduce the amount of overtime needed. Public transit systems must set scheduling and make arrangements for work hours that enable them to provide essential community services. Special payment provisions have evolved through the years to compensate public transit operators for unique working requirements, such as the scheduling of bus drivers in two split shifts at peak commuter hours. *See, e.g.*, K. Chomitz and C. Lave, *Forecasting the Financial Effects of Work Rule Changes*, 37 Transp. Q. 453 (1983). If the FLSA provisions are superimposed on the pay structures the States have designed to respond to these special scheduling and other operational needs, substantial additional costs will be incurred.[28] A city with a restricted budget, as most are, may have to curtail service to points at the end of routes to avoid excessive overtime costs. If service at those hours is curtailed, the low and middle income people dependent on public transportation may be limited in the locations they can accept employment or may be forced to spend much more time commuting. Street traffic congestion will likely increase, perhaps necessitating use of additional police to direct traffic. Additional traffic would result in increased air pollution, *see Transit Fact Book*

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[27] Indeed, Congress assumed that such cost minimization would be a natural result of the FLSA overtime provisions. *See, e.g.*, S. Rep. No. 1487, 89th Cong., 2d Sess. 22, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3002, 3024 ("the committee believes that new jobs will become available as the excessive hours worked by present employees are reduced.").

[28] Labor costs in the form of salaries and fringe benefits are of critical significance to the management of transit systems. In 1980, for example, they comprised more than 70 percent of all operating expenses. *Transit Fact Book* 49.

38, perhaps causing additional expenditures to reduce other sources of pollution. This Court was critical in *National League of Cities*, 426 U.S. at 847, of "[t]his type of forced relinquishment of important governmental activities."

Application of FLSA requirements thus would leave the States with "less money for other vital State programs," and would limit their ability to pursue their "social and economic policies beyond their immediate managerial goals." *See EEOC*, 103 S. Ct. at 1063. Of course, to minimize the cost impact of the federal requirements the States could change their scheduling practices, but this would "have the effect of coercing the States to structure work periods in some employment areas . . . in a manner substantially different from practices which have long been commonly accepted among local governments of this Nation." *National League of Cities*, 426 U.S. at 850. "Nothing in the Constitution permits Congress to force the states into a Procrustean national mold that takes no account of local needs and conditions. That is the antithesis of what the authors of the Constitution contemplated for our federal system." *EEOC*, 103 S. Ct. at 1075 (Burger, C.J., dissenting).

B. The Provision Of Publicly Owned Local Mass Transit Services Is Not A New Concept In State And Local Government Responsibility.

Appellants contend that, because local mass transit has become a pervasively state and local governmental function in recent decades, it cannot be protected under *National League of Cities.* Federal appellant, for example, urges this Court to give "primacy . . . to historical evidence," U.S. Br. 25, and to base its decision on whether the States have regarded transit services as an integral part of their governmental activities "since the inception of the industry." *Id.* at 24. Any such "static historical view" was expressly rejected by this Court in *LIRR*, 455 U.S. at 686, when it clarified that it would "not merely

. . . look[] only to the past to determine what is 'traditional.'" *Id.* It stated:

> This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation.

Id. at 686-87. *Cf. First National City Bank v. Banco Para El Comercio Exterior*, 103 S. Ct. 2591, 2603 n.27 (1983).

The provision of a local transportation infrastructure has been an integral function of state and local governments since the earliest days of our Republic.[29] *See Molina-Estrada*, 680 F.2d at 845. With the industrial age and the growth of the nation's urban areas, local streets and roads became inadequate to meet this governmental obligation. Indeed, "[i]n 1905 congested traffic at rush hours was described as the number one problem of large cities in the United States." W. Owen, *The Metropolitan Transportation Problem* 6 (rev. ed. 1966). As the problems of urbanization (such as unemployment, traffic congestion and safety, air pollution and mobility for students and the elderly) increased, state and local governments turned to developing public transit technology to meet community-wide needs.

Several major cities entered into the provision of publicly owned transit services financed through state and local bond issues or taxes early in this century.[30] In fact,

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[29] Even before the ratification of the federal Constitution, in Massachusetts "townships [were] obliged by law to keep their roads in good repair." A. de Tocqueville, *Democracy in America* 77 n.29 (J.P. Mayer ed. 1969) (citing Laws of Massachusetts, Law of March 5, 1787, Vol. I, p. 305).

[30] *See, e.g.*, C. Thompson, *Public Ownership* 225-26, 240-41 (1925). As early as 1925, this author commented: "So we now have in America not only numerous smaller cities owning and successfully

before the enactment of UMTA providing federal financial assistance, more than half of the nation's 21 largest cities provided publicly owned transit services. *See infra* p. 36.

By 1978, about 90 percent of transit revenues, total transit miles, total transit vehicles owned and leased, and linked passenger trips were attributable to publicly owned mass transit systems. Feinsod Affidavit ¶ 4, R. 176-77; *Transit Fact Book* 43. Today almost all of the metropolitan areas in the country with a population over 200,000 are served by transit systems owned by state or local government agencies.[31]

Moreover, local governments in rural areas also have responded to the need for public mass transit. By 1981, 248 out of 339, or 73 percent, of transit systems in nonurbanized areas were publicly owned.[32] The pervasiveness of state and local ownership of public transit is compar-

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operating municipal street car lines, but three of our larger cities [are also doing so]." *Id.* at 222. San Francisco had started providing local public mass transit service in 1912, Seattle in 1919, Detroit in 1922 and New York City in 1932. Cleveland acquired its public transit system in 1942, and public transit systems serving Boston and Chicago were acquired in 1947. American Public Works Association, *History of Public Works in the United States, 1776-1976* 177 (1976). Los Angeles, San Antonio, and Sacramento were served by publicly owned systems by 1959, J. Moody, *Moody's Transportation Manual* a70 (1960), Oakland by 1960, Memphis by 1961, J. Moody, *Moody's Transportation Manual* a72 (1961), and Miami in 1962, J. Moody, *Moody's Transportation Manual* a78 (1962). Public transit systems serving Long Beach and St. Louis were acquired in 1963, followed by those serving Dallas and Pittsburgh in early 1964, J. Moody, *Moody's Transportation Manual* a60-a61 (1964).

[31] U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* 1-12 (1981).

[32] U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service* 13 (1981).

able to other traditional governmental functions expressly listed in *National League of Cities.*[33]

Large numbers of state and local governments thus assumed the responsibility for providing mass transit services and funding them from tax revenues after it became clear that essential community-wide transit services could not be operated in a manner that would meet public needs and demands unless operated by a state or local government.[34] States have undertaken this function because they regard the maintenance of urban transportation infrastructures accessible to all residents "as integral parts of their governmental activities," *National League of Cities*, 426 U.S. at 854 n.18, and as "governmental services which their citizens require," *id.* at 847. These services, moreover, are for the benefit of the local community, rather than as part of an integrated network that serves all parts of the country. Thus, local publicly owned mass transit is the type of public service that the States have determined over many years is necessary to meet their fundamental public welfare obligations in the fulfillment of their "role in the Union." *LIRR*, 455 U.S. at 687.[35]

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[33] The fact that private institutions also provide some local transit services (*i.e.*, carrying about 6 percent of the passengers, *Transit Fact Book* 27, 43) cannot be a determinative factor under *National League of Cities*, since private institutions provide services in other areas protected by that decision. In 1979, for example, private schools accounted for 20 percent of elementary schools, 19.3 percent of secondary schools, and 56.5 percent of post-secondary schools. U.S. Department of Commerce, *Statistical Abstract of the United States*, Table 214 at 132 (1981) (published annually) ("SAUS: 19xx"). Moreover, in 1974, private firms collected 50 percent of all residential waste and 90 percent of all commercial waste. H.R. Rep. No. 1461, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6323, 6325.

[34] *Transit Fact Book* 27; D. Barnum, *From Private to Public: Labor Relations in Urban Transit*, 25 Indus. and Labor Rel. Rev. 95, 99 (1971). *See also Jackson Transit Authority*, 457 U.S. at 17.

[35] The essential and sovereign character of public transit services has been expressly recognized by some state constitutions, *see, e.g.*,

II. Other Federal Laws Applicable To Local Mass Transit Raised By Appellants Are Irrelevant To The Constitutional Principle At Issue And Do Not Distinguish This Activity Of State And Local Government From Other Activities Protected By *National League of Cities.*

Appellants interject into their analysis of this case a number of federal laws other than the FLSA which are irrelevant to the constitutional principle involved here. This attempt to complicate the picture and obscure the controlling effect of *National League of Cities* fails to provide any constitutionally significant basis for distinguishing publicly owned local mass transit from those activities of state and local government this Court expressly exempted from the FLSA requirements. Nor do appellants' contentions establish any federal interest sufficient to override the States' judgment that their provision of local transit services is as integral to the functions of state and local government as are the enumerated activities.[36]

Ga. Const. art. 9, §§ 4(2), 5(2); Ill. Const. art. XIII, § 7, and legislatures, *see, e.g., Inman Park Restoration, Inc. v. Urban Mass Transp. Admin.*, 414 F. Supp. 99, 104 (N.D. Ga. 1975), *aff'd sub nom. Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth.*, 576 F.2d 573 (5th Cir. 1978); *Henderson v. Metropolitan Atlanta Rapid Transit Auth.*, 236 Ga. 849, 853, 225 S.E.2d 424, 427 (Ga. 1976); *Mass Transit Admin. v. Baltimore County Revenue Auth.*, 267 Md. 687, 690, 298 A.2d 413, 415 (Md. 1973); *Teamsters Local Union No. 676 v. Port Auth. Transit Corp.*, 108 N.J. Super. 502, 507, 261 A.2d 713, 716 (N.J. Super. Ct. Ch. Div. 1970); *County of Niagara v. Levitt*, 97 Misc.2d 421, 422, 411 N.Y.S.2d 810, 812 (N.Y. Sup. Ct. 1978); *Pennsylvania v. Erie Metropolitan Transit Auth.*, 444 Pa. 345, 350, 281 A.2d 882, 885 (Pa. 1971).

[36] Federal appellant also attempts to distinguish publicly owned mass transit from the other protected activities by reliance on an early tax case, *Helvering v. Powers*, 293 U.S. 214 (1934), which held that the Trustees of the Boston Elevated Railway Company were not immune from federal income taxation. The activity addressed in that case, however, was the temporary quasi-public operation of

A. Traditional Federal Statutory Regulation Would Not Be Eroded If The Fair Labor Standards Act Is Not Applicable To State And Local Public Transit Agencies.

Appellants strain to bring this case within the limitation on Tenth Amendment immunity addressed in *LIRR*. In upholding the application of the Railway Labor Act to the employees of the state-owned Long Island Rail Road, this Court followed and expressly affirmed its decision in *National League of Cities*. Following a line of prior Supreme Court decisions involving statutes other than the FLSA—*Parden v. Terminal Railway*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *United States v. California*, 297 U.S. 175 (1936)—this Court stated in *National League of Cities* that "the operation of a railroad engaged in 'common carriage by rail in interstate commerce . . .,'" 426 U.S. at 854 n.18 (citation omitted), is not "in an area that the States have

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a privately owned transit system. *Cf. Fry v. United States*, 421 U.S. 542 (1975). As Justice Rehnquist stated in his dissent in *Fry*, *id.* at 555 n.1: "The Court in [the later decided] *Helvering v. Gerhardt*, 304 U.S. 405, 424 (1938), was careful to distinguish between the imposition of a federal income tax on the New York Port Authority, a question which it reserved, and such a tax upon an employee of the Authority, a question which it decided in favor of taxability." Moreover, reference to this 1934 case does not answer whether public transit has become a traditional function of government as the result of the widespread establishment of public transit services by state and local governments since then. As Justice Black noted in his concurring opinion in *Gerhardt*,

> [m]any governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires.

304 U.S. at 427; *see also Massachusetts v. United States*, 435 U.S. 444, 458-59 (1978) (Brennan, J., concurring); *Graves v. New York*, 306 U.S. 466 (1939).

regarded as integral parts of their governmental activities," *id.*[37]

This Court further determined in *LIRR* that a state would "erode federal authority in areas traditionally subject to federal statutory regulation," 455 U.S. at 687, if it could exempt its employees from federal Railway Labor Act protection by acquiring a small but integral part of the national railroad system that has long been subject to federal Commerce Clause legislation specifically directed at that integrated system. This statement was made, however, in the context of what was perhaps a unique function for a state to acquire, *i.e.*, railroads, which even when publicly owned still serve as part of the national railroad system[38] and *qua* railroads, public or private:

> have been subject to *comprehensive* federal regulation for nearly a *century*. The Interstate Commerce Act—the first *comprehensive* federal regulation of the industry—was passed in 1887. A year earlier we had held that *only* the Federal Government, not the states, could regulate the interstate rates of railroads. . . . The first federal statute dealing with railroad labor relations was the Arbitration Act of 1888. . . . The Railway Labor Act thus has provided the framework for collective bargaining between all interstate railroads and their employees for the past 56 years. There is no comparable history of long-

[37] The Court noted in *LIRR* that only two of the seventeen commuter railroads were publicly owned. 455 U.S. at 686 n.12.

[38] Indeed, federal appellant represented to this Court in *LIRR* that "the *LIRR, despite the evolving character of its operations,* remains a railroad—an integral part of the interstate railroad industry and *plainly distinguishable* from conventional intraurban transit systems." Brief for United States as *Amicus Curiae* at 12, *LIRR*, 455 U.S. 678 (1982) (emphasis added). "As is reflected in the definitions and statutory provisions cited . . . *one important attribute of commuter railroads is their genesis as a part of the railroad industry, rather than as a form of intraurban transit.*" *Id.* at 26 n.19 (emphasis added); *see also id.* at 25-27, nn.19-20.

> standing state regulation of railroad collective bargaining or of other aspects of the railroad industry.

455 U.S. at 687-88 (footnotes omitted; emphasis added). "Moreover, the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system." *Id.*[39] The Long Island Rail Road acceded to this federal regulatory authority for the first 13 years of its ownership by the state, *id.* at 690;

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[39] In *LIRR*, the Court stressed that "Congress [had] long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the national economy." 455 U.S. at 688. Under these circumstances, "[t]o allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any other of the elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system." *Id.* at 689.

Extrapolating from this Court's concern in *LIRR* for preserving the perhaps unique, comprehensive, uniform federal regulation of railroads, federal appellant suggests that "substantial deference" is due the congressional determination that there should be uniformity in the FLSA between public and private transit agencies in order to avoid "unfair competition." U.S. Br. 13-14, 46-48. But this congressional desire for uniformity is of a wholly different nature from that in *LIRR* and was as much a reason why Congress in 1974 sought to bring within the FLSA many other public activities, including activities expressly protected in *National League of Cities*. H.R. Rep. No. 1366, 89th Cong., 2d Sess. 16-17 (1966); S. Rep. No. 1487, 89th Cong., 2d Sess. 8, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3002, 3009-10. It is highly misleading for federal appellant to imply that Congress amended the FLSA because of a unique concern with eliminating some perceived "unfair competition" between public and private transit; in fact, the congressional reports cited for this proposition, *id.*, address the amendment of the FLSA definition of "enterprises" which affected coverage of public schools, hospitals, institutions and transit systems. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(c), 80 Stat. 830, 831. Furthermore, contrary to federal appellant's statement, U.S. Br. 36 n.29, sewage treatment has been privately provided in some cities, C. Thompson, *Public Ownership* 290 (1925); *cf.* Advisory Comm'n on Intergovernmental Relations, *Intergovernmental Responsibilities for Water Supply and Sewage Disposal in Metropolitan Areas* 15-16 (1962), and thus the same concern for competition could have arisen in that field.

it was only in the midst of the cooling-off period during a strike that the state attempted a conversion of the Long Island Rail Road's corporate status, "apparently believing that the change would eliminate Railway Labor Act coverage," *id.* at 681.

Local mass transit, in contrast, has always been a local responsibility. There simply is not, and never has been, any comprehensive federal system of law regulating local mass transit, private or publicly owned. *See Local Division 589, Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618, 633 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982). State or local laws have dictated, for example, the rates charged users of local transit,[40] equipment standards for transit vehicles,[41] the licensing of drivers of those vehicles,[42] and traffic safety rules.[43]

It simply cannot be said that when state and local governments entered this area they "knew of and accepted" the application of the FLSA. *Cf. LIRR*, 455 U.S. at 690. The statutory history of the FLSA is instructive. First,

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[40] *See, e.g.*, Cal. Pub. Util. Code §§ 210, 216, 451 (West 1975 & Supp. 1983); N.Y. Transp. Law § 141 (McKinney 1975 & Supp. 1983); Wash. Rev. Code Ann. §§ 81.64.010, 81.64.080 (1962).

[41] *See, e.g.*, Cal. Pub. Util. Code § 7810 (West 1965); Cal. Veh. Code §§ 26711, 35106, 35250, 35400, 35550-35551.5 (West 1971 & Supp. 1983); Ill. Ann. Stat. ch. 95 ½ §§ 1-107, 15-102 (Smith-Hurd 1971 & Supp. 1983); N.Y. Veh. & Traf. Law §§ 104, 375, 385 (McKinney 1970 & Supp. 1983); Wash. Rev. Code Ann. §§ 46.04.320, 46.37.005-46.37.500 (1970 & Supp. 1983).

[42] *See, e.g.*, Cal. Veh. Code § 12804 (West 1971 & Supp. 1983); Ill. Ann. Stat. ch. 95 ½ §§ 1-146, 6-104 (Smith-Hurd 1971 & Supp. 1983); N.Y. Veh. & Traf. Law § 509a-509h (McKinney Supp. 1983); Wash. Rev. Code Ann. § 46.20.440 (1970 & Supp. 1983).

[43] *See, e.g.*, Cal. Veh. Code §§ 21000 *et seq.* (West 1971 & Supp. 1983); Ill. Ann. Stat. ch. 95 ½ §§ 11-100 *et seq.* (Smith-Hurd 1971 & Supp. 1983); N.Y. Veh. & Traf. Law §§ 1100 *et seq.* (McKinney 1970 & Supp. 1983); Wash. Rev. Code Ann. §§ 46.61.005 *et seq.* (1970 & Supp. 1983).

it is a general statute applicable to virtually every private business engaged in interstate commerce; it is not a statute setting up a regulatory system with respect to a specific industry. Second, although applicable to many other private employers since first enacted in 1938, Congress did not even attempt to apply the FLSA to regulate the wages and hours of even private transit employees until 1961.[44] Its first limited attempt to extend these requirements to *public* transit employees (along with employees of public hospitals and schools) was in 1966, and even then Congress specifically excluded most private and public transit employees (*e.g.*, bus drivers and other operators) from the overtime requirements. Even after *Wirtz*, when Congress attempted to extend the FLSA requirements to most public agencies, overtime coverage of public and private transit operating employees was to be phased in; it was not until 1976, only seven years ago, that Congress intended to extend the full reach of federal wage and hour regulation to most local public transit employees,[45] and only four years ago (just two months before this action was filed) that the Executive Branch sought to implement this congressional directive.[46] State and local governments began to provide transit services prior to the enactment of the FLSA and well before Congress' attempt to extend it to private or public transit. About the time Congress attempted to apply the provisions of the FLSA to any transit system—public or private—the majority of major urban areas was served by publicly owned transit systems,[47] and the majority of

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[44] Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72.

[45] Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 21(b), 88 Stat. 55, 68.

[46] *See supra* text accompanying note 7.

[47] *See infra* p. 36.

transit employees worked for publicly owned systems.[48] Furthermore, when Congress or the Department of Labor did act, those actions were immediately challenged in the courts.[49]

Federal appellant concedes that "the specific federal legislation at issue here is of comparatively recent vintage," and "Congress did not fully exercise its [alleged] powers to legislate respecting terms of employment in the transit industry until relatively recently." U.S. Br. 41-42. Thus federal appellant demonstrates that the States' provision of local transit services did not "erode federal authority in areas traditionally subject to federal statutory regulations," *LIRR*, 455 U.S. at 687. Rather, the federal government here seeks to extend its power into an activity the States were already conducting and into an area of historic regulation by the "States as employers." *See Hodel*, 452 U.S. at 286 (quoting *National League of Cities*, 426 U.S. at 841).[50] "[T]he Federal

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[48] By late 1964, 56 percent of transit employees worked for public authorities. *Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. 297 (1965) (testimony of C. Cochran).

[49] Federal appellant would have this Court ignore the fact that the Court's view of the Tenth Amendment has changed since 1966 when *Wirtz* was decided. *See* U.S. Br. 49-50 and n.38. It is not clear what federal appellant means by warning against a "doctrine of creeping unconstitutionality," *id.* at 50. No sinister scenario is suggested by the answer to federal appellants' question: "[o]n what date did the public transit provisions of the FLSA, assuredly valid when enacted, become unconstitutional?" *Id.* That date was June 24, 1976 when *National League of Cities* overruled *Wirtz*.

[50] The court below recognized that:

> the FLSA is not a current manifestation of a traditional federal concern for labor relations in the mass transit field. Transit was specifically exempted from coverage from the time of the Act's original passage in 1938 until 1961 amendments subjected private transit operators to minimum wage provisions (but not the overtime pay provisions). Pub. L. No. 75-78, § 13(a)(3), 52 Stat. 1067 (1938); Pub. L. No. 87-30, §§ 2(c),

Government cannot usurp traditional state functions [just as] there is no justification for a rule which would allow the states . . . to erode federal authority in areas traditionally subject to federal statutory regulation." *LIRR*, 455 U.S. at 687.

The fact that some activities protected by *National League of Cities* were at one time conducted more significantly in the private sector than in the public sector was not relevant to that decision. Perhaps this was because, unlike the acquisition of an interstate railroad, there was no reason to believe that a tradition of federal statutory regulation would be eroded by state acquisition of such activities. For, like local mass transit, and unlike railroads where there is "no comparable history of long-standing state regulation," *LIRR*, 455 U.S. at 688, the protected activities in *National League of Cities* were subject to extensive state regulation.[51] These are functions within the traditional sphere of state responsibility, and nothing in *LIRR* suggests that state acquisition of a private hospital, university or local mass transit system would so erode federal regulatory authority as to deny the States the immunity established by *National League of Cities.* Indeed, publicly owned hospitals, recreational facilities, schools and universities, museums

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9, 75 Stat. 65, 66, 72 (1961). Public employers remained entirely exempt until 1966. *Diminution of federal authority resulting from private to public conversions during this period, would have been attributable to the statutory exemption and consistent with congressional intent.*

U.S.J.S. 7a-9a (emphasis added).

[51] Hospital regulation includes state licensing of hospitals and medical personnel. *See* American Hospital Association, *AHA Guide* C18-C19 (1983). Similarly, education, police and fire protection are heavily state-regulated. *See, e.g.*, Education Commission of the States, *Working Paper No. 2, Survey of States' Teacher Policies*, Tables I-IV (Oct. 1983) (teacher certification); Education Commission of the States, *A 50-State Survey of Initiatives in Science, Mathematics and Computer Education* 29-41 (1983) (curriculum guidelines and graduation requirements).

and sanitation services that have been acquired from the private sector are no longer subject to FLSA requirements.

In an attempt to fabricate an unconstitutional erosion of comprehensive federal regulation, appellants cite other general federal labor laws which apply to private local transit. U.S. Br. 39-40; G. Br. 19-20. But the statutes cited do not establish a *comprehensive* scheme of federal regulation unique to transit labor relations, as, for example, the Railway Labor Act does for railroads. Instead, the cited statutes regulate particular employment conditions for virtually all private employers in interstate commerce, including the private counterparts of the activities expressly protected in *National League of Cities*. In contrast, public employers, including publicly owned transit systems, are generally exempt from such federal labor laws and instead are subject to state collective bargaining laws that govern wages and hours for their employees. U.S. Department of Labor, *Summary of Public Sector Labor Relations Policies* (1981).[52]

Thus, the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981), regulates the private conduct of all the activities listed in *National League of Cities, e.g.*, private hospitals and schools, as well as pri-

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[52] Federal appellant also cites some federal statutes that apply to traditional governmental functions, such as the Equal Pay Act, 29 U.S.C. § 206 (1976 & Supp. V 1981), which was upheld against Tenth Amendment challenge in *Pearce v. Wichita County*, 590 F.2d 128 (5th Cir. 1979). Like *EEOC*, in which the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976 & Supp. V 1981), was upheld against Tenth Amendment challenge by a state park game warden, *Pearce* involved an employment category, public hospital employees, which with respect to the FLSA was expressly immunized by *National League of Cities*. Thus, the fact that some federal labor laws may even apply to traditional governmental functions does not make the particular governmental functions any less traditional for the purposes of the FLSA wage and overtime compensation requirements—which *National League of Cities* held cannot be imposed on the States.

vate transit, but it specifically exempts state and local government employees, including public transit employees. 29 U.S.C. § 152(2) (1976). *See also Jackson Transit Authority*, 457 U.S. at 23. For this reason the district court concluded, "any diminution of federal authority under the NLRA that results from a private to public conversion is attributable to this statutory exemption, not to the Tenth Amendment, and is consistent with congressional intent." U.S.J.S. 7a-9a. Furthermore, the statutes cited, except perhaps the NLRA, were enacted after the state and local governments of many of the nation's major metropolitan areas were providing local public transit services. *See supra* note 30. Unlike the railroad regulation in question in *LIRR* and the national emergency wage freeze legislation at issue in *Fry*, regulation of the labor relations of local mass transit, publicly or privately owned, has not presented a problem that Congress believed "only collective action by the National Government might forestall." *National League of Cities*, 426 U.S. at 853.

B. By Accepting Federal Financial Assistance, The States Should Not Be Held To Have Tacitly Unleashed Boundless Federal Commerce Clause Authority.

Unless this Court adopts a "static historic view," [53] appellants have not presented any convincing reasons why publicly owned local transit services are constitutionally distinguishable from activities expressly protected in *National League of Cities*. Appellants thus search for another constitutionally significant basis upon which to justify federal usurpation of the States' authority to fix the hours and wages of their public transit employees. They seize upon the federal funding to the States under UMTA to shore up their weak argument that the FLSA may

[53] This view, of course, was rejected in *LIRR*, 455 U.S. at 686.

be applied to publicly owned local transit. The significance of UMTA funding is elusive, however.

1. This Court was well aware that the activities protected in *National League of Cities* received substantial federal financial support, *see* 426 U.S. at 878 (Brennan, J., dissenting); yet the Court nevertheless held that the FLSA could not be applied to them. UMTA funding is no more significant than the federal funding of other traditional activities simply because, if appellants' allegations are correct, it provided an incentive for public ownership.

Contrary to appellants' contention, U.S. Br. 12, 17, 26, 28; G. Br. 20-21, the trend toward public ownership of local mass transit was well established before the enactment of UMTA. Prior to the availability of UMTA funds, the majority of the largest urban centers had publicly owned transit systems. Of the nation's twenty-one largest cities (*i.e.*, with populations in excess of 500,000), twelve were served by publicly owned transit systems by 1964. *Compare supra* note 30 *with SAUS: 1965*, Table 14 at 19-20. There is no doubt that federal aid helped many cities, particularly smaller cities, to fulfill their responsibility to provide transit services when private systems were unable to satisfy the public welfare obligations that urban transit had assumed.[54] But state and local governments have obligated substantial portions of their limited resources to perform this service because it is an integral part of their traditional function of facilitating intra-urban transportation.[55] It is simply historical revi-

[54] "Today nine-tenths of the mounting expenses of city governments are for services that did not exist at the turn of the century—traffic engineering, airports, parking facilities, health clinics, and a long list of others." W. Owen, *The Metropolitan Transportation Problem* 4-5 (rev. ed. 1966).

[55] As noted *supra* note 22, state and local operating assistance contributes a substantially greater share of public transit revenues than does federal operating assistance. *Transit Fact Book* 45. State

sionism to imply that state and local governments provide transit services because federal aid enticed them into doing so. Indeed, Congress made clear that UMTA was not intended to encourage the acquisition of private transit systems by public agencies. *See, e.g.*, 49 U.S.C. § 1602(e) (1976 & Supp. V 1981); S. Rep. No. 82, 88th Cong., 1st Sess. 19 (1963); H.R. Rep. No. 204, 88th Cong., 1st Sess. 12, *reprinted in* 1964 U.S. Code Cong. & Ad. News 2569, 2581; 110 Cong. Rec. 14,905 (1964) (statement of floor leader Rains). Rather, Congress responded to pleas from state and local government officials for financial assistance that would help the States preserve a function they believed critical to the local public welfare,[56] and therefore a "core state function." *EEOC*,

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and local governments have also provided substantial capital funds. *See id.* at 29. Federal appellant's argument regarding federal funding of transit is grossly misleading. *See, e.g.*, U.S. Br. 34-36. He states that "the federal government . . . has supplied a larger share of [transit] operating subsidies than state government in many recent years," *id.* at 34, but this ignores the facts stated in appellant's own source that during those years local governments have provided a substantially greater share of operating assistance than has the federal government and that state and local government assistance combined has been in the range of 70-80 percent of all government operating assistance. *Transit Fact Book* 28-29. Another incomplete quotation in federal appellant's brief, U.S. Br. 31, implies that APTA has conceded the importance of federal funds to widespread state and local government takeover of transit services. He fails to include the first part of the sentence, which states: "*The relatively small amount of funding* during the 1960s was used by many cities to buy the vehicles and facilities owned by private transit systems that were on the verge of bankruptcy." *Transit Fact Book* 29 (emphasis added).

[56] *See* U.S. Br. 12; *see also Urban Mass Transportation Act of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency*, 88th Cong., 1st Sess. 88 (1963) (statement of J.F. Collins, Mayor of Boston); *id.* at 91 (statement of E. Peabody, Governor of Massachusetts); *id.* at 312 (statement of P.H. Sachs, Chairman of Maryland Metropolitan Transit Authority); *id.* at 414-15 (statement of W.D. McClelland, Chairman of the Board of County Commissioners of Allegheny County); *Urban Mass Transporta-*

103 S. Ct. at 1060. Federal grant aid to cities in support of transit services—like federal aid to education, hospitals and law enforcement—simply demonstrates that Congress thought it important that states be able to meet their local public welfare responsibilities in these areas.[57]

No doubt changing circumstances such as the increased use of automobiles and the migration to the suburbs, which were due in large part to substantial federal highway funding,[58] contributed greatly to the collapse of pri-

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tion—1963: Hearings on S. 6 and S. 917 Before a Subcomm. of the Senate Comm. on Banking and Currency, 88th Cong., 1st Sess. 188-89 (1963) (statement of G.S. Clinton, Mayor of Seattle).

[57] Federal funding has not made state provision of sanitation, health or educational services any less a traditional governmental function. Many such state and local programs would not have existed without federal funding. For example, federal funding of advanced waste treatment facilities began in 1956. The Senate Report on the Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246 (repealed 1970), refers to "the long period of disregard and neglect that preceded Federal legislation in this field." S. Rep. No. 1367, 89th Cong., 2d Sess. 7, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3969, 3975. Similarly, comprehensive, statewide health planning was "spotty and fragmented" prior to federal funding of such planning, *see* H.R. Rep. No. 2271, 89th Cong., 2d Sess. 4, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3830, 3833. *See also* National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, §§ 1512, 1513, 88 Stat. 2225, 2232-39 (specifies structure and functions of local health systems agencies, which may themselves be local governmental units); Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3(a), 89 Stat. 773, 774 ("State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children;" the federal role is to be "a catalyst to local and State program growth," S. Rep. No. 168, 94th Cong., 1st Sess. 5, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1429).

[58] *See* S. Rep. No. 82, 88th Cong., 1st Sess. 4 (1963).

vate urban transit systems.[59] UMTA represents in part a congressional attempt to redress the imbalance between federal highway funding and support for mass transit so that the States could fashion the "completely balanced transportation system," *see* U.S. Br. 29, that they believe would best meet the needs of local residents and the community at large.[60]

2. Appellants' argument must therefore rest on the onerous notion that by accepting federal funds to assume a function necessary to the life of the community, state and local governments—without express notice in the statute or in a condition of the grant—unleashed boundless federal Commerce Clause authority over an integral activity otherwise entitled to Tenth Amendment protection.

This argument is so wholly inconsistent with this Court's precedents that it must be scrutinized closely. *See, e.g., Pennhurst*, 451 U.S. at 17; *Harris v. McRae*, 448 U.S. 297 (1980); *Employees of Department of Public Health and Welfare v. Department of Public Health and Welfare*, 411 U.S. 279 (1973).

Like the program of aid for the developmentally disabled at issue in *Pennhurst*, UMTA "is a federal-state grant program whereby the Federal Government provides financial assistance to participating States" for the provision of public mass transit services. 451 U.S. at 11. It is not any different fundamentally from federal grant programs that assist schools, hospitals, police and fire departments and sanitation.[61] "Like other federal-state coopera-

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[59] H.R. Rep. No. 204, 88th Cong., 1st Sess. 4, *reprinted in* 1964 U.S. Code Cong. & Ad. News 2569, 2571-72.

[60] S. Rep. No. 82, 88th Cong., 1st Sess. 4 (1963); H.R. Rep. No. 204, 88th Cong., 1st Sess. 4, *reprinted in* 1964 U.S. Code Cong. & Ad. News 2569, 2571-72; 110 Cong. Rec. 14,907 (1964) (statement of floor leader Rains).

[61] Federal funding of other traditional governmental functions has far exceeded that of local public mass transit. The federal ap-

tive programs, the Act is voluntary and the States are given the choice of complying with the conditions set forth in the Act or foregoing the benefits of federal funding."

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pellant states that "[b]y 1978 more than $13 billion in [federal] aid [to transit] had been awarded under the UMT Act and other federal programs. . . . Federal capital grants exceeded $2 billion annually in fiscal 1978 and 1979." U.S. Br. 27-28. In comparison, however, between 1965 and 1978 (excluding 1967, for which data are not available), more than $57.8 billion in federal aid was given to public elementary and secondary schools. (For years 1966, 1970, and 1975-78, *see SAUS: 1981*, Table 218 at 135; for years 1965, 1968 and 1969, *see SAUS: 1970*, Table 149 at 105; for years 1971 and 1972, *see SAUS: 1972*, Table 157 at 106; for 1973, *see SAUS: 1976*, Table 186 at 117; and for 1974, *see SAUS: 1980*, Table 222 at 141.) For the two-year period, 1977-78, the federal government provided $7.7 billion in aid to public elementary and secondary schools. W. Grant & L. Eiden, *Digest of Education Statistics*, Table 66 at 75 (1982).

Similarly, a comparison of federal funding of sanitation and public transit shows that during the ten-year period, 1971-81, the federal government had awarded states $27.11 billion in sewage treatment construction grants. (U.S. Department of the Treasury, *Federal Aid to States* (published annually) (*"FAS: 19xx"*). *FAS: 1971* at 4; *FAS: 1972* at 4; *FAS: 1973* at 6; *FAS: 1974* at 5; *FAS: 1975* at 6; *FAS: 1976* at 8, 27; *FAS: 1977* at 6; *FAS: 1978* at 6; *FAS: 1979* at 7; *FAS: 1980* at 10; and *FAS: 1981* at 9.) In 1979 alone, the federal government provided $3.7 billion in subsidies for sewage and sanitation services, *FAS: 1979* at 7, which accounted for 31.4 percent of total local expenditures of $11.77 billion on such services. U.S. Department of Commerce, *Environmental Quality Control, Governmental Finance: Fiscal Year 1978-1979*, Table C at 4 (1981). This compares with only $2.96 billion in 1979 for local public mass transit operating subsidies and capital grants, or 36.6 percent of available revenues, *Transit Fact Book*, Table 5 at 46 and Table 19 at 67.

With such substantial federal financial assistance now necessary to support the capability of state and local governments to perform essential public services such as education, sanitation, and public local mass transit, it would indeed be an odd constitutional doctrine that drew the line at some arbitrary percentage of federal assistance and rested a fundamental principle of constitutional law on the shifting sands of the federal budget process.

Id. The question in this case is not whether Congress has the power pursuant to the Spending Clause [62] to condition federal assistance to public transit systems on compliance with the FLSA, because Congress did not impose this condition. In accepting federal assistance to acquire, operate or expand this necessary public service, the States were accepting only the federal authority expressed in the statute or the grant, *Pennhurst*, 451 U.S. at 16-17. UMTA does not condition grants on consent to other federal labor regulations, including the FLSA. Moreover, unlike the Railway Labor Act directly at issue in *LIRR*, UMTA was not enacted pursuant to the Commerce Clause and does not purport to be part of a comprehensive system of federal regulation of local transit, *Local Division 589*, 666 F.2d at 633-34. Nor does any such system exist. Congress did address labor relations in UMTA, but instead of imposing specific federal conditions such as the FLSA requirements, it deliberately chose a less intrusive approach, providing in section 13(c) that state and local governments should make "arrangements" to preserve existing collective bargaining rights as a condition of federal funding. 49 U.S.C. § 1609(c) (1976). In *Jackson Transit Authority*, 457 U.S. at 27, this Court unanimously held that Congress "did not intend [UMTA] to create a body of federal law applicable to labor relations between local governmental entities and transit workers." Congress respected the States' need for flexibility to manage their labor relations with local transit employees consistently with their public service obligations.[63]

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[62] The relationship between the Spending Clause and the Tenth Amendment was expressly not addressed in *National League of Cities*, 426 U.S. at 852 n.17. *See also Pennhurst*, 451 U.S. at 17 n.13.

[63] In *Jackson Transit Authority*, 457 U.S. at 27, this Court held that section 13(c), which addresses state and local transit employees' collective bargaining rights in, for example, wages and hours,

UMTA's section 13(c) allows the States to select among alternative means to preserve rights of employees of private transit systems. The FLSA, in contrast with section 13(c), is so specific in its wage and hour provisions that it would be impossible for the States to preserve necessary options and at the same time fulfill federal requirements.[64]

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does not establish any *federal* rights for employees of transit systems receiving UMTA funds in addition to those rights established by *state* law. This Court stated:

> Section 13(c) would not supersede state law, it would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations.

Id. at 27 (footnote omitted).

Jackson Transit Authority sharply distinguished the effect of section 13(c) of UMTA on the federal rights of transit workers from the effects of a federal labor statute on the federal rights of railroad employees. *Id.* at 27 n.9. The Court thus found that the law applicable to local public transit workers was *not* similar to its decision in *Norfolk & Western Railroad Co. v. Nemitz*, 404 U.S. 37 (1971), that "a railroad's employees stated federal claims when they alleged a breach of an agreement entered into by the railroad under § 5(2)(f) of the Interstate Commerce Act," *Jackson Transit Authority*, 457 U.S. at 27 n.9; with respect to transit, the Court determined that section 13(c) of UMTA "addresses 'municipal and State problems, and not Federal problems.'" *Id.* at 28 n.11.

[64] Thus, as this Court concluded in *EEOC*, the FLSA and the ADEA at issue in that case have a very different effect on the States' policy choices. Unlike the FLSA, the ADEA

> does not require the State to abandon [its] goals, or to abandon the public policy decisions underlying them.
>
> Perhaps more important, . . . in distinct contrast to the situation in *National League of Cities*, even the State's discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard.

103 S. Ct. at 1062 (citations omitted).

This Court has made clear that:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'. . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst, 451 U.S. at 17 (citations omitted). *Pennhurst* and *Jackson Transit Authority*, together, establish that in enacting UMTA Congress has not attempted to require state compliance with the FLSA through the exercise of its Spending Clause power.

It would indeed be a strange conclusion, therefore, that Congress, by providing UMTA funds through the exercise of its Spending Power, has implicitly eliminated the Tenth Amendment limitation on its Commerce Clause powers. Again, as this Court stated in *Pennhurst*, 451 U.S. at 16-17: "Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under [some other constitutional] authority [in addition to the Spending Clause when Congress has not] expressly articulate[d] its intent to legislate. . . . The case for inferring intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." Nevertheless, appel-

lants in effect urge this Court to decide that in the enactment of UMTA Congress intended to legislate pursuant to the Commerce Clause, as well as the Spending Power, and to imply a condition on the receipt of federal funds which, as an exercise of Commerce Clause power unrestrained by the Tenth Amendment, would alter permanently the balance of federal-state relations even though the States did not realize the existence of such an implied condition at the time they accepted the federal funds.[65]

3. Appellants also contend that UMTA funding has established a federal interest that outweighs the interests of the States. But, as already noted, *supra* pp. 36-39, the federal funding here, like most federal funding of other traditional functions, is simply helping the States perform a function that they may have chosen to provide. Since the revenue raising ability of states is much more limited than that of the federal government, it is not surprising that states have sought federal financial assistance for public transit as they have done in virtually every other area of traditional state governmental functions.

Federal appellant argues, furthermore, that local public mass transit systems are not "integral to the functioning of state and local governments [because] the very shape of transit systems as they exist today reflects the imprint of *federal* policy" encouraging "comprehensive area wide plan[ning]." U.S. Br. 32-33. If local governments of cities and their suburbs "were induced [by the federal government] . . . to band together and to create metropolitan transit systems spanning the entire urban area," *id.* at 32, this type of federal incentive is indistinguishable from similar federal planning incentives

[65] Appellants' argument is particularly threatening because it constitutes a realignment that the States cannot cure since the rationale is based on initial, not continuing, acceptance of federal money. *Cf. Guardians Ass'n v. Civil Serv. Comm'n*, 103 S. Ct. 3221, 3229 (1983) (States may prefer to terminate receipt of federal money rather than comply with a condition if they disagree with its interpretation).

that have induced regional coordination among local governmental units in providing many of the public services expressly protected in *National League of Cities.*[66]

State and local governments must have a strong interest in providing a service before they will assume the function, regardless of whether federal funds are available. It drains their limited resources in ways not compensated for by federal funds, as they must match a share of federal funds and generate revenue through the local tax base. It would be a confusion of the respective functions of the different levels of government to conclude that simply because the federal government raises revenues and concurs in the States' judgment that grants should be given to provide a basic community service, that the federal government can impose the full force of federal private sector regulations on state agencies. Through uniform national taxation, the federal government has resources the States cannot approach. If federal revenue is shared with the States to enable them to provide a service they deem integral to community life, the result should not be that at some undetermined time in the future the States, without warning, will find they have surrendered substantial portions of their sovereignty.

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[66] *See, e.g.,* National Health Planning and Resources Development Act, 42 U.S.C. § 300m-4 (1976 & Supp. V 1981) (grants for planning by state health systems agencies and state health planning development agencies); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6942-6949 (1976) (federal grants and guidelines for comprehensive planning for solid waste disposal); Federal Water Pollution Control Act, 33 U.S.C. §§ 1255, 1256, 1281-1291 (1976 & Supp. V 1981) (grants to state agencies for comprehensive water quality control plans and encouragement of areawide waste treatment plans).

III. Alternatively, Application Of The Fair Labor Standards Act To Publicly Owned Local Mass Transit After *National League of Cities* Is Impermissible In The Absence Of A Subsequent Amendment To That Act.

Before *National League of Cities* overruled *Wirtz*, Congress extended FLSA requirements to all state and local government agencies, including public transit agencies. *National League of Cities* struck down as unconstitutional most of the intended coverage.

Despite the presence of a standard severability clause in the FLSA, 29 U.S.C. § 219 (1976), it is not probable that Congress would have intended to enact a law only directed at a small class of public employees if it could no longer carry out its intent to cover all state and local employees.[67] *See Sloan v. Lemon*, 413 U.S. at 834. This statutory scheme is quite unlike that considered in *Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764, 2775 (1983). Several categories of public employees covered by the FLSA were brought within its ambit in 1966; at that time most public transit employees were excluded from the overtime compensation provisions. When the law was broadened in 1974, and the coverage of the large number of transit employees was phased in, Congress was acting on the strength of *Wirtz* and its belief that it could comprehensively regulate wages and hours for all state public employees. The presumption articulated in *Chadha* should not be applied to federal regulation of state activity because congressional regulation of the States has always required express statement of congressional intent. *Cf. Pennhurst*, 451 U.S. 1 (1981).

Moreover, what remains after severance is not "fully operative" and "workable administrative machinery."

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[67] *National League of Cities* expressly eviscerated coverage for what is currently 73 percent of state and local government employees. *SAUS: 1983*, Table 501 at 303.

Chadha, 103 S. Ct. at 2775. Such federal intervention in wage and hour decisions for a small number of state employees and not for others is divisive and may undermine the States' leverage in labor negotiations with its employees not subject to federal law.

Therefore, the minimum wage and overtime compensation provisions of the FLSA should not be applied to publicly owned local mass transit, even if public transit were not an integral operation in an area of traditional governmental function, because these requirements are not severable from the unconstitutional provisions of the statute. This Court may rely on this alternative argument to affirm even though it was not the ground relied on by the lower court. *See Fusari v. Steinberg*, 419 U.S. 379, 387 n.13 (1975).

CONCLUSION

The district court correctly concluded that, like protected activities expressly mentioned in *National League of Cities*, publicly owned local transit services are "important governmental activities," 426 U.S. at 847, which are "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services," *id.* at 851 (footnote omitted). Indeed, these are precisely the kinds of public welfare services that "States have traditionally afforded their citizens." *Id.*

Since this Court has held, and repeatedly confirmed, that the precise federal regulation at issue here impermissibly interferes with an essential attribute of state sovereignty—the power to fix wages and overtime compensation—and that when applied to integral operations in areas of traditional governmental functions it "endangers [the States'] 'separate and independent' existence," *LIRR*, 455 U.S. at 690 (quoting *National League of Cities*, 426 U.S. at 851), it follows that publicly

owned local mass transit, as an integral and traditional governmental function, may not be subject to the FLSA.

Accordingly, this Court should affirm the court below.

Respectfully submitted,

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