Nos. 82-1951 and 82-1913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.,

Appellees.

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.,

Appellees.

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

BRIEF OF SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY

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QUESTIONS PRESENTED

1. Whether *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), bars application of the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (1976 & Supp. V 1981) ("FLSA") to the operations of San Antonio Metropolitan Transit Authority because it is performing an integral operation in an area of traditional governmental functions?

2. Whether the FLSA's minimum wage and overtime provisions, having been held inapplicable to most state and local government employees in *National League*, are inapplicable to all such employees in the absence of congressional enactment of a constitutionally valid amendment to that Act?

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On Appeals From The United States District Court For The Western District Of Texas

BRIEF OF SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the laws reproduced in the Government's brief, certain provisions from Texas Revised Civil Statutes Annotated, articles 1118x (Vernon Supp. 1982-83), 6663b and

6663c (Vernon 1977) are involved in this case. The more important provisions are set forth in an appendix to this brief, *infra*, 1a-8a, along with additional excerpts from the FLSA and the Urban Mass Transportation Act, 49 U.S.C. § 1601, *et seq.* (1976 & Supp. V 1981) ("UMTA").

STATEMENT OF THE CASE

An Historical Overview Of The FLSA, As Applied To The States

As originally enacted in 1938, the FLSA set minimum wage and overtime pay requirements for employees engaged in commerce or the production of goods for commerce. Specifically excluded were states and their political subdivisions as well as employees of "street, suburban, or interurban electric railway[s], or local trolley or motorbus carrier[s]." Pub. L. No. 75-718, §§ 3(d), 13(a)(9), 52 Stat. 1060, 1067 (1938).

In 1961, the FLSA was amended to extend minimum wage coverage to employees of private electric railways and trolley and motorbus carriers having gross revenues of one million dollars or more; an exemption from the overtime requirements for all such employees was simultaneously enacted. Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72 (1961). The exemption from both the minimum wage and overtime provisions was continued for all employees of such entities having gross revenues of less than one million dollars. *Id.* § 9. The total exemption of public employers remained unchanged.

In 1966, the FLSA was amended to cover states or their political subdivisions with respect to schools, hospitals and "street, suburban or interurban electric railway[s], or local trolley or motorbus carrier[s] . . . [whose] rates and services . . . are subject to regulation by a State or local agency . . . ." Pub. L. No. 89-601, §§ 102(a) & 102(b), 80 Stat. 830, 831 (1966). The threshold level for coverage was reduced to $250,000, and the overtime exemption was continued for transit operators, drivers and conductors. *Id.* §§ 102(c), 206(c). In 1968, the amendment covering public schools and hospitals was held constitutional. *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).

In 1974, the FLSA was amended to reach all state and local government employees and, in stages, to repeal the overtime exemption for drivers, operators and conductors effective May 1, 1976. Pub. L. No. 93-259, §§ 6(a)(1), 6(a)(6) & 21(b)(1), 88 Stat. 55, 58, 60, 68 (1974). The constitutionality of the amendments covering state and local government employees was challenged in a landmark case in which this Court held that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art I, § 8, cl 3." *National League*, 426 U.S. at 852. The Court did not identify all constitutionally protected state activities, but listed by way of example "fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* at 851. The Court expressly overruled *Maryland* v. *Wirtz*, and thereby extended constitutional immunity to schools and hospitals, which it concluded also "provide[] an integral portion of those governmental services[1] which the States and their political subdivisions have traditionally afforded their citizens." 426 U.S. at 855. The only activity identified as not being immune was a state-operated railroad. *Id.* at 854 n.18. Public transit was not mentioned.

On remand, the court recognized that this Court's decision did not provide an exhaustive list of exempt activities and left a gray area for future resolution. *National League of Cities* v. *Marshall*, 429 F. Supp. 703, 705-06 (D.D.C. 1977). As a result, the Secretary of Labor issued regulations (29 C.F.R. §§ 775.2 & 775.3) under which the Wage and Hour Administrator is to determine those operations against which he will seek to enforce the FLSA and to publish those determinations as amendments to section 775.3(b).

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[1] Garcia's brief (pp. 7, 8, 13, 23, 24) is largely premised on the faulty and self-serving hypothesis that government provision of a "service" should be treated differently from the activities exempted in *National League*. Garcia's strained logic disregards the fact that the very activities listed in *National League* were denominated services by this Court.

The Proceedings In This Case

By letter dated September 17, 1979 (R. 163), to the Amalgamated Transit Union, the Deputy Wage and Hour Administrator concluded that "publicly operated local mass transit systems such as the San Antonio Transit System [SAMTA's municipally-owned predecessor] . . . are not within the constitutional immunity of the Tenth Amendment as defined by the Supreme Court in *National League*. . . ." On November 21, 1979, SAMTA filed this action for a declaratory judgment that the FLSA's minimum wage and overtime provisions are inapplicable to its operations. SAMTA's operators then brought a separate action for alleged unpaid overtime and liquidated damages, which was stayed pending disposition of the constitutional issue in this suit. The Secretary of Labor counterclaimed against SAMTA for backpay and injunctive relief, and the American Public Transit Association ("APTA") and Joe G. Garcia, one of SAMTA's employees, were permitted to intervene.

On November 17, 1981, the district court held that local publicly owned mass transit systems constitute integral operations in areas of traditional governmental functions under *National League* and entered summary judgment in favor of SAMTA and APTA. Gov't J.S. App. C. Upon direct appeal, this Court vacated the district court's decision and remanded for "further consideration" in light of its intervening decision in *United Transportation Union* v. *Long Island Rail Road*, 455 U.S. 678 (1982) ("LIRR"). *Donovan* v. *San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982).

On February 18, 1983, the district court reentered summary judgment in favor of SAMTA and APTA.[2] The court articulated the question before it as "whether public transit is one of 'the *numerous* line and support activities which are well within the area of traditional operations of state and local govern-

[2] A copy of the district court's opinion has been reproduced as Appendix A to the Government's jurisdictional statement and is cited in this brief as "Gov't J.S."

ments.' " Gov't J.S. 3a (emphasis in original). The court found that "mass transit has traditionally been a state prerogative and responsibility, not a federal concern," and that "[u]nlike the railroad in *LIRR*, . . . neither labor relations nor other aspects of mass transit have been the subject of federal regulation that will be eroded by recognizing a Tenth Amendment immunity." Gov't J.S. 6a, 7a. The court also concluded that "[t]he states themselves have given public transportation almost universal recognition as an essential state function, thus placing it on a par with the [*National League of Cities* v.] *Usery* functions," and that "Congress [has] recognized the similarities between public transit and the *Usery* functions." Gov't J.S. 12a, 13a. The court rejected the claim that partial federal funding of transit defeats *National League* immunity because the federal funding statute for transit "is an exercise of the Congressional Spending Power," "federal funding supports each of the *Usery* functions," and "the recent dramatic shifts in federal priorities show that federal funding is a particularly inappropriate test for a state's Tenth Amendment immunity." Gov't J.S. 14a, 16a.

The district court also rejected the "[p]ervasiveness of government performance of a function" and a "function's origins in the private sector" as bases for distinguishing transit from the activities listed in *National League* and cited statistics showing that publicly owned hospitals would not be exempt under such a test. Gov't J.S. 16a, 17a. Finally, the court concluded that transit satisfied the four immunizing factors set out in *Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979): transit "benefits the community as a whole"; it "is provided at a heavily subsidized price"; transit "services cannot be provided at a profit"; and "government is today the primary provider of transit services." Gov't J.S. 18a, 19a.[3]

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[3] Since *LIRR* was decided, four federal appellate courts have considered this same question. However, contrary to the Government's claim (brief p. 10), all courts of appeals have not "unanimously recognized" the constitutionality of FLSA coverage of publicly owned transit systems. In *Molina-Estrada* v. *Puerto Rico Highway Auth.*, 680 F.2d 841 (1st Cir. 1982),

Facts About Public Transit In San Antonio[4]

Publicly owned transit has existed in San Antonio since 1959, when the City acquired the San Antonio Transit Company and began providing transit as a municipal service through the newly created San Antonio Transit System ("SATS").[5] The City's purchase was financed by revenue

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the court held that a highway authority which, among other things, had the power to operate a mass transportation system (and intended to build one) was exempt under *National League* because its activities were "sufficient to indicate that the Authority is responsible for 'traditional' or 'integral' governmental activities." *Id.* at 845. The court could find "no meaningful distinction between the Authority's activities, and those, for example, of a municipal airport, . . . or the parks, recreation and public health activities mentioned in *National League of Cities* itself." 680 F.2d at 846. *National League* immunity was denied in *Alewine* v. *City Council of Augusta, Ga.*, 699 F.2d 1060 (11th Cir. 1983), *petitions for cert. pending* (Nos. 82-1974 & 83-257) and *Kramer* v. *New Castle Area Transit Auth.*, 677 F.2d 308 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 786 (1983), and summary judgment on this issue was reversed in *Dove* v. *Chattanooga Area Regional Transp. Auth.*, 701 F.2d 50 (6th Cir. 1983). *Alewine* and *Kramer* were based on an historical approach, which was eschewed by this Court in *LIRR*, and on federal funding under UMTA, which contravenes this Court's decision in *Jackson Transit Auth.* v. *Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982), see discussion *infra* pp. 29-33, 41-45. *Dove* relied in large part on this Court's denial of certiorari in *Kramer* and federal funding of transit.

[4] Unless another citation is given, the facts are taken from the affidavit of Wayne Cook. R. 196-203.

[5] Garcia's brief (p. 3) gives the erroneous impression that the City may have created SATS to make money. As newspaper articles at the time indicate, this was not the case. According to one article, negotiations between the City and the transit company for a new franchise broke down over increased fares and "inadequate city control over future fare increases." As a result, the City called a bond election to purchase the system. The San Antonio Light December 23, 1958 at A1, col. 1 and A4, col. 1. An article in The Light on January 11, 1959, recites that "if voters veto the bond issue the city will be forced to grant a new franchise to the present company on the company's terms . . . [which] would almost certainly include continued increases in fares"; that the transit company intends "to double the fares of school children"; and that "the city . . . held that fares should be reduced rather than increased." The article mentions a newsletter from the research and planning council and states that public transit "is a declining industry due to soaring costs, declining patronage and vanishing profits," which can result

bonds, and no federal funds were involved in the acquisition. For forty-four years before 1959, the City regulated street transportation pursuant to authority from the state. See *infra*, pp. 24-26.

In 1973, the Texas Legislature enacted article 1118x, which authorizes the establishment of metropolitan rapid transit authorities and provides that they are "exercising public and essential governmental functions. . . ." *Id.* § 6(a).[5] SAMTA was created under article 1118x by the City Council of San Antonio in 1977. After an election was held confirming SAMTA's creation and authorizing it to levy a one-half percent sales tax, SAMTA purchased the facilities and equipment of SATS from the City and commenced operations on March 1, 1978. SAMTA funded the purchase through bonds secured by its revenues and certain property. No federal funds were used in the purchase.

During its first two fiscal years, SAMTA's regularly scheduled line-service buses carried approximately 63.4 million passengers over more than 26.5 million bus miles. Of these passengers, approximately 5.3 million were senior citizens, 1.5 million were handicapped persons and 14.6 million were elementa-

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in "deficits and subsidies . . . [that] have to be provided for out of taxes." The article closes by stating that "City officials are well aware of these complications. But they simply see no alternative to municipal ownership unless public transportation is to be discontinued. Because this is an issue of broad public policy they have referred the question to the voters." *Id.* at A1, col. 1 & A4, col. 1.

[5] Under article 1118x, an authority can, among other things, exercise the right of eminent domain; establish and maintain fares subject to approval by a local government approval committee; make all rules and regulations governing the use, operation and maintenance of the system; issue bonds and notes; levy and collect motor vehicle emission taxes; levy, collect and impose a local sales and use tax subject to a local election; levy and collect any kind of tax other than an ad valorem tax on property which is not prohibited by the Texas constitution; and prescribe the compensation of its employees. *Id.* §§ 6, 6E, 7, 8, 11A, 11B, 12(a). An authority *must* provide service to incorporated cities and unincorporated areas adjacent to its service area if the electorate of such a city or area vote for annexation into the authority. *Id.* § 6A.

ry, junior high, high school and college students, and children under 12. Approximately 3.3 million other student passengers were transported to and from school by SAMTA on nonline school bus service pursuant to arrangements with two Bexar County school districts. It is estimated that at least two-thirds of all passengers riding SAMTA's regular line-service buses are travelling to or from school or their jobs. SAMTA also serves the needs of the elderly and handicapped through a fleet of lift-equipped vans, which cost riders 50¢ and SAMTA over $8.50 per trip.[7]

SAMTA operates almost entirely from local sales taxes, federal funds and fare box receipts. Fares charged to passengers are nominal, ranging from no charge for the smaller El Centro buses that circulate through the downtown area, up to 60¢ per ride for the longest runs, with children, the elderly and the handicapped paying 10¢. The average fare is 18¢. For SAMTA's first two fiscal years, total revenues from line-service fares were about $10.1 million, compared to operating expenses for such services of about $41.6 million. SAMTA had an operational deficit of about $31.5 million, which was satisfied from sales taxes totalling approximately $26.8 million, operational grants of approximately $12.5 million from the Urban Mass Transportation Administration, and other operational revenues of approximately $.7 million.

Summary Of Argument

I. In *National League* this Court held that the States' power to determine wages and hours is an attribute of state sovereignty and that the FLSA unconstitutionally threatens the States' separate and independent existence when it is applied to "integral operations in areas of traditional governmental functions." 426 U.S. at 852. The narrow question presented in this case, therefore, is whether publicly owned mass transit is an activity that is properly includable in the "catalogue of the numerous line and support activities" which

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[7] Facts regarding fares are from the record and therefore reflect circumstances at the time of briefing in the court below.

the Court has insulated from FLSA coverage. *Id.* at 851 n.16. Transit clearly is one of these activities.

A. In *LIRR*, the Court relied upon certain characteristics of railroads which made the Long Island Railroad a nontraditional state activity. Transit does not share these characteristics.

1. Unlike railroads, for which the "Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system," *LIRR*, 455 U.S. at 688, transit provides a purely local service and is not part of a national transportation system requiring uniformity.

2. Unlike railroads, which "have been subject to comprehensive federal regulation for nearly a century," *id.* at 687, Congress has regulated transit no more than the activities specifically protected in *National League*. In contrast to the industry-specific laws aimed at railroads, the National Labor Relations Act, cited by the Government, is a law of general application that applies to all exempt *National League* activities when performed by nonpublic employers. It encompasses most all private sector activities and does *not* apply to the States. If this generally applicable law could defeat Tenth Amendment immunity, then those activities in *National League* having substantial private sector involvement (notably hospitals, sanitation, and parks and recreation) would be denied immunity as would any new function undertaken by the States if it had ever been performed by the private sector. The discrimination laws, also cited by the Government, are irrelevant because they apply to all state and local government activities, including those which this Court protected in *National League*. The FLSA amendments of 1961 and 1966 likewise cannot satisfy the requirement that transit be subject to federal regulation that is long standing and comprehensive. For its first twenty-three years, the FLSA exempted all transit employees. The 1961 amendments brought limited minimum wage coverage to certain large systems, while granting a total exemption from the overtime requirements. Even the 1966 amendments did not cover all transit systems and con-

tinued the overtime exemption for operating employees, who were the vast majority of the work force. Not until 1974 were all publicly owned transit systems swept under the FLSA along with virtually all other state and local government employees; however, those amendments, which are the very subject of this litigation, cannot evidence long-standing comprehensive regulation of transit.

3. Unlike the railroad industry, which had no "history of long standing state regulation," *LIRR*, 455 U.S. at 688, state and local government regulation of street transportation in Texas dates back more than seven decades. Since at least 1913, the cities have had exclusive control over their streets and highways. In 1915, the City of San Antonio started regulating vehicles operated to transport passengers for hire. This continued until 1959, when the City acquired the local transit system pursuant to a state law, which was followed in 1978 by the creation of SAMTA.

4. Unlike passenger railroads—only two of which are publicly owned, *id.* at 686 n.12—state and local governments are the principal providers of transit services. Transit in San Antonio has been publicly owned and operated since 1959. By 1979, all eighteen municipal transit systems in Texas were publicly owned or operated. Nationally, 94% of all transit riders use public mass transit. By at least 1965, over one-half of all transit employees worked for publicly owned systems.

5. Unlike the Long Island Railroad, which "operated under [the Railway Labor Act] for 13 years without claiming any impairment of its traditional sovereignty," *id.* at 690, SAMTA has never accepted FLSA coverage and promptly brought this lawsuit after the Government ruled that local transit is constitutionally within the FLSA.

B. The Government's all-consuming preoccupation with history conflicts with *LIRR*, which shunned a "static historical view," *id.* at 686, as well as the legacy of Supreme Court decisions construing the Constitution as a living document requiring flexibility to meet changing conditions and values.

The Tenth Amendment, no less than any other part of the Constitution, cannot be shackled by static, historical concepts of state activities. Current realities of urban mass transit clearly entitle transit to *National League* protection.

C. Transit is analogous to the other exempt *National League* activities. Congress has emphasized that transit is as essential as fire and police protection, sewers, and the other protected activities. Similarly, Texas, like many other states, has by law declared public transit authorities to be performing "essential governmental functions", art. 1118x § 6(a), thereby showing that it regards transit "as [an] integral part of [its] governmental activities. . . ." *National League*, 426 U.S. at 854 n.18. Furthermore, transit shares many characteristics common to the activities identified as exempt in *National League*. For example, hospitals have their roots in the private sector and remain a predominantly private-sector activity. Hospital development has been significantly stimulated by federal funding since at least 1946. Garbage collection and parks and recreation have substantial private sector involvement.

The Government disingenuously attempts to distinguish transit from other constitutionally protected activities on the ground that Congress referred to unfair competition in covering public transit. When Congress amended the FLSA in 1966, it specifically stated that it was also including public schools and hospitals in order to prevent unfair competition. The Government relied on this in *Maryland* v. *Wirtz*, and in *National League* claimed that other state activities (ultimately held traditional by this Court), compete with the private sector. Of course, as a practical matter, there is no competition in urban mass transit, which today is a subsidized public service. Contrary to the Government's claim, transit cannot be distinguished from exempt activities because transit is partially subsidized by user charges since a number of the activities listed in *National League* also collect substantial user fees.

D. It is irrelevant that the federal government, through UMTA funding, allegedly hastened the public takeover of transit systems.

First, neither SAMTA nor its publicly owned predecessor received one cent of federal assistance in acquiring the local transit operations in San Antonio.

Second, any proposition that federal funding of transit permits federal law to displace state law is inconsistent with this Court's holding in *Jackson Transit Authority* v. *Amalgamated Transit Union Local 1285*, 457 U.S. 15, 27 (1982) that "Congress made it absolutely clear [in UMTA] that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers." The applicability of *Jackson Transit* to this case is underscored by section 13(c) of UMTA, which requires fair and equitable arrangements to protect the interests of employees affected by federal assistance. Nothing in the arrangements between SAMTA and the Government requires FLSA overtime, and they, as well as section 9(d) of UMTA, specifically preclude any other restriction of SAMTA's rights.

Third, the Government is really making a Spending Power argument in a Commerce Clause case. *National League* recognized this distinction, and it is clear from the Court's decision that federal funding is irrelevant in determining whether an activity is protected. However, even if federal funding were relevant, funding of transit is no greater and, in some cases, less than that provided to several of the other activities mentioned in *National League*, at least two of which (hospitals and solid waste management) proliferated under the stimuli of federal financial assistance.

II. Under *National League*, "integral operations in *areas* of traditional governmental functions" are protected by the Tenth Amendment. 426 U.S. at 852 (emphasis added). Under this standard, transit is also exempt from the FLSA because it is an integral component of the traditional state activity of providing and maintaining means of public transportation. Recent appellate decisions have emphasized that government involvement in building and maintaining roads for public transportation is a traditional activity, even from an historical standpoint. With changing needs and evolving technology, the

States have adopted multifaceted transportation plans that comprise not only road building and maintenance, but mass transit as well.

III. Even if transit were not exempt under *National League*, the FLSA still cannot be constitutionally applied to SAMTA or any state or local government employee absent a constitutionally valid amendment. First, the 1974 amendments to the FLSA purport to cover virtually all state and local government employees by adding "public agenc[ies]" to the definition of "employer" and defining "public agency" as, among other things, "the government of a state or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State." 29 U.S.C. §§ 203(d), 203(x) (1976). In order to make these definitions constitutionally valid, a court would have to add words of limitation to the definitions. The severability clause in the FLSA does not permit the Court to add words to the amendments that are not currently there. Second, the effect of this Court's decision in *National League* is to remove the great majority of state and local government employees from the FLSA. That Act sets up no dichotomy between traditional and nontraditional governmental functions, and to apply the 1974 amendments to the small group of public workers performing nontraditional functions would create a program different from the one Congress actually adopted.

ARGUMENT

I. TRANSIT IS A TRADITIONAL FUNCTION.

In *National League*, this Court held that the States' power to detemine their employees' wages, hours and overtime compensation is an "undoubted attribute of state sovereignty." 426 U.S. at 845.[8] It identified the question before it as whether

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[8] Garcia (brief p. 10) agrees that "*National League of Cities* establishes that the fixing of wages and hours for public employees is 'indisputably [an] attribute[ ] of state sovereignty.' " The Government's brief (pp. 43-44 n. 34), however, cites *EEOC* v. *Wyoming*, 103 S. Ct. 1054 (1983), for the proposition that not "every state employment *decision* . . . should be considered to

determinations of wages, hours and overtime "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. The Court discussed the effect the FLSA amendments would have on fire and police protection, but, noting disagreement among the parties as to the "precise effect the amendments will have in application," concluded that "particularized assessments of actual impact are [not] crucial to resolution of the issue presented. . . ." *Id.* at 851. *Accord, EEOC* v. *Wyoming*, 103 S. Ct. 1054, 1063 (1983).[9] The Court then held that "application [of

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be an exercise of an 'undoubted attribute of state sovereignty.' " (emphasis added). If the Government contends that the "attribute of sovereignty" test is still an issue in FLSA cases, it is ignoring the clear holding in *National League* and is confusing decisionmaking — *e.g.*, the determination of wages and hours in *National League* and forced retirement based on age in *EEOC* v. *Wyoming* — with the characterization of state activities — *e.g.*, hospitals, transit, etc. — as traditional functions.

[9] The Government (brief pp. 43-46) challenges the impact FLSA coverage of transit will have on the States. Not only is the Government's discussion of impact inappropriate in view of this Court's decisions in *National League* and *EEOC* v. *Wyoming*, but it flies in the face of the Government's representation in its brief to the trial court that "allegations of adverse impact are irrelevant to a determination of coverage by the Act." R. 389. *National League* has already decided that the FLSA amendments have sufficient effect on state decisionmaking to preclude their constitutional application to traditional activities because they displace state "choices" regarding the wages and hours of their employees. 426 U.S. at 850. This is evident from the Court's summary, and generic, exemption of most listed activities without any impact analysis. If impact were relevant to a determination of traditionality, then a specific impact analysis would have been required for each of the activities exempted and, presumably, for each government unit providing each type of activity.

Even if impact were considered, application of the FLSA to transit would be foreclosed. The Government recently published a study showing the effect FLSA coverage of transit will have on the States. Advisory Comm'n on Intergovernmental Relations, *Mass Transit and the Tenth Amendment* 23 (1983) ("A labor-intensive industry, labor costs are estimated to comprise anywhere from 65 percent to 73 percent of the operating costs of mass transit. Therefore, any policy affecting labor costs could be expected, correspondingly, to have a profound effect on mass transit finances . . . . Strict

the FLSA amendments] will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships" in activities "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.

Contrary to the Government's position, which is largely premised on decisions of this Court that involved statutes other than the FLSA, concepts of the States' separate and independent existence[10] and a federal-state interest balancing

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application of overtime provisions would still add considerably to transit agencies' operating budgets.") *See also* affidavit of Wayne Cook, R. 203 (peak passenger loads create fluctuating manpower needs during SAMTA's operational hours and require that regular drivers be scheduled for shifts ranging between 8 hours and 8 hours 45 minutes, making it extremely difficult to limit drivers to 8 hour shifts "without seriously disrupting service to transit passengers"). FLSA application would straitjacket local governments into complying with federally imposed requirements, thereby foreclosing the ability to structure essential transit services by making changes in wage and hour policies, as local needs dictate. The possibility that the States may need flexibility to restructure employment practices is portended by the Administration's efforts to eliminate transit operational assistance. *See* Office of Mgmt. & Budget, Exec. Office of the President, *Major Themes & Additional Budget Details Fiscal Year 1983* at 121-22 ("*Budget Details 1983*").

[10] The Government's jurisdictional statement (p. 21; see also pp. 10, 25 & brief pp. 16, 21, 33, 34, 43) contends that for public transit to be exempt under *National League*, it must be "an essential aspect of the states '*separate* and *independent* existence.' " The Government has misread *National League*, which posited the question before it as follows:

> One 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. *The question we must resolve* here, then, *is whether these determinations are " 'functions essential to separate and independent existence,' "* [case citation omitted], so that Congress may not abrogate the States' otherwise plenary authority to make them.

426 U.S. at 845-46 (emphasis added).

In answering this question in favor of the States, the Court conclusively decided that the power of the States to make wage and hour determinations

test[11] are not a concern in this case since this Court has already resolved these issues in favor of the States for purposes of the FLSA. Rather, after *National League*, the only task remaining for the Court in FLSA cases is to complete the "catalogue of the numerous line and support activities" which are "integral operations in areas of traditional governmental functions." *Id.* at 851 n.16, 852. Thus the issue before the Court is whether

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is a function essential to their separate and independent existence and that Congress cannot regulate the States' prerogatives in this area when a traditional activity is involved. The "separate and independent existence" test referred to by the Government is irrelevant in determining whether an activity is traditional, but rather goes to the question whether the particular federal regulatory scheme unconstitutionally impairs state choices that are essential to separate and independent existence—such as, in *National League*, the prerogative to prescribe wages and hours; in *LIRR*, the power to regulate railroad labor relations; and, in *EEOC* v. *Wyoming*, 103 S. Ct. 1054 (1983), the right to set employment conditions on the basis of age. *National League* has already determined that the FLSA's interference with the States' right to set the wages and hours of public employees "threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking," *EEOC* v. *Wyoming*, 103 S. Ct. at 1062, thereby endangering the States' separate and independent existence, and that issue accordingly is not present in this case. This is underscored by the fact that parks and recreation could not be exempt under the Government's theory since they are not essential to the States' separate and independent existence; nor could hospitals and refuse collection (sanitation) in view of the substantial private sector involvement in those activities. Similarly, libraries and museums, which the Secretary of Labor has exempted by regulation (29 C.F.R. § 775.4), would not meet the Government's test for immunity. However, even if this were the test, transit would qualify since it is as important to the States as the exempt *National League* activities. See *infra*, pp. 33-38.

[11] The Government (brief p. 46) refers to the balancing test, which traces its genesis to Justice Blackmun's concurring opinion in *National League*. 426 U.S. at 856. The Government fails to recognize that this Court has already struck the balance in favor of the States in FLSA cases and that balancing is required only with respect to other federal regulation "such as environmental protection, when the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." *Id.* Nothing in *National League* or its progeny suggests that balancing plays any role in determining whether an activity is an integral operation in an area of traditional governmental functions.

SAMTA (and local public mass transit generally) is one of these activities. Transit is not materially different from the other activities exempted in *National League*, and the district court's decision finding transit to be exempt is entirely consistent with *National League* as well as the Court's unanimous decisions in *LIRR* and *Jackson Transit Authority* v. *Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982).

A. TRANSIT SATISFIES THE TESTS FOR *NATIONAL LEAGUE* IMMUNITY ARTICULATED IN *LIRR*.

In *LIRR*, the Court held that the Railway Labor Act can be constitutionally applied to a "[state-owned] railroad engaged in interstate commerce," but acknowledged that "under *most* circumstances federal power to regulate commerce [cannot] be exercised in such a manner as to undermine the role of the states in our federal system." 455 U.S. at 685, 686 (emphasis added). Although *LIRR* involved a different statute raising different considerations from the FLSA, the factors upon which the Court's ruling turned support the decision below.

In *LIRR*, the Court focused upon four crucial attributes of railroads, which do not exist in the case of local transit: (1) railroads are part of a national rail network requiring uniform federal regulation; (2) railroads have been subject to comprehensive, long-standing federal regulation; (3) railroads have no comparable history of state regulation; and (4) the railroad in *LIRR* was only one of two state-owned passenger railroads in the United States. The Court also emphasized that the Long Island Railroad voluntarily operated for years under the Railway Labor Act without any claim of disruption. As shown below, each of these elements is inapplicable to transit.

1. Transit Is Not Part Of A National Transportation Network.

In *LIRR*, the Court emphasized the interstate nature of railroads and their role as a component part of the national rail system. The Court noted that the Long Island Railroad "connects with lines of railroads which serve other parts of the

country[,] . . . supplies Long Island's only freight service [and] does a significant volume of freight business." 455 U.S. at 680 n.1. The Court concluded:

> [T]he Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system. In particular, Congress long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the national economy. A disruption of service on any portion of the interstate railroad system can cause serious problems throughout the system. . . .
>
> . . . To allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other 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 688-89.

In contrast, SAMTA provides a purely local service in Bexar County. Furthermore, during its first two fiscal years, approximately twenty percent of its local line-service passengers were students or children, and another 3.3 million students were carried on nonline service under arrangements with school districts.[12] SAMTA also serves Bexar County hospitals and provides mini-bus service in the downtown area.

Unlike the railroad industry, there is no national transit system; nor has Congress ever concluded that "uniformity" in transit is essential. In fact, the contrary is evident from statements made by the Administration in its effort to eliminate transit operating subsidies:

> Primary responsibility for mass transit should remain with State and local governments. *Decisions about* service levels, equipment and facilities, fares, *wage rates* and management practices *are better left to local decision-makers*. Excessive levels of Federal assistance unfortunately lead to excessive Federal interference in these local decisions.

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[12] In this respect, SAMTA is engaged in an activity integral to education.

Budget Details 1983 at 121 (emphasis added). Any disruption of a transit system is a purely local problem which, unlike an interstate railroad, has no impact on other transit systems serving other localities.[13]

The Government's reference in its brief (pp. 33, 36) to UMTA's characterization of the decline of transit services as a "national problem" and the Government's portrayal of public transit as a "venture in 'cooperative federalism' " between the States and federal government does not enhance its position one whit since Congress has passed laws and made the same observations about virtually all of the other activities exempted by *National League*.[14] Examples are:

Health and Hospitals: Safe Drinking Water Act establishes a "joint Federal-State system for assuring compliance with

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[13] The Government (brief p. 47) claims that because transit impacts "interstate commerce the FLSA may constitutionally be applied to public transit employees." This logic is specious and circular. If the Government did not claim a nexus between transit and interstate commerce, the FLSA could not be applied to transit. Furthermore, in amending the FLSA to encompass virtually all public employees in 1974, Congress emphasized the impact on interstate commerce of state and local government activities. *See, e.g.*, S. Rep. No. 93-690, 93d Cong., 2d Sess. 24 (1974). *See also Maryland* v. *Wirtz*, 392 U.S. 183, 194-95 (1968) (finding that public schools and hospitals affect commerce). The constitutional question arose in *National League* only because the regulated state activities affected commerce. *See id.* 426 U.S. at 840-41.

[14] For the same reason, the Government's reliance (brief pp. 14, 32, 46-47) on the fact that some transit systems are "areawide" and some "cross state lines" is misplaced since the same can be said of activities expressly protected by *National League*. *E.g.*, S. Rep. No. 96-96, 96th Cong., 1st Sess. 33-34, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1306, 1338-39 (of 205 **health** service areas, 15 are interstate, one is tristate and 13 encompass interstate SMSA's); S. Rep. No. 11, 88th Cong., 1st Sess. 5, *reprinted in* 1963 U.S. Code Cong. & Ad. News 664, 667 (Secretary of the Interior should "encourage interstate and regional cooperation in the planning, acquisition, and development of outdoor **recreation** resources"); Am. Pub. Works Ass'n, *History of Public Works in the United States 1776-1976* at 416, 418 (1976 ["*History of Public Works*"]) ("[i]nterstate compacts have offered a more effective means of promoting regional **water pollution** control" . . . the 1948 Water Pollution Control Act provided for "interstate cooperation"); H.R. Rep. No. 899, 89th Cong., 1st Sess. 8, 27, *reprinted in* 1965 U.S. Code Cong.

these standards" (H.R. Rep. No. 93-1185, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6454, 6455). National Health Planning & Resources Development Act of 1974 will "assure the development of a national health policy"; Hill-Burton Act, providing for hospital construction, was a "Federal-State partnership"; "national guidelines" for health planning are needed; it is the "responsibility of the Federal government to intervene" to upgrade large urban hospitals (S. Rep. No. 93-1285, 93d Cong., 2d Sess. 1, 19, 42, 59, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7842, 7859, 7882, 7898).

Sanitation: Solid Waste Disposal Act requires that "immediate action must be taken to initiate a national program directed toward finding and applying new solutions to the waste disposal problem"; "[t]he problem of solid waste disposal is all-pervasive and has become national in scope . . . [and] will require the combined resources of the Federal, State, and local governments as well as industry and research institutions" (H.R. Rep. No. 899, 89th Cong., 1st Sess. 7, 22, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3608, 3614, 3627). "[P]roblems of waste disposal . . . have become a matter national in scope" (Resource Conservation & Recovery Act of 1976, 42 U.S.C. § 6901(a)(4) (Supp. V 1981)).

Education: The "purpose" of the Elementary & Secondary Education Act of 1965 "is to meet a national problem" (S. Rep. No. 146, 89th Cong., 1st Sess. 4, *reprinted in* 1965 U.S. Code Cong. & Ad. News 1446, 1449).

Fire: "Fire is a major national problem" (S. Rep. No. 93-470, 93d Cong., 1st Sess. 6, *reprinted in* 1974 U.S. Code Cong. &

& Ad. News 3608, 3615, 3634 (federal financial assistance is needed to encourage and help the states and interstate agencies undertake surveys of **solid waste** and develop plans on a "statewide or interstate basis" . . . "interstate and interlocal cooperation" is needed); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1288(a)(3) (1976) (providing for "areawide **waste treatment** management plans" for multistate areas); Resource Conservation & Recovery Act of 1976, 42 U.S.C. § 6946(c) (1976) (providing for "interstate [**solid waste** disposal] regions"); **Crime Control** Act of 1973, Pub. L. No. 93-83, 87 Stat. 197, 200 (1973) (amended 1979) (providing for "interstate metropolitan regional planning units").

Ad. News 6191, 6196). The federal government is a "partner in attaining" the goal of improving the quality of local fire service delivery (Advisory Comm'n on Intergovernmental Relations, *The Federal Role in Local Fire Protection* 18 (1980)).

Police: "Crime is a national catastrophe"; "[t]here are certain national objectives which are vital to every citizen of this country, and the elimination of crimes is one of the foremost among these objectives" (S. Rep. No. 1097, 90th Cong., 2d Sess. 31, 179, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2117, 2239). The role of the Law Enforcement Assistance Administration is a "partner with State and local governments" (S. Rep. No. 91-1253, 91st Cong., 2d Sess. 14, *reprinted in* 1970 U.S. Code Cong. & Ad. News 5804, 5805).

Each of these "national" problems has received congressional attention and support. Yet, each is exempt from FLSA coverage.

2. Transit Has Not Been Subject To Comprehensive And Long-Standing Federal Regulation.

In *LIRR*, the Court relied heavily on the fact that "[r]ailroads have been subject to comprehensive federal regulation for nearly a century." 455 U.S. at 687. The Court concluded that "there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas *traditionally subject to federal statutory regulation.*" *Id.* (emphasis added).

Unlike the "national rail system," *id.* at 688, federal regulation of transit has been no greater than that governing the activities specifically exempted by *National League*. There is no scheme of federal regulation designed to provide uniformity among transit systems, as in the case of railroads, which are subject to an array of industry-specific federal laws.[15] The Government's claim (brief pp. 39-43) that federal regulation of

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[15] In addition to the statutes cited in *LIRR*, there are many other federal regulatory statutes directed exclusively at railroads. Title 45 of the U.S. Code deals solely with railroads.

transit distinguishes that service from the activities held constitutionally protected in *National League* finds no support in the federal statutes it cites and in fact underscores the minimal federal regulatory role in the transit field.

The National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.* (1976 & Supp. V 1981), and therefore the Labor-Management Reporting & Disclosure Act, 29 U.S.C. § 401, *et seq.* (1976 & Supp. V 1981) (see definition of "employer," *id.* § 402(e)), apply to the activities specifically exempted in *National League* when performed by private sector employers. *E.g.*, **Hospitals**[16]: *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483 (1978). **Schools:** *Cornell University*, 183 NLRB 329 (1970). **Fire and Police Protection:** *Florence Volunteer Fire Department, Inc.*, 265 NLRB No. 134 (1982); *Pinkerton's National Detective Agency, Inc.*, 90 NLRB 532 (1950). **Sanitation:** *Dale Service Corp.*, 263 NLRB No. 114 (1982) (sewage treatment); *Nichols Sanitation, Inc.*, 230 NLRB 834 (1977) (garbage collection); *Oakland Scavenger Co.*, 98 NLRB 1318 (1952) (same). **Recreation:** *Coney Island, Inc.*, 140 NLRB 77 (1962); *Union News Co.*, 112 NLRB 584 (1955) (ice skating rink). *See also Management Services, Inc.*, 108 NLRB 951 (1954) (municipal services).

A law of general application that regulates virtually every private employer in the country, including those *National League* activities (*e.g.*, hospitals, schools and sanitation) that have substantial private sector involvement, cannot be equ-

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[16] Hospitals, including nonprofit ones, were covered by the NLRA when it was originally enacted. *NLRB* v. *Central Dispensary & Emergency Hosp.*, 145 F.2d 852 (D.C. Cir. 1944), *cert. denied*, 324 U.S. 847 (1945). In 1947, the NLRA was amended to exempt nonprofit hospitals, Labor Management Relations Act, ch. 120, 61 Stat. 136, 138 (1947), and thereafter the NLRB asserted jurisdiction over company hospitals. *E.g.*, *General Elec. Co.*, 89 NLRB 1247 (1950). In 1974, Congress deleted the exemption for nonprofit hospitals and incorporated special provisions in the NLRA directed specifically at the hospital industry. Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395 (1974). *See generally* S. Rep. No. 93-766, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 3946.

ated with the comprehensive federal statutes specifically regulating railroads. In view of the almost universal applicability of the NLRA, the Government's argument would impose the "static historical view of state functions" shunned by this Court in *LIRR*, 455 U.S. at 686, since any new activity undertaken by a state—no matter how necessary or important—would be denied Tenth Amendment protection if it was previously performed to any degree by the private sector. This would render meaningless the Court's *LIRR* holding that only state acquisitions that "erode federal authority" are not protected. *Id.* at 687. Furthermore, as noted by the district court (Gov't J.S. 9a), the NLRA "contains an exemption for state and local governments." It would indeed be anomalous to deny Tenth Amendment protection to the States based upon a statute that Congress specifically decreed shall not apply to the States. Contrary to the Government's assertion (brief p. 40), a state acquiring a transit system, or any other private entity, does so knowing that it will *not* be subject to the NLRA.

The Government also relies on the fact that the Equal Pay Act (29 U.S.C. § 206(d) (1976)) and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.* (1976 & Supp. V 1981)) apply to transit. This logic is circular because those same statutes apply to public employers providing activities exempted by *National League*. *E.g.*, *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) (upholding Title VII's application to the States); *Pearce* v. *Wichita County Hospital Board*, 590 F.2d 128 (5th Cir. 1979) (applying Equal Pay Act to a public hospital).

The Government's reliance on the 1961 and 1966 FLSA amendments is misplaced. Private transit systems were by statute exempt before 1961, and therefore during its first twenty-three years, the FLSA was totally inapplicable to transit. The 1961 amendments extended the FLSA only to private systems with revenues exceeding one million dollars, but exempted all employees from the overtime requirements. Even the 1966 amendments continued the overtime exemption for operators and excluded systems whose rates or services are

not subject to regulation by a state or local agency.[17] It was not until 1976 that even private transit was brought fully under the FLSA's overtime requirements, but this was pursuant to the 1974 amendments, whose constitutionality is challenged in this very action, and which cannot provide bootstrap support for the Government's position. The vast majority[18] of transit employees have been subject to the full play of the FLSA only since 1976, and this hardly constitutes long-standing or comprehensive federal regulation of wage and hour practices or any other aspect of transit operations.

3. There *Is* Long-Standing State Regulation Of Transit.

In holding the Long Island Railroad to be nontraditional, the Court also relied upon the fact that "[t]here is no comparable history of longstanding state regulation of railroad collective bargaining or of other aspects of the railroad industry."[19] 455 U.S. at 688. The reverse is true of transit in Texas and San Antonio.

State and local regulation of street transportation in Texas dates back at least 70 years. In 1913, the Texas legislature

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[17] The Government's claim (brief p. 40) that "90% [of all transit systems] were still privately owned in 1967" is misleading. In 1965, 56% of all transit workers in the United States were employed by publicly owned systems, which means that a majority of transit employees in the country were not covered by the FLSA or the NLRA. *Amendments to the Fair Labor Standards Act: Hearings on S. 763, et al. Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 89th Cong., 1st Sess. 309 (1965) ("*Hearings on S. 763*").

[18] *See* Garcia Appendix below at 62, which shows that during SAMTA's first fiscal year, about 69% of its payroll went to operators.

[19] The Government's argument (brief pp. 21-24) that a "history of state regulation of private transit" is not an appropriate consideration thus improperly disregards an important element of the test for immunity articulated in *LIRR*. Furthermore, the Government's claim (brief pp. 23-24) that the States made a "fundamental policy decision to pursue their objectives through regulation of nongovernment transit providers" is plainly wrong and is refuted by the very data cited in the Government's own brief (p. 17) that publicly owned transit systems carry over 94% of all transit riders.

delegated to the cities exclusive control over their streets and highways, including the powers:

> To license, operate and control the operation of all character of vehicles using the public streets, including motorcycles, automobiles or like vehicles, and to prescribe the speed of the same, the qualification of the operator of the same, and the lighting of the same by night and to provide for the giving bond or other security for the operation of the same.
>
> To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire. . . .

1913 Tex. Gen. Laws, ch. 147, § 4, at 314, *as codified*, Tex. Rev. Civ. Stat. Ann. art. 1175 §§ 20, 21 (Vernon 1963).

In 1915, the City of San Antonio passed a comprehensive ordinance to regulate vehicles operated for hire to transport passengers. San Antonio, Tex., Ordinance OF1-1 (Mar. 8, 1915). The ordinance required owners of vehicles, including motor buses, to obtain a franchise from the City for transporting passengers for hire on city streets; established license application and fee specifications and insurance or bond requirements; and specified vehicle safety features such as lighting, speed and driver age and conduct. Another comprehensive ordinance was enacted in 1921, updating the 1915 ordinance and including a designated motor bus route and terminals. San Antonio, Tex., Ordinance OF-266 (Dec. 1, 1921).

The City continued to regulate fares, routes, schedules and franchises of private transit companies until 1959, when it created SATS and purchased the assets of SATS' predecessor pursuant to a state law authorizing cities to issue bonds for the purchase, construction or improvement of street transportation systems. Tex. Rev. Civ. Stat. Ann. art. 1118w (Vernon 1963 & Supp. 1982-83). Public mass transit in San Antonio changed again after state legislation in 1973 authorized a change from a municipal to a metropolitan facility and specifically designated publicly owned transit systems as performing "essential governmental functions." Art. 1118x, § 6(a). *See*

also §§ 6(p), 6C(a), 13A.[20] The history of transit in San Antonio, from a city-controlled private franchise, to a city-owned system in 1959, to an autonomous metropolitan authority in 1978, illustrates the traditional role of the city and state in ensuring efficient transportation for the convenience and welfare of local citizens.[21]

4. State And Local Government Are The Principal Providers Of Transit.

In finding the Long Island Railroad not to be a traditional function, this Court noted that only two of seventeen commu-

[20] Other Texas statutes regulating intracity bus systems include Tex. Rev. Civ. Stat. Ann. art. 1015 (Vernon 1963) (authorizing cities to license, tax and regulate omnibus drivers); art. 1181 (Vernon Supp. 1982-83, *original version at* 1913 Tex. Gen. Laws, ch. 147, § 9, at 317) (confirming that cities have exclusive power to grant franchises for the use of public streets); art. 6663e (Vernon 1977 & Supp. 1982-83) (authorizing state assistance to cities for establishment of mass transit systems); art. 6675a-2 (Vernon 1977) (providing for registration of motor vehicles); art. 6675a-5 (Vernon Supp. 1982-83) (setting annual license fees for street and suburban buses); art. 6675a-13 (Vernon 1977) (establishing license plate requirements for motor vehicles); art. 6687b, § 5 (Vernon 1977) (establishing requirements for drivers of school buses); art. 6698 (Vernon 1977) (authorizing towns to collect city permit fees on motor vehicles transporting passengers for hire).

[21] Unlike the States' virtually unencumbered power to regulate transit, the States are forbidden from regulating many aspects of interstate railroads. In *LIRR*, 455 U.S. at 687, this Court cited *Wabash, St. L. & P. Ry.* v. *Illinois*, 118 U.S. 557 (1886) (states cannot regulate interstate freight rates). Other examples include *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761 (1945) (regulation of train length); *Transit Comm'n* v. *United States*, 289 U.S. 121 (1933) (regulation of trackage agreements); *Colorado* v. *United States*, 271 U.S. 153 (1926) (prohibiting abandonment of lines); *Napier* v. *Atlantic Coast Line R.R.*, 272 U.S. 605 (1926) (regulation of locomotive equipment); *Missouri, Kan. & Tex. Ry.* v. *Texas*, 245 U.S. 484 (1918) (regulation of departure times and length of connection time); *Erie R.R.* v. *New York*, 233 U.S. 671 (1914) (limitation on employee hours of service); *Herndon* v. *Chicago, R. I. & P. Ry.*, 218 U.S. 135 (1910) (requirement that trains stop at all junction points); *Houston & Tex. Cent. R.R.* v. *Mayes*, 201 U.S. 321 (1906) (requirement that railroads provide cars for delivery of freight); *Illinois Cent. R.R.* v. *Illinois*, 163 U.S. 142 (1896) (requiring diversion of trains to the county seat); *Bowman* v. *Chicago & N.W. Ry.*, 125 U.S. 465 (1888) (prohibition against transport of intoxicating liquors into the state without proper certificate).

ter railroads in the United States were public. One of those was the Long Island itself, which was converted from a "private stock corporation to a public benefit corporation" in 1980. 455 U.S. at 681. The other was the Staten Island, which became public in 1971. *Id.* at 686 n. 12. *See also Employees* v. *Missouri Department of Public Health & Welfare*, 411 U.S. 279, 285 (1973) (state-owned railroad in *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964) was "a rather isolated state activity").[22]

Although transit services were once predominantly provided by the private sector, this has not been true for many years. The rudimentary street transportation of the first half of this century has evolved into a new mass transit technology serving entire urban areas.[23] The States have recognized that modern transit services cannot be operated profitably and constitute a service as essential to survival as fire and police. In order to ensure the continuation of vital transit services, the States, of necessity, have added transit as a component part of the array of "governmental services which their citizens require," *National League*, 426 U.S. at 847, and have been the principal provider of transit services for many years.[24]

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[22] Commuter railroads are not considered part of mass transit. "The urban transit industry includes all 'companies and systems primarily engaged in local and suburban mass passenger transportation over regular routes and on regular schedules' *except computer railroads* and limousine service. . . ." Barnum, *From Private to Public: Labor Relations in Urban Transit*, 25 Indus. & Lab. Rel. Rev. 95 (1971) (emphasis added).

[23] The Government's reliance (brief p. 20) on footnote 11 in *LIRR*—in which the Court stated that a state-operated common carrier would be subject to Commerce Clause regulation—untenably stretches the Court's statement. The cited portion of that footnote is a quotation from Chief Justice Burger's concurring opinion in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 422 (1978), which in turn was derived from *United States* v. *California*, 297 U.S. 175 (1936). That case involved the Federal Safety Appliance Act, 45 U.S.C. § 1, *et seq.* (1976 & Supp. V 1981), which covers "common carrier[s] engaged in interstate commerce *by railroad*." (emphasis added). Both textual sentences surrounding footnote 11 in *LIRR* pertain to railroads, and it would appear that the Court's reference to common carriers also pertained to railroads.

[24] A major premise of Garcia's brief is that publicly owned transit systems constitute business enterprises. Garcia's assertion is belied by the experience of the past quarter century. Congress enacted UMTA because "in

Local transit in San Antonio has been publicly owned and operated since 1959. By 1979 all eighteen municipal transit systems in Texas operating five or more vehicles in scheduled, fixed route, intracity service were publicly owned or operated. Tex. Dep't of Hwys. & Pub. Transp., *1979 Texas Transit Statistics* 1 (1980). Nationally, 94% of all transit riders use public mass transit. APTA, *Transit Fact Book 1981* at 27.

The figures in the Government's brief (pp. 17-18) showing that roughly half of the 686 transit systems in urban areas over 50,000 population are public is misleading since those 686 systems include the smallest, with only one bus, and the largest with over 2000 buses. The publication from which these figures are taken reflects that the principal provider of transit services in each of the 25 largest urban areas in the United States and in at least 100 of the 106 urban areas having populations exceeding 200,000 is public. U.S. Dep't of Transp., *Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* (1981) (*"DOT Directory"*). The Government's claim (brief p. 49) that "in 1966 . . . transit service was, by any measure, still predominantly a service provided by private enterprise" is repudiated by its own brief (p. 17), which states that "[i]n 1967 over 50% of all transit riders patronized publicly owned systems." Furthermore, by 1965, 56% of all transit employees worked for publicly owned systems. *Hearings on S. 763* at 309.[25]

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recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten continuation of this essential public service. . . ." 49 U.S.C. § 1601b(4) (1976). In San Antonio, SAMTA's fare box receipts are less than 25% of its operating expenses. According to the Government's own brief (p. 49 n.37), nationally fares constitute 40.7% of operating revenues. Just to break even on expenses, transit fares would have to increase several fold—to the detriment of the poor, the elderly and minorities, who constitute the greatest group of transit patrons. For transit to try to operate as a business enterprise would sound its death knell.

[25] The Government's attempt (brief p. 19) to equate the histories of public mass transit and passenger railroads conflicts with the position it took in its amicus brief in *LIRR*. For example, on page 12 of that brief, the Government

5. SAMTA Has Never Acceded To FLSA Coverage.

In *LIRR*, the Court relied on the fact that the "State knew of and accepted" the Railway Labor Act and "operated under [it] for 13 years without claiming any impairment of its traditional sovereignty." 455 U.S. at 690. When the Long Island Railroad was sued for a declaratory judgment that the Railway Labor Act applied, its response "was to acknowledge that the Railway Labor Act applied." *Id.* Then, while the suit was pending, it converted to a public benefit corporation "apparently believing that the change would eliminate Railway Labor Act coverage and bring the employees under the umbrella of the Taylor Law." *Id.* at 681.

Unlike the Long Island Railroad's acceptance of the Railway Labor Act, SAMTA has never accepted FLSA coverage of its operations. When the Deputy Wage and Hour Administrator issued his September 17, 1979 ruling that local transit is constitutionally within the FLSA, SAMTA promptly brought this action challenging the ruling.

B. AS A "LIVING DOCUMENT," THE CONSTITUTION MUST BE GIVEN FLEXIBILITY TO MEET CHANGING TIMES, AND THEREFORE CONSTITUTIONAL DOCTRINE REGARDING STATE ACTIVITIES CANNOT BE SHACKLED BY STATIC, HISTORICAL CONCEPTS.

The Government (brief p. 25) states that it "take[s] the teaching of *Long Island R.R.* to be that primacy is assigned to

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insisted that the Long Island Railroad "remains a railroad—an integral part of the interstate railroad industry and *plainly distinguishable from conventional intraurban transit systems.*" (emphasis added). The Government contended that this distinction "is firmly grounded in the separate histories of these two sectors of the transportatin industry, in the applicable law, and in the usages of the industry," *id.* at 25 n.19, and contrasted the 2 public commuter railroads (out of 17) with the more than 1000 transit systems in the United States, "nearly half of [which], including most of the largest ones, carrying a total of 91% of all transit passengers, were owned by public agencies." *Id.* at 27 n.20. The Government cited these statistics in support of its contention that "public ownership and operation of conventional transit systems is substantially better established than is such operation of commuter railroads." *Id.*

historical evidence in the Tenth Amendment analysis . . . ." Later in its brief (p. 50) the Government attempts to denigrate any analysis that is not based strictly upon historical considerations as amounting to "creeping unconstitutionality." The Government's inflexible preoccupation with history and its refusal to acknowledge that changing societal values and technological innovations play an important role in constitutional analysis is directly repudiated by this Court's rejection in *LIRR* of a "static historical view of state functions generally immune from federal regulation." 455 U.S. at 686. It is also diametrically opposed to the constitutional jurisprudence established by this Court, which has emphasized that "the Constitution has been treated as a living document adaptable to new situations." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 681 (1952) (Vinson, C.J., dissenting). As Chief Justice Marshall stated in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) over 150 years ago:

> This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

See also Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 698-99 (1976) ("Because of the general language used in the Constitution, judges should not hesitate to use their authority to make the Constitution relevant and useful in solving the problems of modern society.")[26]

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[26] The same principles appear in Eighth Amendment cases. *E.g.*, *Furman* v. *Georgia*, 408 U.S. 238 (1972) (p. 327: " '[T]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a

This Court has recognized that the concept of a living constitution has particular applicability to the evolving role of the States in serving the needs of their citizens. For example, in *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60 (1978), Justice Rehnquist emphasized that " '[v]iable local government may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions.' " *Id.* at 75 (quoting *Sailors* v. *Board of Education*, 387 U.S. 105, 110-11 (1967)). *See also Helvering* v. *Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring) ("[T]here cannot be any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental . . . . [T]he people—acting . . . through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires.").

Consistent with the concept that the Tenth Amendment is not a static reservation of those States' rights existing when our forefathers enacted the Bill of Rights, we must consider publicly owned mass transit "in the light of its full development and its present place in American life throughout the Nation." *Brown* v. *Board of Education*, 347 U.S. 483, 492-93 (1954). When viewed in its present developed stage—where 94% of all passenger trips are on publicly owned transit systems, where

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maturing society.' " [Marshall, J., concurring]) (p. 382: The Amendment's "applicability must change as the basic mores of society change." [Burger, C.J., dissenting]) (p. 408: "[T]he Cruel and Unusual Punishments Clause 'may acquire meaning as public opinion becomes enlightened by a humane justice.' " [Blackmun, J., dissenting]) (p. 420: "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and to gain meaning through application to specific circumstances, many of which were not contemplated by their authors." [Powell, J., dissenting]); *Weems* v. *United States*, 217 U.S. 349, 373 (1910) ("Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.")

local citizenry demand efficient, low cost mass transportation services as an essential governmental service, and where the private sector cannot provide this service—it should be clear beyond peradventure that publicly owned mass transit is within the protective umbrella of the Tenth Amendment.

Perhaps most apposite to transit are the Court's observations in *Brush* v. *Commissioner of Internal Revenue*, 300 U.S. 352 (1937), tracing the evolution of private water service into an essential function of government:

> We conclude that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions . . . .
>
> We find nothing that detracts from this view in the fact that in former times the business of furnishing water to urban communities, including New York, in fact was left largely, or even entirely, to private enterprise. The tendency for many years has been in the opposite direction, until now in nearly all the larger cities of the country the duty has been assumed by the municipal authorities. Governmental functions are not be be regarded as nonexistent because they are held in abeyance, or because they lie dormant, for a time. If they be by their nature governmental, they are none the less so because the use of them has had a recent beginning.

Id. at 370-71.

Although public transit, like water service, was once largely a private function, it has evolved into an essential function of state and local government, and this Court's conclusions are no less applicable to transit today than they were to water service forty-seven years ago.[27] *See also Amersbach* v. *City of*

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[27] For this reason, *Helvering* v. *Powers*, 293 U.S. 214 (1934), relied upon by the Government (brief pp. 18-19), is inapposite. *Powers* was written 50 years ago when public transportation was in its formative stage and mass transit as we know it today did not exist. As the Court noted at the time, public operation of a street railway was "a departure from *usual* governmental functions." *Id.* at 225 (emphasis added). Just as the provision of water passed from the private sector into an essential governmental service in *Brush*, transit has become a vital service provided almost exclusively by the

Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979) (extending FLSA immunity to a municipal airport and holding that the "terms 'traditional' or 'integral' are to be given a meaning permitting expansion to meet changing times").

C. TRANSIT IS ANALOGOUS TO THE OTHER STATE ACTIVITIES HELD EXEMPT IN *NATIONAL LEAGUE*.

As noted by the district court, "[a]nalogy to the non-exclusive list of traditional state functions set out in *Usery* is one method of testing for Tenth Amendment immunity." Gov't J.S. 11a. Whether transit is compared to these activities generally or to the specific characteristics of those activities that are predominantly user-related—*e.g.*, hospitals, sanitation, and parks and recreation—it is clear that transit cannot be distinguished for Tenth Amendment purposes.

1. Congress has emphasized the reality that transit is as essential as fire and police protection and other vital services. For example, during hearings in 1960 on mass transit legislation, Congressman Addonizio stated:

> It is as necessary to provide transportation for these new communities as it is to provide other public necessities such as water, sewers, police and fire protection, and so forth.

Hearings Before Subcomm. No. 1 of the Comm. on Banking & Currency of the House of Representatives on Metropolitan Mass Transportation Legislation, 86th Cong., 2d Sess. 14

States as an "integral part[] of their governmental activities," *National League*, 426 U.S. at 854 n.18, and as a "service[] which their citizens require," *id.* at 847. Today, the States provide transit as a matter of public necessity rather than by choice, and they clearly are not "running . . . a business enterprise" or conducting a "business activit[y] which [has] as [its] aim the production of revenues in excess of costs," *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 418 n.1, 424 (1978) (Burger, C.J., concurring). *See also Helvering* v. *Gerhardt*, 304 U.S. 405, 418 (1937) (noting that "the state function affected [in *Powers*] was one which could be carried on by private enterprise . . . .").

(1960). During the same hearing, this message was echoed by Congressman Corbett:

> It is a vital public necessity that such service be provided, as necessary to economic life of the community as the provision of water, police, and fire protection and other recognized public necessities.

Id. at 26. Again in 1973, the essential nature of public transportation was emphasized:

> Public transportation is as necessary to the life of the community as fully tax-supported services. In some ways it is even more essential. Potato peelings can be buried in the back yard or composted, but people cannot walk six miles to work every day.

119 Cong. Rec. 4242 (1973). One year later, Senator Biden compared mass transit to the fire department and hospitals:

> In any case, I believe it is the duty of the Government to provide such subsidies as are needed because I think mass transit is as much an essential public service as the fire department or hospitals.

120 Cong. Rec. 1042 (1974). *Accord*, 119 Cong. Rec. 4474 (1973) (remarks of Congresswoman Abzug: "transit . . . is as much of an essential service for working people as is police protection"); 120 Cong. Rec. 28,430 (1974) (remarks of Congressman Anderson: "[R]apid transit benefits everyone, and it should be thought of, I believe, as a public service, just as police and fire protection are to benefit everyone."). *See also* UMTA, 49 U.S.C. § 1601b (1976).

2. It is also clear that the States regard transit "as [an] integral part[ ] of their governmental activities," which is another test for *National League* immunity. 426 U.S. at 854 n.18. Article 1118x provides that metropolitan transit authorities are "essential governmental functions" and are not "proprietary." *Id.* §§ 6(a), 13A. Article 6663c, § 1(a)(2), Tex. Rev. Civ. Stat. Ann. (Vernon 1977) provides that "public transportation is an essential component of the state's transportation system . . . ." Examples of "other state laws decreeing public mass transit to be an essential function of government" are cited in the district court's memorandum opinion.

Gov't J.S. 12a n.7. All such laws predated this Court's decision in *National League*.

3. Closer comparison of transit with some of the specific activities exempted in *National League* underscores the propriety of the decision below. For example, public sector involvement in hospitals is not as well established as in the transit field. In 1980, of this nation's 7,051 hospitals, only 2,562 (36%), including federal facilities, were under government control. Bureau of Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1982-83* tab. 171, at 111 (1982) ("*Statistical Abstract*"). By comparison, in 1981, 598 (58%) of the 1,025 transit systems of all sizes were owned by state or local governments.[28] In 1981, about 30% of all hospital beds were in state or local government hospitals, Am. Hosp. Ass'n, *Hospital Statistics* tab. 4A, at 14 (1982), whereas, in 1980, 90% of all transit vehicles were publicly owned or leased, APTA, *Transit Fact Book 1981* tab. 3, at 43. A 1965 Senate hearing report states that "[t]here are 79 cities in which the dominant transit system is publicly owned and operated . . . [and whose] employees . . . represent approximately 56% of the total employees in the local transit industry." *Hearings on S. 763* at 309. In contrast, almost 10 years later, "56 percent of all hospital employees" worked for "non-profit, non-public hospitals." S. Rep. No. 93-766, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. Code Cong. & Ad. News 3946, 3948.[29] Hospitals have

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[28] *DOT Directory* 19; U.S. Dep't of Transp., *A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service* 13 (1981).

[29] The Government (brief pp. 36-37 & n.30) attempts to distinguish hospitals from transit on the ground that although "[t]he largest sector of the hospital industry undoubtedly is in private hands," most hospitals are nonprofit rather than proprietary. The Government's rationalization disintegrates when one considers that Congress specifically covered nonprofit hospitals in the 1966 FLSA amendments to eliminate their unfair competitive advantage over proprietary hospitals:

> Hospitals and related institutions, such as schools and colleges, which are not proprietary, that is, not operated for profit, are engaged in activities which are in substantial competition with similar activities

their roots in the private sector and to this day are primarily private:

> The hospitals established in the eighteenth and nineteenth centuries were constructed and run by proprietary groups and church and other nonprofit organizations. This form of ownership remains the predominant characteristic of United States medical facilities.

History of Public Works 490.

Federal funding has also played a significant role in the development of hospitals. Before 1946, more than 1,000 counties in the nation had no health facilities at all. A. Treloar & D. Chill, *Patient Care Facilities: Construction Needs and Hill-Burton Accomplishments* 11 (1961). In 1946, the Hill-Burton Act, Pub. L. No. 79-725, 60 Stat. 1041 (1946) (*current version at* 42 U.S.C. § 291, *et seq.* (1976 & Supp. V 1981)), was passed to improve the situation, and more than half of hospital construction accomplished under that Act has been in areas with no hospital facilities. Treloar, *supra*, at 12, 14. "[R]oughly, 42 per cent of the county hospitals in operation in 1956 opened" after the end of World War II, and "[u]ndoubtedly, much of this latter growth was due to the federal grants for hospital construction received under the terms of the Hill-Burton Act of 1946. . . . In the state of Texas alone, fifty-three such institutions were founded in the interval from 1946 to 1956." J. Hamilton, *Patterns of Hospital Ownership and Control* 76 (1961).

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carried on by enterprises organized for a common business purpose. Failure to cover all activities of these nonprofit hospitals, schools or institutions will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which "constitute an unfair method of competition in commerce."

H.R. Rep. No. 871, 89th Cong., 1st Sess. 15 (1965). *See also* 120 Cong. Rec. 12,938 (1974) (remarks of Congressman Williams regarding the 1974 amendments to the NLRA: "Private nonprofit hospitals should at least be subject to the same regulations, obligations, and rights that apply to proprietary hospitals. There is virtually no difference between employees of profit and of nonprofit hospitals.")

In its brief (p. 18), the Government notes that some public transit systems have management contracts with outside concerns.[30] The same arrangement exists with hospitals. In 1980, investor-owned firms held 150 management contracts with city or county hospitals. *City, County Contracts Lead to Hospital Sales*, Modern Healthcare, Sept. 1980 at 44. The most rapid growth in this area has occurred in municipal and county owned facilities such as the 1,300-bed Cook County Hospital in Chicago, J. Goldsmith, *Can Hospitals Survive?* 114 (1981), and the 1,465-bed John J. Kane Hospital in Pittsburgh, Mannisto, *For-Profit Systems Pursue Growth in Specialization and Diversification*, Hospitals, Sept. 1, 1981 at 72. Moreover, unlike transit systems, which have become predominantly publicly owned, many public hospitals are selling out to private operators. Hull, *How Ailing Hospital in South Was Rescued by a For-Profit Chain*, Wall St. J., Jan. 28, 1983, at 1, col. 1. Furthermore, hospitals have long been subject to the very same statutes cited by the Government as regulating transit. In fact, when *National League* was decided, there had been more extensive FLSA coverage of hospitals and schools since both activities were brought totally under the FLSA in 1966, whereas public transit was given an overtime exemption for operating employees until 1976 and transit systems whose fares or services were not subject to regulation by a state or local agency were not covered at all. Yet, this Court had no difficulty in exempting both hospitals and schools under the Tenth Amendment.[31]

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[30] The Government's brief (p. 18) incorrectly asserts that "more than 120" publicly owned transit systems are privately managed. The Government's source, the *DOT Directory*, shows that 123 systems have management contracts and that 31 of these are privately owned systems. *Id.* pp. 2-19.

[31] The fact that Congress specifically included public schools and hospitals in the 1966 FLSA amendments singularly destroys the Government's attempt (brief p. 44) to distinguish transit from the expressly exempt *National League* activities on the ground that the "public transit provisions are carefully targeted at a discrete function . . . ."

Facts about the exempt activity of solid waste collection (sanitation) provide analogous reenforcement for the Tenth Amendment immunity of public transit. Garbage collection at the White House has been by a private purveyor since the days of President John Adams. *History of Public Works* 433. In 1975, private firms collected residential refuse in 67% of 2,060 cities of all sizes surveyed, 61.4% of which relied entirely on private firms. E. Savas, *The Organization and Efficiency of Solid Waste Collection* 45, 63 (1977). "Waste disposal is one of today's hot new glamour industries . . . [which] has become a $10 billion business . . . ." Blyskal, *Glittering, Glamorous Garbage*, Forbes, June 8, 1981 at 156. *See also History of Public Works* 400 ("[m]ost of the early sewers were built with private capital"; "[r]emoval and disposition of sanitary waste was regarded as a private responsibility"; "private contractors cleaned cesspools and privies").

Data about parks and recreation also support SAMTA's position. According to a 1965 survey, 85,000 commercial enterprises provided outdoor recreational opportunities on 23 million acres, 46,000 more provided outdoor recreation facilities related to amusement and spectator sports on 18 million acres, and one million nonprofit enterprises were provided by 47,000 private and quasi-private nonprofit organizations on 7 million acres. *History of Public Works* 553, 554. *See also Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 159 n.8 (1978) (recreational parks are not an "exclusively public function"). Golf courses had their genesis in the private sector as private clubs, 10 Encyclopaedia Brittanica *Golf* 500-01 (1947), and in 1981 only about 15% of all golf courses in the United States were municipal, *Statistical Abstract* tab. 400, at 235.[32]

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[32] The Government's decision to exempt other activities not mentioned in *National League* reinforces SAMTA's position. For example, museums, although an important part of our cultural heritage, are not essential to the continued vitality of our urban areas. In 1975, 56% of the country's museums were run by private, nonprofit organizations, 34% were government run and 10% were governed by educational institutions. Nat'l Research Center of the Arts, Inc., Nat'l Endowment for the Arts, *Museums USA: A Survey Report* 13 (1975). The Government also ruled that a home for the retarded is exempt

4. A recurring, but disingenuous, theme of the Government's brief (pp. 20, 36 n.29, 46, 47, 48 n.37) is that transit can be distinguished from the activities exempted in *National League* because Congress extended the FLSA to public transit to prevent unfair competition with the private sector. On page 20 of its brief the Government has quoted an incomplete and misleading excerpt from the House and Senate reports. The full text of the quoted paragraph shows that Congress was also addressing unfair competition by public hospitals and schools:

> In addition to the amendment to section 3(s) of the act, section 3(r), which defines "enterprise," is amended to make plain the intent to bring under the coverage of the act employees of hospitals and related institutions, schools for physically or mentally handicapped or gifted children, or institutions of higher education, whether or not any of these hospitals, schools, or institutions are public or private or operated for profit or not for profit. Section 3(r) of the act is further amended to cover employees of street, surburban or interurban electric railways, or local trolley or motorbus carriers, if the rates and services of these railways or carriers are subject to regulation by a State or local agency, regardless of whether or not such railways or carriers are public or private or operated for profit or not for profit. These enterprises which are not proprietary that is, not operated for profit, are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose. Failure to cover all activities of these enterprises

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from the FLSA under *National League* (Opinion WH:492, Feb. 1, 1979, *reprinted in* Wage & Hour Manual (BNA) 91:1137-38) because it was owned by the county government, was operated by a board of commissioners appointed by the Police Jury, was established by an act of the state legislature, was considered a political subdivision of state government, and had the power to issue bonds and purchase land. These same factors apply to SAMTA, which was established by an act of the Texas legislature and is a political subdivision of the state, art. 1118x § 6(a); is operated by a board of trustees appointed by elected officials of cities in its service area and commissioners of Bexar County, *id.* § 6B; and can purchase land and issue bonds, *id.* §§ 6(d) & 7.

> will result in the failure to implement one of the basic purposes of the act, the elimination of conditions which "constitute an unfair method of competition in commerce."

S. Rep. No. 1487, 89th Cong., 2d Sess. 8, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3002, 3010. Interestingly, in its brief on the merits in *National League*, the Government argued that state activities besides schools and hospitals compete with the private sector and pointed to "trash collection agencies," "recreation facilities, libraries, and the like . . .," *id.* at 20, and in its brief in *Maryland* v. *Wirtz*, (pp. 13-14), the Government cited the very same House Report it now cites (No. 1366) in support of its argument that public hospitals and schools were properly brought under the FLSA to eliminate unfair competition.

In actuality, there is no competition in the transit field. Unlike hospitals, garbage collection companies and recreational facilities, mass transit does not and cannot operate profitably.

5. The Government (brief at p. 48 n.37) attempts to distinguish transit from the *National League* activities on the ground that transit receives user fees. The Government even maintains that sanitation, education and parks do not receive such fees. The Government is wrong in its analysis. User charges as a percent of total costs in 1980-81 in the nation's 46 largest cities, were 43% for sewage, 40% for hospitals, 19% for institutions of higher education, and 16% for parks and recreation. Bureau of Census, U.S. Dep't of Commerce, *City Government Finances in 1980-81* tab. 8, at 98 (1981).[33] As noted earlier, SAMTA's fare box receipts represent less than 25% of operating costs. Furthermore, public facilities such as golf courses and garbage collection routinely charge user fees. Federal law even requires that federally funded sewage treatment plants adopt user charges that permit break-even financing. 33 U.S.C. § 1284(b)(1)(A) (Supp. V 1981).

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[33] These percentages were calculated by dividing total expenditures for each service into total revenues for each service.

D. FEDERAL FUNDING OF TRANSIT IS IRRELEVANT.

The Government and Garcia both challenge *National League* immunity on the ground that UMTA funds allegedly hastened the public takeover of transit systems. This contention draws absolutely no support from *National League* or *LIRR*, it is invalidated by this Court's decision in *Jackson Transit Authority* v. *Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982), and it constitutes a convoluted attempt to apply Spending Power arguments in a Commerce Clause case.

Initially, it should be noted that neither the City of San Antonio nor SAMTA received one cent of federal assistance in acquiring the local transit operations in San Antonio. The City bought the San Antonio Transit Company's assets in 1959, five years *before* federal grants were available. SAMTA acquired the equipment and facilities of the city-owned system in 1978 through the issuance of bonds payable only out of local revenues — not out of federally provided funds.

More importantly, this Court's decision in *Jackson Transit* forecloses appellants' federal funding argument. In that case, a unanimous Court rejected a transit union's claim that by providing UMTA funds Congress intended to regulate transit labor relations. The Court specifically held that "Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers." *Id.* at 27. Certainly receipt of those very same funds cannot abrogate the Tenth Amendment rights of those same governmental entities, particularly since nothing in UMTA requires compliance with the FLSA.

Section 13(c) of UMTA (49 U.S.C. § 1609(c) (1976)), relied on by the Government (brief p. 45) and Garcia (brief p. 17), underscores the irrelevancy of federal aid to transit. Section 13(c) requires that as a condition of federal assistance, "fair and equitable arrangements [be] made, as determined by the Secretary of Labor, to protect the interests of employees affected

by such assistance" and that the terms and conditions of the assurances be specified in the contract granting UMTA assistance.[34] Nothing in the 13(c) assurances between SAMTA and the Government (R. 514-527) obligates SAMTA to pay FLSA overtime to its workers. Rather, they require only that the rights, privileges and benefits of SAMTA's employees under the existing working conditions and practices and policies be preserved and continued. R. 515. They also state (*id.*) that "[u]nless otherwise provided, nothing in these arrangements shall be deemed to restrict any rights the Recipient may otherwise have to direct the working forces and manage its business as it deems best, in accordance with the working conditions." Section 9(d) of UMTA (49 U.S.C. § 1608(d)(Supp. V 1981) prohibits use of UMTA provisions to "regulate in any manner the mode of operation of any mass transportation system" receiving a section 1602 grant except to require compliance with "undertakings furnished . . . in connection with the application for the grant." Since nothing in UMTA or the 13(c) assurances requires FLSA overtime, and they in fact bar other federal interference in SAMTA's operations, appellants cannot rely upon UMTA to compel compliance with the FLSA. *See Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981) ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously").[35]

In arguing that UMTA grants affect transit's *National League* immunity, the Government is really making a Spend-

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[34] Federal funding laws in areas exempted by the Court contain similar provisions conditioning assistance on "fair and equitable arrangements . . . to protect the interests of employees": Juvenile Justice & Delinquency Prevention Act of 1974, 42 U.S.C. § 5633(a)(18) (Supp. V 1981); Public Health Service Act (as amended in 1979), 42 U.S.C. § 300t-12(c)(1)(Supp. V 1981); Developmentally Disabled Assistance & Bill of Rights Act, 42 U.S.C. § 6063(b)(7)(B) (Supp. V 1981).

[35] Whether UMTA could have constitutionally required FLSA coverage is not an issue in this case. The point is that neither UMTA nor SAMTA's 13(c) assurances undertook to require compliance with the FLSA.

ing Power argument in a Commerce Clause case. This difference was explicitly recognized in *National League*. 426 U.S. at 852 n.17. The Court obviously did not consider federal funding relevant since the dissent pointed out that during fiscal 1977 the President's proposed budget recommended $60.5 billion in assistance to the States, including $716 million for law enforcement assistance. *Id.* at 878.

The irrelevancy of federal aid to transit is also evident from a comparison of the substantial federal assistance to other exempt *National League* activities. Although the Government (brief pp. 34-35) has focused only on education and police protection in analyzing the role of federal aid to the States, it is undisputed that the federal government has underwritten other *National League* activities as much if not more than transit.[36] For example, between 1973 and 1981, $33.3 billion was appropriated for wastewater treatment plant construction. *Municipal Wastewater Treatment Construction Grants Program: Hearings on S. 975 & S. 1274 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment & Public Works*, 97th Cong., 1st Sess. 7, 16 (1981). This is almost double the $18 billion in federal aid to transit which Garcia (brief p. 20) claims has been made in the twenty years since UMTA was passed. Furthermore, the federal government pays up to 85% of capital costs for sewage treatment plants, many of which probably would not have been built without federal funds. 33 U.S.C. § 1282(a) (Supp. V 1981). In 1982 alone, the federal government contributed $54.6 billion (40.3%) of total hospital expenditures in the United States. Gibson, *National Health Expenditures 1982*, 5 Health

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[36] The Government (brief pp. 7, 32) and Garcia (brief p. 3) both place great reliance on the testimony of the general manager of SAMTA's predecessor when he appeared before Congress and requested more federal funding of transit. Similar statements were made at congressional hearings by state and local officials about sewage treatment. *E.g., Federal Pollution Control Act Amendments of 1977: Hearings Before the Subcomm. on Environmental Pollution of the Comm. on Environment & Pub. Works*, 95th Cong., 1st Sess. 124-30 (1977). The archives are undoubtedly filled with similar pleas for federal aid for virtually any state activity Congress has chosen to fund.

Care Financing Rev. 1, 9 (1983). State and local governments contributed only 12.8% of the total. *Id.* at 9. In 1982, federal aid to transit comprised only 4% of the $88.2 billion grants-in-aid given to state and local governments. Office of Mgmt. & Budget, Exec. Office of the President, *Special Analyses, Budget of the United States Government Fiscal Year 1984* tab. H-11, at pp. H-29, H-34 (1983). During the same period, 4% of federal grants were for sewage treatment plant construction, *id.* at H-28, 8% were for education, *id.* at H-30, and 20% were for health, *id.* at H-31.[37]

Even if federal funds had been used in the acquisition of the transit system in San Antonio, SAMTA's entitlement to Tenth Amendment protection would not be affected. Local government's use of federal funds to acquire transit opeations as a necessary step to ensure continuation of an essential local service is not materially different from federal subsidization of other local government activities which are exempt under *National League* and which would be curtailed or eliminated without federal aid. An activity specifically exempted in *National League*, which was essentially created as a result of federal funding, is solid waste management (sanitation). According to Office of Solid Waste Mgmt. Programs, EPA, *State Activities in Solid Waste Management, 1974* at iii (1975),

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[37] During fiscal 1980 (the last year for which such data could be found), of the more than $445 million in federal grants made to local governments and private entities and individuals in Bexar County, approximately $6.4 million were construction grants for wastewater treatment works, $44.6 million were for education, $96.8 million were for health and human services, $9.5 million were UMTA grants, and $15.8 million were for revenue sharing. Community Serv. Admin., *Geographic Distribution of Federal Funds in Texas* 17-20 (1980). In fiscal 1982, federal aid to Texas and its political subdivisions was $3.73 billion. Div. of Gov't Accounts & Reports, Fiscal Service—Bureau of Gov't Fin. Operations, Dep't of the Treasury, *Federal Aid to States Fiscal Year 1982* at 1 (1983). This sum included approximately $190 million for elementary and secondary education, *id.* at 8; $173 million for construction of wastewater treatment works, *id.* at 10; $682 million for medical assistance, *id.* at 11; $8 million for law enforcement assistance, *id.* at 17; $78 million for UMTA assistance, *id.* at 21; and $233 million in general revenue sharing, *id.* at 21.

"[m]ost of the State programs in solid waste management originated only within the past decade, under the stimuli of Federal planning grants and technical assistance authorized by the Solid Waste Disposal Act of 1965." See also discussion, *supra*, regarding the role of federal funds in the development of hospitals.

II. TRANSIT IS ALSO EXEMPT UNDER *NATIONAL LEAGUE* BECAUSE IT IS AN INTEGRAL COMPONENT OF THE TRADITIONAL STATE ACTIVITY OF PROVIDING AND MAINTAINING STREETS AND HIGHWAYS FOR PUBLIC TRANSPORTATION

This Court's holding in *National League* granted FLSA immunity to "integral operations in *areas* of traditional governmental functions." 426 U.S. at 852 (emphasis added). In view of the language used by the Court in setting the parameters of its decision, it would appear that transit is immune from the FLSA under the Tenth Amendment if it is integral to a traditional state function. As shown below, transit is an essential component of the traditional state activity of providing and maintaining streets and highways for public transportation.

It is undisputed even under an historical standard that road building and maintenance for public transportation is a traditional activity of the States. As this Court noted in *South Carolina State Highway Department* v. *Barnwell Brothers, Inc.*, 303 U.S. 177 (1938):

> Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. . . . *Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions.* The state has a primary and immediate concern in their safe and economical administration.

Id. at 187 (emphasis added).[38] *See also Molina-Estrada* v. *Puerto Rico Highway Authority*, 680 F.2d 841, 845 (1st Cir.

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[38] Since there is no history of the States' building, owning and maintaining railroad tracks and rights-of-way, railroads cannot be properly classified as an integral component of the street and highway transportation system.

1982) ("governments have built and maintained roads from time immemorial"); *Peel* v. *Florida Department of Transportation*, 600 F.2d 1070, 1083 (5th Cir. 1979) ("Overseeing the transportation system of the state has traditionally been one of the functions of state government, and thus appears to be within the activities protected by the tenth amendment.").

Over the years, the States' role as road builder and owner has evolved to meet the changing needs of the populace, and as a consequence the States have adopted comprehensive transportation plans that encompass not only road building and maintenance, but mass transit as well. For example, article 6663c(1)(a)(2), Tex. Rev. Civ. Stat. Ann. (Vernon 1977) decrees that "[p]ublic transportation is an essential component of the State's transportation system . . . ." In 1975, article 6663b merged the Texas Mass Transportation Commission into the State Department of Highways and Public Transportation. *See also* article 1118x, § 1(c) ("concentration of motor vehicles places an undue burden on existing streets, freeways and other traffic ways, resulting in serious vehicular traffic congestion"). Senator Harrison A. Williams, in introducing a bill to amend UMTA in 1969, eloquently underscored the role of transit as a component part of road building: "If it is a public responsibility to build highways for those who can afford a car, then surely we have even a greater obligation to make sure that public transportation is available to those without cars." 115 Cong. Rec. 3433 (1969). *See also Molina-Estrada*, *supra*, in which the First Circuit lumped all of the highway department's activities together—including road building and repairing, operating toll roads and parking lots, and building a transit system—in concluding "that the Authority is responsible for 'traditional' or 'integral' governmental activities." 680 F.2d at 845. These authorities demonstrate that the district court was eminently correct in concluding that "[m]ass transit is an integral component of a state's transportation system." Gov't J.S. 5a.[39]

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[39] Also instructive are the many cases that have found other nonrailroad instrumentalities of transportation to be essential functions. *E.g.*, *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 715, 723 (1961) (parking building

III. THE FLSA CANNOT BE APPLIED TO ANY STATE OR LOCAL GOVERNMENT EMPLOYEES ABSENT A CONSTITUTIONALLY VALID AMENDMENT[40]

A. If this Court allows application of the FLSA amendments only to public employees not excluded by *National League*, it will be engaging in judicial reformulation of the FLSA to add words of limitation (codifying the Court's "traditional governmental function" holding) where none presently exist. Although the FLSA has a severability clause (29 U.S.C. § 219 (1976)), the decisions of this Court show that such a clause does not permit a court to add words to a statute in order to make it constitutional.

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operated by state-created parking authority "was dedicated to 'public uses' in performance of the Authority's 'essential governmental functions' "); *Amersbach* v. *City of Cleveland*, 598 F.2d 1033, 1038 (6th Cir. 1979) (municipal airport); *United States* v. *State Road Dep't of Florida*, 255 F.2d 516, 518 (5th Cir. 1958) ("it must be conceded that the building and maintenance of a system of state roads is essentially a governmental function. It being further conceded that this ferry is an integral part of the state road system . . ."); *Fowler* v. *California Toll-Bridge Auth.*, 128 F.2d 549, 551 (9th Cir. 1942) (Toll Bridge Authority "is representing and assisting the State in the performance of a traditional governmental function, that of building, operating and maintaining bridges and highway crossings as a part of the government system of state highways"); *People ex rel. Gutknecht* v. *Chicago Regional Port Dist.*, 123 N.E.2d 92, 99 (Ill. 1954) ("There is in principle no essential difference, so far as the public interest and the public safety are concerned, between the operation of a public airport and that of a highway, subway, wharf, public park, and the like.")

[40] This question was pled and briefed in the proceeding below, but the district court did not pass on its merits. The Court may consider the issue since "an appeal under 28 U.S.C. § 1252 . . . brings the 'whole case' before the Court." *Fusari* v. *Steinberg*, 419 U.S. 379, 387 n.13 (1975); *accord*, *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 419 (1977). SAMTA and APTA listed this as one of the questions presented in their motions to affirm, and appellants therefore should have presented any arguments they wish to bring before the Court on this point in their main briefs. *See* R. Stern & E. Gressman, *Supreme Court Practice* 704 (5th ed. 1978). Since they did not, they should be foreclosed from addressing it in their reply briefs. Alternatively, appellees should be given an opportunity to respond to the reply briefs on this point.

Hill v. *Wallace*, 259 U.S. 44 (1922) involved a severability clause virtually indistinguishable from the one in the FLSA. The Court held that the clause "did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain [since] [t]his is legislative work beyond the power and function of the court." *Id.* at 70. The Court relied on and quoted from *United States* v. *Reese*, 92 U.S. 214 (1876) in which Chief Justice Waite said:

> "We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. *The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there.* . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty. . . ."

259 U.S. at 70-71 (emphasis added). The Court also stated:

> To be sure in the cases cited there was no saving provision like § 11, and undoubtedly such a provision furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. *But it does not give the court power to amend the act.*

Id. at 71 (emphasis added).

In order to bring virtually all states and local governments under the FLSA in 1974, Congress amended section 203(d) to include a "public agency" within the definition of "employer" and added section 203(x) to define public agency as meaning, among other things, "the government of a State or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State." In order to make these definitions constitutionally valid under *National League*, a court would have to reframe the definition to add words of limitation such as, "to the extent they are not performing integral operations in areas of traditional governmental functions." Under

the rationale of *Hill* v. *Wallace*, a court cannot do this notwithstanding the presence of a severability clause. This Court's recent ruling in *INS* v. *Chadha*, 103 S. Ct. 2764, 2774-76 (1983) does not affect this result since that case did not involve use of a severability clause to add rather than delete provisions.[41]

B. Application of the FLSA only to nontraditional functions is also constitutionally unsound for a second reason. Congress intended to extend FLSA coverage to virtually all public employees. However, the necessary result of *National League* is to remove the great majority of public employees from the FLSA. Thus the very limited application of the FLSA permitted by *National League* would create a program different from the one Congress believed it was adopting. *See Sloan* v. *Lemon*, 413 U.S. 825, 834 (1973) (severability clause does not permit a court to apply educational reimbursement statute to nonsectarian schools since it could not be constitutionally applied to sectarian schools; "[t]he statute nowhere sets up this suggested dichotomy between sectarian and nonsectarian schools, and to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted"). The FLSA sets up no dichotomy between traditional and nontraditional governmental functions, and

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[41] The 1966 FLSA amendments apply only to public transit systems whose "rates and services are subject to regulation by a state or local agency . . . ." The plain meaning of this provision must be that only public systems that are regulated by some other state or local agency are covered. If public transit systems that regulated their own rates and services were included, the limitation in the 1966 amendments would have no meaning since all public systems would be covered. That SAMTA's interpretation is correct is indicated by the fact that in 1971, a bill was introduced to amend the FLSA to "apply to public transit systems whether or not their rates and services are subject to regulation by a state or local agency." *Hearings on H.R. 7130 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 206 (1971) (statement of C. Cochran, for Am. Transit Ass'n). Since SAMTA regulates its own services, *see* article 1118x §§ 6, 12, 13, and therefore is not embraced by the 1966 amendments, the only way FLSA coverage can be extended to its operations is through the 1974 amendments' inclusion of "public agenc[ies]."

therefore to reframe the statute to incorporate such a distinction would create a program different from the one Congress actually adopted. *See also Meek* v. *Pittenger*, 421 U.S. 349, 371 n.21 (1975).

Chadha does not require a different result. Congress relied on this Court's decision in *Maryland* v. *Wirtz* when it extended the FLSA to the entire public sector, and it presumably did not intend to enact a program covering only a small number of public employees. *See* H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 6-7, *reprinted in* 1974 U.S. Code Cong. & Ad. News 2811, 2816-17; *see also* 118 Cong. Rec. 24,240, 24,749 (1972).

CONCLUSION

SAMTA respectfully submits that the judgment of the district court is manifestly correct and should be affirmed.

Respectfully submitted,

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