Nos. 82-1951 and 82-1913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND J. DONOVAN, Secretary of Labor,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY AND AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees.

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY AND AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees.

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

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Does *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), in concluding that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act interfere with an essential attribute of state sovereignty and therefore cannot constitutionally be applied to traditional governmental functions, preclude application of these statutory provisions to publicly owned local mass transit systems?

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

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MOTION TO AFFIRM

The American Public Transit Association ("APTA"), appellee, moves, pursuant to Rule 16 of the Supreme Court, to affirm the judgment of the court below on the ground that such court correctly held that *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), controls this case.

STATEMENT OF THE CASE

1. San Antonio established a publicly owned local mass transit system in 1959.[1] In 1978, appellee San Antonio Metropolitan Transit Authority ("SAMTA") acquired the assets from the city and now operates the local public transit system providing service to the city and most of Bexar County, Texas. SAMTA, a political subdivision of the State of Texas, is "exercising public and essential governmental functions." Tex. Rev. Civ. Stat. Ann. art. 1118x § 6(a) (Vernon Supp. 1982). SAMTA provides bus service to the entire community at fares which cover only 25 percent of operating expenses, and service at reduced fares for school children, the elderly and the handicapped. Some downtown service is provided free of charge. The operational deficit is recovered through government funding, more than one-third of which is generated by state sales tax revenues. Acquisition of the system was financed entirely by public bonds; no federal funds were used.

2. This case arises out of a dispute between the States and the federal government that has ensued since 1966, when Congress, acting pursuant to its Commerce Clause powers, amended the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981) ("FLSA"), at-

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[1] Facts concerning local transit in San Antonio are drawn from Affidavit of Wayne M. Cook accompanying Brief for San Antonio Metropolitan Transit Authority in Support of Motion for Summary Judgment.

tempting for the first time to include a limited number of state activities within its coverage. In that year, it extended FLSA coverage to public as well as private schools, institutions, hospitals, and some public employees of "street, suburban or interurban electric railway, or local trolley or motorbus carrier[s],"[2] Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102, 80 Stat. 830, 831. The operators, drivers and conductors of covered transit services, however, were excluded by specific exemption from the overtime compensation provisions of the 1966 statute. Pub. L. No. 89-601, § 206, 80 Stat. 830, 836 (1966). The 1966 amendments extended the limited coverage of private transit enacted in 1961, Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72, to similar categories of public transit employees. In 1974, after this Court's decision in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), affirmed the power of Congress to cover state activities, Congress amended the statute to embrace most state and local employment relationships in areas where private employers were covered. The overtime exemption for transit operators, private or public, was phased out over a two-year period. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 21(b), 88 Stat. 55, 68.

State and local governments successfully challenged Congress' attempt to apply the FLSA wage and hour provisions to most activities of state and local governments in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). This Court cited several examples of the numerous state activities affected by its decision, but did not

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

specifically include or exclude publicly owned local mass transit.

3. Federal appellant first indicated its intent to apply the FLSA to publicly owned local mass transit over two years after *National League of Cities* was decided, in a letter dated September 17, 1979 to a transit union.[3] SAMTA learned of the letter and sued on November 21, 1979 to declare such application unconstitutional. APTA, the members of which include most of the local mass transit systems owned by state and local governments, intervened. On December 21, 1979, federal appellant formally amended its FLSA regulations—without any public notice or comment—to assert that local publicly owned mass transit agencies do not perform a traditional governmental function, and therefore are subject to the FLSA. 44 Fed. Reg. 75,628 (1979); 29 C.F.R. § 775.2(b) (1982).[4] Federal appellant also counterclaimed on behalf

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[3] Letter from the Deputy Administrator of the United States Department of Labor to the Amalgamated Transit Union (September 17, 1979), Brief of American Public Transit Association in Support of Motion for Summary Judgment, Exhibit A.

[4] Also listed in the regulation as functions to which the federal government believed the FLSA could be applied were off-track betting corporations, generation and distribution of electric power, provision of residential and commercial telephone and telegraphic communication, production and sale of organic fertilizer as a by-product of sewage processing, production, cultivation, growing or harvesting of agricultural commodities for sale to consumers, and repair and maintenance of boats and marine engines for the general public. 29 C.F.R. § 775.3(b) (1982). At the same time, federal appellant indicated that the Department of Labor would not seek to apply the FLSA to libraries and museums. 29 C.F.R. § 775.4(b) (1982).

of SAMTA's employees for back pay[5] and injunctive relief.[6] An employee, Joe G. Garcia, intervened.

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

4. After further briefing and oral argument, the district court found that this Court's decision and reasoning

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[5] The FLSA authorizes the Secretary of Labor to seek back pay and equal liquidated damages for employees for up to three years if an employer did not compensate employees in the manner established by the FLSA. 29 U.S.C. § 216(c) (1976 & Supp. IV 1980).

[6] While this action is the only case in which the federal government is a party, the issue has been raised in other federal appellate courts. *Compare, e.g.*, *Molina-Estrada* v. *Puerto Rico Highway Authority*, 680 F.2d 841 (1st Cir. 1982) (concluding that the FLSA may not be applied to a state highway and transit authority) *with Alewine* v. *City Council of Augusta*, 699 F.2d 1060, *reh'g denied*, 707 F.2d 523 (11th Cir. 1983), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Aug. 17, 1983) (No. 83-257); *City of Macon* v. *Joiner*, 699 F.2d 1060 (11th Cir. 1983), *petition for cert. filed*, 51 U.S.L.W. 388 (U.S. June 3, 1983) (No. 82-1974); *and Kramer* v. *New Castle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 786 (1983) (concluding that the FLSA may be applied to local publicly owned mass transit systems). *See also Dove* v. *Chattanooga Area Regional Transportation Authority*, 701 F.2d 50 (6th Cir. 1983) (reversing grant of summary judgment for transit agency and remanding for further proceedings).

in *LIRR* were fully consistent with its previous conclusion that "operation of a public transit system is a governmental function entitled to Tenth Amendment immunity." U.S. J.S. App. 2a.[7]

ARGUMENT

In *National League of Cities*, this Court reviewed the same statutory provisions at issue here and decided that the ability to determine the wages, hours and overtime compensation of state and local employees is an essential attribute of state sovereignty. The Court therefore held that FLSA wage and overtime requirements may not be applied to state and local governments where they "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852.

In subsequent decisions, this Court has addressed Tenth Amendment challenges to Congress' exercise of Commerce Clause power in other statutory contexts. In each case it distinguished the federal statutory provisions at issue in *National League of Cities*, consistently reaffirming that the FLSA wage and overtime provisions cannot constitutionally be applied to the traditional functions of state and local government. *EEOC* v. *Wyoming*, 103 S. Ct. 1054, 1060 (1983); *FERC* v. *Mississippi*, 456 U.S. 742, 758-59 (1982); *United Transportation Union* v. *Long Island Rail Road Co.*, 455 U.S. 678, 685 (1982); *Hodel* v. *Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 287-88 (1981). Thus, the only question now before this Court is whether to apply *National League of Cities* to an activity of state and local

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

government that, while not specifically mentioned in that opinion, is one of the "numerous line and support activities," 426 U.S. at 851 n.16, that "states have traditionally afforded their citizens," *id.* at 851.[8]

The facts in the record fully support the finding of the court below that publicly owned local mass transit is in an area of traditional governmental functions. Summary affirmance is therefore appropriate.

I. The Narrow Issue In This Case Is Whether Publicly Owned Local Mass Transit Is A Traditional Function Of State And Local Government

As its subsequent decisions have made increasingly clear, in *National League of Cities* this Court conclusively determined all but possibly one of the requirements for invalidating application of the FLSA to local publicly owned mass transit. *See LIRR*, 455 U.S. at 684 n.9; *Hodel*, 452 U.S. at 287-88. First, this Court held that application of the FLSA to the States and their political subdivisions is a regulation of the "States as States," 426 U.S. at 845. Second, it decided that the FLSA's regulation of minimum wage and overtime compensation for state and local employees addresses a matter that is an "undoubted attribute of state sovereignty." *Id.* Furthermore, in *LIRR* this Court recently confirmed that *National League of Cities* had considered the balance between the federal and state interests, *see* 426 U.S. at 852-53, *see also id.* at 856 (Blackmun, J., concurring), and had determined that the federal interest in the FLSA was

[8] *National League of Cities* was founded on an analysis of the limitations imposed by the Tenth Amendment and our system of federalism on the otherwise legitimate exercise of congressional Commerce Clause powers; the issue is not, as appellant Garcia suggests, G. J.S. at 11, whether "Congress by its generosity forfeited its authority under the Commerce Clause."

not "so great as to 'justif[y] State submission.' " *LIRR*, 455 U.S. at 684 n.9 (*quoting Hodel*, 452 U.S. at 288 n.29).

The one issue not expressly resolved by *National League of Cities* is whether publicly owned local mass transit is a traditional governmental function. This is the sole question presented because *National League of Cities* has already decided the first part of the final inquiry: whether requiring the States to comply with a federal law would "directly impair their ability 'to structure integral operations in areas of traditional governmental functions.' " *Hodel*, 452 U.S. at 288 (citation omitted).[9] Here, the federal law is the FLSA, which when applied to traditional governmental functions, "impermissibly interfere[s]" with an essential attribute of state sovereignty, leaving little of the "States' 'separate and independent existence,' " 426 U.S. at 851 (citation omitted).[10] *National*

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[9] This was "the key prong of the *National League of Cities* test" applicable to *LIRR*, 455 U.S. at 684, and was the focus of the inquiry in *EEOC* as well, 103 S. Ct. at 1061. Distinguishing *National League of Cities*, however, this Court found that the statutory provisions at issue in *EEOC* (the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976) (as amended)) did not unconstitutionally displace an attribute of state sovereignty and those in *LIRR* (the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1976)) did not involve a traditional state governmental function.

[10] Contrary to federal appellant's suggestion, U.S. J.S. at 18-21, the inquiry mandated by *National League of Cities* into whether imposition of a federal program would endanger the States' "separate and independent existence," 426 U.S. at 851, calls for evaluation of the effect on state sovereignty by the displacement of state policy choices regarding wages and hours, rather than consideration of whether state provision of certain services, *e.g.*, transit, parks, and hospitals, is essential to the States' "separate and independent existence," *id.* As the Court stated in *EEOC*, "application of the federal wage and hour statute to the States threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking." 103 S. Ct. at 1062 (citation omitted).

League of Cities held that federal displacement of the States' prerogative to establish wage and overtime compensation for their employees engaged in areas of traditional functions would impair the States' " 'ability to function effectively in a federal system,' " *id.* at 852 (citation omitted).[11]

As this Court reaffirmed in *EEOC*, "*National League of Cities* held that 'there are attributes of sovereignty attaching to every state government which may not be

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[11] "[P]articularized assessments of actual impact" of federal regulations, of course, are not necessary since it is the States' policy choices that are constitutionally protected. *National League of Cities*, 426 U.S. at 851. "The determinative factor . . . [is] the nature of the federal action, not the ultimate economic impact on the States." *FERC*, 456 U.S. at 770 n.33 (*quoting Hodel*, 452 U.S. at 292 n.33).

The FLSA overtime requirements, however, do have a direct impact on the ability of state and local governments to choose how they structure routes, employee work hours, service schedules, record keeping and wage rates. For example, the FLSA requires payment of time-and-one-half for hours worked over forty hours per week, which is computed in accordance with a federal statutory formula. 29 U.S.C. § 207(a) (1976); 29 C.F.R. § 197 (1982). Many public transit systems find it necessary to schedule their employees in two split shifts at peak commuter hours, *see, e.g., Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. 303 (1965) (testimony of C. Cochran), and to provide premium compensation for the split scheme in lieu of FLSA mandated overtime, *cf. Fair Labor Standards Amendments of 1973: Hearings on H.R. 4757 and H.R. 2831 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 165 (1973) (testimony of C. Cochran), *id.* at 170 (testimony of F. Hill); S. Rep. No. 300, 93d Cong., 1st Sess. 126 (1973) (minority views of Messrs. Dominick, Taft and Beall).

Such scheduling is not merely a matter of management efficiency; it is a means, for example, by which the State facilitates employment

impaired by Congress' and that '[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work and what compensation will be provided where these employees may be called upon to work overtime.' 426 U.S. at 845." 103 S. Ct. at 1061 n.11. Thus, *National League of Cities* has decided part of the final test, leaving unresolved only whether local publicly owned mass transit is a traditional function of state and local government. The district court in this litigation answered in the affirmative. This precise issue, in keeping with the suggestion of the federal government in that case,[12] was not addressed in *LIRR*.

II. The Lower Court Decision Is Compelled By *National League Of Cities*

As the district court concluded, the provision of publicly owned local mass transit services is as integral to the public responsibility of state and local government as are "fire prevention, police protection, sanitation, public health, and parks and recreation," *National League of*

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for low income groups and education for inner city students. Application of FLSA requirements would require redundant payments, leaving the States with "less money for other vital State programs," and would limit their ability to pursue their "social and economic policies beyond their immediate managerial goals." *See EEOC*, 103 S. Ct. at 1063. Of course, to minimize the cost impact of the federal requirements the States could change their scheduling practices, but this would "have the effect of coercing the States to structure work periods in some employment areas . . . in a manner substantially different from practices which have long been commonly accepted among local governments of this Nation." *National League of Cities*, 426 U.S. at 850.

[12] See note 22, *infra*.

Cities, 426 U.S. at 851, and schools and hospitals, *id.* at 855, which, while "obviously not an exhaustive catalogue," *id.* at 851 n.16, this Court has held are "typical" examples of the "numerous line and support activities which are well within the area of traditional operations of state and local governments," *id.*[13]

The provision of a local transportation infrastructure has been an integral function of state and local governments since the earliest days of our Republic. *See Molina-Estrada*, 680 F.2d at 845. With the industrial age and the growth of the nation's urban areas, local streets and roads became inadequate to meet this governmental obligation. Indeed, "[i]n 1905 congested traffic at rush hours was

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[13] While distinctions can be drawn between publicly owned local transit and the activities enumerated in *National League of Cities*, and "[w]hile there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." *National League of Cities*, 426 U.S. at 855 (footnote omitted).

Federal appellant attempts to distinguish publicly owned mass transit from the other protected activities by reliance on an early tax case, *Helvering* v. *Powers*, 293 U.S. 214 (1934), which held that the Trustees of the Boston Elevated Railway Company were not immune from federal income taxation. The activity addressed in that case, however, was the temporary quasi-public operation of a transit system. Furthermore, as Justice Rehnquist stated in his dissent in *Fry* v. *United States*, 421 U.S. 542, 555 n.1 (1975): "The Court in *Helvering* v. *Gerhardt*, 304 U.S. 405, 424 (1938), was careful to distinguish between the imposition of a federal income tax on the New York Port Authority, a question which it reserved, and such a tax upon an employee of the Authority, a question which it decided in favor of taxability." *See also Massachusetts* v. *United States*, 435 U.S. 444, 458-59 (1978) (Brennan, J., concurring); *Graves* v. *New York*, 306 U.S. 466 (1939).

described as the number one problem of large cities in the United States." W. Owen, *The Metropolitan Transportation Problem* 6 (rev. ed. 1966). As the problems of urbanization increased (*e.g.*, unemployment, congestion, traffic safety, pollution and mobility for students and the elderly) state and local governments increasingly turned to public transit to meet community-wide needs.

Several major cities entered into the provision of publicly owned transit services financed through state and local bond issues or taxes early in this century.[14] In fact, before the enactment of federal legislation to provide financial assistance, more than half of the nation's 21 largest cities provided publicly owned transit services. *See infra* at 27.

By 1978, about 90 percent of transit revenues, total transit miles, total transit vehicles owned and leased, and

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[14] *See, e.g.*, C. Thompson, *Public Ownership* 225-26, 240-41 (1925). As early as 1925, this author commented: "So we now have in America not only numerous smaller cities owning and successfully operating municipal street car lines, but three of our larger cities [are also doing so]." *Id.* at 222.

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

linked passenger trips were attributable to publicly owned mass transit systems. Affidavit of Stanley G. Feinsod accompanying Brief of American Public Transit Association in Support of Motion for Summary Judgment ¶ 4 ("Feinsod Affidavit"); *Transit Fact Book* at 43. Today almost all of the metropolitan areas in the country with a population over 200,000 are served by transit systems owned by state or local government agencies.[15]

Moreover, as time has gone on, local governments in rural areas have also responded to this need. By 1981, 248 out of 339 transit operations in non-urbanized areas (73 percent) were publicly owned.[16] The pervasiveness of state and local ownership of public transit is comparable to other traditional governmental functions expressly listed in *National League of Cities*.[17]

Thus, as the district court concluded, local publicly owned mass transit is a traditional function of state and local governments. It is the type of public service that the

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

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

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

States have determined over many years is necessary to meet their fundamental public welfare obligations in the fulfillment of their "role in the Union." *LIRR*, 455 U.S. at 687. The essential and sovereign character of public transit services has been expressly recognized by state constitutions and legislatures.[18]

Appellants contend that because transit has become a pervasively state and local governmental function in recent decades, this activity is somehow disqualified from protection under *National League of Cities*. First, their premise overlooks the fact that publicly owned transit became a widespread, well-recognized state and local function early in the process of urban industrialization and the development of transit technology. Second, any "static historical view" was expressly rejected by this Court in *LIRR*, 455 U.S. at 686, when it clarified that it would "not merely . . . look[] only to the past to determine what is 'traditional.' " *Id.* It stated:

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

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[18] Examples of state laws decreeing public mass transit to be an essential function of government are considered in *Inman Park Restoration, Inc.* v. *Urban Mass Transportation Administration*, 414 F. Supp. 99, 104 (N.D. Ga. 1975), *aff'd sub nom. Save Our Sycamore* v. *Metropolitan Atlanta Rapid Transit Authority*, 576 F.2d 573 (5th Cir. 1978); *Henderson* v. *Metropolitan Atlanta Rapid Transit Authority*, 236 Ga. 849, 853, 225 S.E.2d 424, 427 (Ga. 1976); *Mass Transit Administration* v. *Baltimore County Revenue Authority*, 267 Md. 687, 690, 298 A.2d 413, 415 (Md. 1973); *Teamsters Local Union No. 676* v. *Port Authority Transit Corp.*, 108 N.J. Super. 502, 507, 261 A.2d 713, 716 (N.J. Super. Ct. Ch. Div. 1970); *County of Niagara* v. *Levitt*, 97 Misc.2d 421, 422, 411 N.Y.S.2d 810, 812 (N.Y. Sup. Ct. 1978); *Pennsylvania* v. *Erie Metropolitan Transit Authority*, 444 Pa. 345, 350, 281 A.2d 882, 885 (Pa. 1971).

> *regulation.* Rather it was meant to require an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its "separate and independent existence." *Ibid.*, at 851.

Id. at 686-87 (emphasis supplied). *Cf. First National City Bank* v. *Banco Para El Comercio Exterior*, 51 U.S.L.W. 4820, 4826 n.27 (U.S. June 17, 1983).

State and local governments in great numbers assumed the responsibility for providing mass transit services and funding them from tax revenues after it became clear that essential community-wide transit services could not be provided profitably in the private sector.[19] States have undertaken this obligation because they regard the maintenance of an urban transportation infrastructure accessible to all residents "as integral parts of their governmental activities," *National League of Cities*, 426 U.S. at 854 n.18, and as "governmental services which their citizens require," *id.* at 847. These services, moreover, are for the benefit of the local community, rather than as part of an integrated network that serves all parts of the country.

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[19] *Transit Fact Book* at 27; D. Barnum, *From Private to Public: Labor Relations in Urban Transit*, 25 Indus. and Labor Rel. Rev. 95, 99 (1971).

APTA is unaware of any publicly owned local mass transit system that does not operate on a deficit basis. Feinsod Affidavit ¶ 6. Fare box revenues constitute only about half of operating costs, with state and local aid providing about 33 percent and federal aid providing about 15 percent of operating costs. *Id.* at ¶ 7. It is beyond doubt that states do not provide transit services to "engag[e] in business activities which have as their aim the production of revenues in excess of costs." *See Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 418 n.1 (1978) (Burger, C.J., concurring). Nor did state and local governments assume the responsibility for providing transit services to perpetuate a failing enterprise.

Public transit agencies are organizationally integrated or closely coordinated with other essential local governmental services such as street and traffic management, public works, land use planning and zoning—often under the umbrella of a common city department or regional authority. Feinsod Affidavit ¶ 11. Transit agencies form an important part of a local government budget. *See, e.g., Subway-Surface Supervisors Association* v. *New York City Transit Authority*, 44 N.Y.2d 101, 111, 375 N.E.2d 384, 389, 404 N.Y.S.2d 323, 329 (N.Y. 1978) (transit system is performing a governmental function because of the "intertwinement" between its finances and the city's). In order to keep the user charges low enough to serve those in a local community dependent on inexpensive transportation,[20] local public mass transit is heavily subsidized with general and special local tax revenues. Feinsod Affidavit ¶ 8. Reduced fares are provided for students and the elderly, *id.* at ¶ 9B, and fares are kept low in the face of rising costs, making transportation accessible to the poor and to low and middle income workers, *id.* at ¶ 9A.

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

> Public transit benefits the community as a whole[,] . . . is provided at a heavily subsidized price[,] . . . [and] cannot be provided at a profit [, and therefore is

[20] The fact that publicly owned local transit systems charge fares does not convert them into businesses and therefore activities which ought not to be protected under *National League of Cities*. User charges also contribute to the operation of hospitals, parks and recreation, and sanitation. Institute of Public Administration, *Financing Transit: Alternatives for Local Government* 228 (July 1979). Some public schools also charge tuition or user fees. *See Mueller* v. *Allen*, 51 U.S.L.W. 5050 (U.S. June 29, 1983).

> provided] for public service, not for pecuniary gain. [Thus] government is particularly well suited . . . [and, in fact,] is the only component of society that can provide the service.
>
> Finally, government today is the primary provider of transit services.

U.S. J.S. App. 18a-19a. In sum, publicly owned local mass transit falls squarely within the category of activities protected in *National League of Cities*.

III. The Lower Court's Conclusion Is Consistent With *Long Island Rail Road* And Other Recent Decisions Of This Court

In seeking to override the controlling effect of *National League of Cities*, appellants misconstrue subsequent judicial decisions and the relevance of federal funding of local public mass transit.

1. The district court's findings regarding publicly owned local mass transit are fully consistent with this Court's decision in *LIRR*. In upholding the application of the Railway Labor Act to the employees of the state-owned Long Island Rail Road, this Court followed and expressly affirmed its decision in *National League of Cities*. Following a line of prior Supreme Court decisions involving statutes other than the FLSA—*Parden* v. *Terminal Railway*, 377 U.S. 184 (1964); *California* v. *Taylor*, 353 U.S. 553 (1957); *United States* v. *California*, 297 U.S. 175 (1936)—this Court stated in *National League of Cities* that "the operation of a railroad engaged in 'common carriage by rail in interstate commerce . . .,' " 426 U.S. at 854, n.18 (citation omitted), is not "in an area that the States have regarded as integral parts of their governmental activities," *id.*[21]

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

Railroads are perhaps unique among state activities because even when publicly owned they still serve as part of the national railroad system and "have been subject to comprehensive [industry-specific] federal regulation for nearly a century." *LIRR*, 455 U.S. at 687 (footnote omitted).[22] By contrast, local public mass transit historically has been regulated by state and local governments.[23]

This Court further determined in *LIRR* that a state would be eroding federal authority if, by acquiring a small part of the privately-owned national railroad system, it could exempt its employees from federal Railway Labor Act protection. This statement was made, however, in the context of a function, *i.e.* railroads, which:

> have been subject to *comprehensive* federal regulation for nearly a *century*. The Interstate Commerce Act—the first *comprehensive* federal regulation of the industry—was passed in 1887. A year earlier we had held that *only* the Federal Government, not the states, could regulate the interstate rates of railroads. . . . The first federal statute dealing with railroad labor relations was the Arbitration Act of 1888.

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

[23] *See* text accompanying notes 25-28, *infra*. Congress recognized this fact in the FLSA by expressly limiting coverage to those local mass transit systems "[whose] rates and services . . . are subject to regulation by a State or local agency." 29 U.S.C. § 203(r)(2) (1976).

> . . . The Railway Labor Act thus has provided the framework for collective bargaining between all interstate railroads and their employees for the past 56 years. There is no comparable history of longstanding state regulation of railroad collective bargaining or of other aspects of the railroad industry.

455 U.S. at 687-88 (footnotes omitted) (emphasis supplied). "Moreover, the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system."[24] *Id.* The LIRR acceded to this federal regulatory authority for the first 13 years of its ownership by the state, *id.* at 690; it was only in the midst of the cooling-off period during a strike that the state attempted to convert the LIRR's corporate status, "apparently believing that the change would eliminate Railway Labor Act coverage," *id.* at 681.

Local mass transit, in contrast, has always been a local responsibility. There simply is not, and never has been, any comprehensive federal system of law regulating local mass transit. *See Local Division 589, Amalgamated Transit Union* v. *Massachusetts*, 666 F.2d 618, 633 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982). State or local laws have dictated, for example, the rates charged users of local transit,[25] equipment standards for transit

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

[25] *See, e.g.*, Cal. Pub. Util. Code §§ 211, 216, 451 (West Supp. 1982); N.Y. Transp. Law § 141 (McKinney 1975); Wash. Rev. Code Ann. §§ 81.64.010, 81.64.080 (1962).

vehicles,[26] the licensing of drivers of those vehicles,[27] and traffic safety rules.[28]

The statutory history of the FLSA is indisputable. Congress did not even attempt to apply the FLSA to regulate the wages and hours of any private transit employees until 1961. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72. Its first limited attempt to extend these requirements to *public* transit employees (along with employees of public hospitals and schools) was in 1966, and even then Congress specifically excluded most private and public transit employees (*e.g.*, bus drivers) from the hour and overtime requirements. Even after *Wirtz*, when Congress attempted to extend the FLSA requirements to most public agencies, overtime coverage of public and private transit operators was to be phased in; it was not until 1976, only seven years ago, that Congress intended to extend the full reach of federal wage and hour regulation to most local public transit employees. State and local governments began to provide transit services prior to

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[26] *See, e.g.*, Cal. Pub. Util. Code § 7810 (West 1971); Cal. Veh. Code §§ 26711, 35106, 35250, 35400, 35550-35551.5 (West 1971); Ill. Ann. Stat. ch. 95½ §§ 1-107, 15-102 (Smith-Hurd 1971 & Supp. 1982); N.Y. Veh. & Traf. Law §§ 104, 375, 385 (McKinney Supp. 1981); Wash. Rev. Code Ann. §§ 46.04.320, 46.37.005-46.37.500 (1962 & Supp. 1981).

[27] *See, e.g.*, Cal. Veh. Code § 12804 (West 1971 & Supp. 1982); Ill. Ann. Stat. ch. 95½ §§ 1-146, 6-104 (Smith-Hurd 1971 & Supp. 1982); N.Y. Veh. & Traf. Law § 509a-509h (McKinney Supp. 1982); Wash. Rev. Code Ann. §§ 46.20.390, 46.20.440 (1970 & Supp. 1981).

[28] *See, e.g.*, Cal. Veh. Code §§ 21000 *et seq.* (West 1971 & Supp. 1982); Ill. Ann. Stat. ch. 95½ §§ 11-100 *et seq.* (Smith-Hurd 1971 & Supp. 1982); N.Y. Veh. & Traf. Law §§ 1100 *et seq.* (McKinney 1970 & Supp. 1982); Wash. Rev. Code Ann. §§ 46.61.005 *et seq.* (1970 & Supp. 1982).

the enactment of the FLSA and well before Congress' attempt to extend it to private or public transit. By the time Congress attempted to apply the overtime provision of the FLSA to any transit system—public or private—the majority of residents of major urban areas was served by publicly owned transit systems, and the majority of transit employees worked for publicly owned systems.[29] Furthermore, when Congress or the Department of Labor did act, those actions were challenged in the courts. Therefore, it simply cannot be said that when state and local governments entered this area "they knew of and accepted" the application of the FLSA. *Cf. LIRR*, 455 U.S. at 690. By providing local transit services the states did not "erode federal authority in areas traditionally subject to federal statutory regulation," *id.* at 687. Rather, here the federal government seeks to extend its power into an activity the States were already conducting and into an area of historic regulation by the "States as employers." *See Hodel*, 452 U.S. at 286 (*quoting National League of Cities*, 426 U.S. at 841).[30]

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

[30] The court below recognized that:

> the FLSA is not a current manifestation of a traditional federal concern for labor relations in the mass transit field. Transit was specifically exempted from coverage from the time of the Act's original passage in 1938 until 1961 amendments subjected private transit operators to minimum wage provisions (but not the overtime pay provisions). Pub. L. No. 75-78, § 13(a)(3), 52 Stat. 1067 (1938); Pub. L. No. 87-30, §§ 2(c), 9; 75 Stat. 65, 66, 72 (1961). Public employers remained entirely exempt until 1966. *Diminution of federal authority resulting from private to public conversions during this period would have been attributable to the statutory exemption and consistent with congressional intent.*

U.S. J.S. App. 7a-9a (emphasis supplied).

The fact that some activities protected by *National League of Cities* were at one time conducted more significantly in the private sector than in the public sector was not relevant to that decision. Private organizations operated 75 percent of hospitals in 1945,[31] for example, but only 58.4 percent of hospitals in 1980.[32] But like local mass transit, and unlike railroads where there is "no comparable history of longstanding state regulation," *LIRR*, 455 U.S. at 688, hospitals are subject to extensive state regulation, including state licensing of hospitals and medical personnel.[33] Likewise, education—including curriculum and teacher licensing, for example—and police and fire protection, are heavily state-regulated. These are functions within the traditional sphere of state responsibility, and nothing in *LIRR* suggests that state acquisition of a private hospital, university or local mass transit system would so erode federal regulatory authority as to deny the State the immunity established by *National League of Cities*. Indeed, appellants would have to concede that there are numerous publicly owned hospitals, recreational facilities, schools and universities, museums and sanitation services that have been acquired from the private sector and are therefore no longer subject to FLSA requirements.

In an attempt to depict an erosion of comprehensive federal regulation, federal appellant cites other federal laws which apply to private local transit. U.S. J.S. at 22-23. But these laws apply equally to the private coun-

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[31] *Hospital Construction Act: Hearings on S. 191 Before the Senate Comm. on Education and Labor*, 79th Cong., 1st Sess. 57 (1945) (statement of Dr. T. Parran, Surgeon General, United States Public Health Service).

[32] *SAUS: 1982-83*, Table 173 at 112.

[33] American Hospital Association, *AHA Guide* C18-C20 (1982).

terparts of the activities expressly protected in *National League of Cities*. For example, the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981), regulates private conduct of all the expressly protected activities and transit, but it specifically exempts state and local government employees, including public transit employees. 29 U.S.C. at § 152(2). *See Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 23 (1982) ("labor relations between local governments and their employees are the subject of a longstanding statutory exemption from the National Labor Relations Act"). From this fact the district court concluded, "*any diminution of federal authority under the NLRA that results from a private to public conversion is attributable to this statutory exemption, not to the Tenth Amendment, and is consistent with congressional intent.*" U.S. J.S. App. 7a-9a (emphasis supplied). The statutes cited do not establish a *comprehensive* scheme of federal regulation unique to transit labor relations, as, for example, the Railway Labor Act does for railroads. Instead, the cited statutes regulate certain particular employment conditions for virtually all private employers in interstate commerce. In contrast, public employers, including publicly owned transit systems, are generally subject to state collective bargaining laws that govern wages and hours for their employees. U.S. Department of Labor, *Summary of Public Sector Labor Relations Policies* (1981). Finally, the statutes cited, except perhaps the National Labor Relations Act, were enacted after the state and local governments of many of the major metropolitan areas were providing local public transit services. It cannot be said, therefore, that applica-

tion of Tenth Amendment immunity erodes federal authority.[34]

2. Appellants invoke the straw man of federal funding under the Urban Mass Transportation Act of 1964, 49 U.S.C. §§ 1601-1618 (1976) (as amended) ("UMTA"), to shore up their weak argument that the FLSA may be applied to publicly owned local transit. This Court was well aware that the activities protected in *National League of Cities* received substantial federal financial support, *see* 426 U.S. at 878 (Brennan, J., dissenting), yet the Court neverthless held that the FLSA could not be applied to them.

Appellants would confuse Congress' Spending Clause powers, which were expressly not addressed in *National League of Cities*, 426 U.S. at 852 n. 17, with its Commerce Clause powers, which are limited by the Tenth Amendment. UMTA is a regular federal funding statute, like federal grant programs that assist schools, hospitals, police and fire departments and sanitation.[35] *Cf. Penn-*

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

[35] The federal appellant states that "[b]y 1978 more than $13 billion in federal aid to transit had been awarded under the UMT Act and other federal programs." U.S. J.S. at 19 (citation omitted). In the same years, more than $57.8 billion in federal aid was given to public

hurst State School and Hospital v. *Halderman*, 451 U.S. 1 (1981). Moreover, unlike the Railway Labor Act directly at issue in *LIRR*, UMTA does not purport to be part of a comprehensive system of federal regulation of local transit, *Local Division 589*, 666 F.2d at 633-34, nor does

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elementary and secondary schools alone. This is the sum of the figures for the school years ending in 1965 through 1978 (excluding 1967, for which data are not available). For years 1966, 1970, and 1975-1978, *see SAUS: 1981*, Table 218 at 135; for years 1965, 1968 and 1969, *see SAUS: 1970*, Table 149 at 105; for years 1971 and 1972, *see SAUS: 1972*, Table 157 at 106; for 1973, *see SAUS: 1976*, Table 186 at 117; and for 1974, *see SAUS: 1980*, Table 222 at 141. In 1977 to 1978, the federal government provided $7.7 billion in aid to public elementary and secondary schools, or 9.4 percent of all such revenue receipts. W. Grant & L. Eiden, *Digest of Education Statistics*, Table 66 at 75 (1982).

Similarly, in 1971 through 1981 the federal government had awarded states $27.11 billion in sewage treatment construction grants. U.S. Department of the Treasury, *Federal Aid to States* (published annually) ("*FAS: 19xx*"). The $27.11 billion figure is the sum of the annual figures. *See FAS: 1971* at 4; *FAS: 1972* at 4; *FAS: 1973* at 6; *FAS: 1974* at 5; *FAS: 1975* at 6; *FAS: 1976* at 8, 27; *FAS: 1977* at 6; *FAS: 1978* at 6; *FAS: 1979* at 7; *FAS: 1980* at 10; and *FAS: 1981* at 9.

In 1979, for example, the federal government subsidized local sanitation and sewage with $3.7 billion, *FAS: 1979* at 7, which accounted for 31.4 percent of total local expenditures of $11.77 billion on such services. U.S. Department of Commerce, *Environmental Quality Control, Governmental Finance: Fiscal Year 1978-1979*, Table C at 4 (1981).

This compares with only $2.96 billion provided by the federal government that year for local public mass transit, or 36.6 percent of available funds of $8.19 billion. *Transit Fact Book*, Table 5 at 46 and Table 19 at 67. The $8.19 billion includes all transit system revenues, operating subsidies and capital grants. It is assumed *arguendo* that capital outlays were provided in an 80%-20% federal/state ratio, and that all capital grants approved were actually provided.

any such system exist.[36] In *Jackson Transit Authority*, 457 U.S. at 27, this Court unanimously held that Congress "did not intend [UMTA] to create a body of federal law applicable to labor relations between local governmental entities and transit workers. Nor does UMTA require fund recipients to comply with the FLSA.

Appellants claim that UMTA funding stimulated the widespread establishment of publicly owned transit services. They are wrong. But, in any event, this does not provide any basis for distinguishing transit from numerous state and local activities within the broad protected areas cited by this Court—for example, sanitation proj-

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[36] As the Court held in *Jackson Transit Authority*, 457 U.S. 15 (1982), the provision of UMTA that addresses state and local transit employees' collective bargaining rights in, for example, wages and hours—section 13(c)—does not establish any *federal* rights for employees of transit systems receiving UMTA funds in addition to those rights established by *state* law. This Court stated:

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

Id. at 27 (footnote omitted).

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

ects such as tertiary treatment plants, educational projects such as Headstart and programs for the handicapped, and health programs such as the health systems planning agencies, that arguably would not even have existed but for federal funding.[37] Constitutional immunity cannot rest on the shifting sands of the federal budget process. Moreover, a result that leaves state highway or airport workers under a state compensation scheme and state public transit employees under the federal scheme would be dangerously politically divisive.

Contrary to appellants' contention, moreover, the trend toward public ownership of local mass transit was well established before the enactment of UMTA. Prior to the availability of UMTA funds, the majority of the

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[37] For example, federal funding of advanced waste treatment facilities began in 1956. The Senate Report on the Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246 (repealed 1970), refers to "the long period of disregard and neglect that preceded Federal legislation in this field." S. Rep. No. 1367, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 3969, 3975. Similarly, comprehensive, statewide health planning was "spotty and fragmented" prior to federal funding of such planning, *see* H.R. Rep. No. 2271, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 3830, 3833. *See also* National Health Planning and Resources Development Act of 1974, 42 U.S.C. §§ 300k *et seq.* (1976) (as amended) (*e.g.*, 42 U.S.C. §§ 300*l*-1, 300*l*-2 (1976) (specifies structure and functions of local health systems agencies, which may themselves be local governmental units)). For education, in the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3(a), 89 Stat. 773, 774, Congress explicitly stated that "State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children." The federal role is to be "a catalyst to local and State program growth." S. Rep. No. 168, 94th Cong., 1st Sess. 5, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1429.

largest urban centers had publicly owned systems. Of the nation's twenty-one largest cities (*i.e.*, with populations in excess of 500,000), twelve were served by publicly owned transit systems by 1964. *SAUS: 1965*, Table 14 at 19-20. There is no doubt that federal aid helped many cities, particularly smaller cities, enhance their direct responsibility for providing transit services as private systems were unable to operate profitably and were unable to satisfy the public welfare obligations that urban transit had assumed.[*] But it is simply historical revisionism to imply that state and local governments provide transit services because federal aid enticed them into doing so. Federal grant aid to cities in support of transit services—like federal aid to education, hospitals and law enforcement—simply demonstrates that Congress thought it important that States be able to meet their local public welfare responsibilities in these areas. The passage of UMTA clearly was not intended to encourage the acquisition of private transit systems by public agencies. *See, e.g.*, 49 U.S.C. § 1602(e) (1976); S. Rep. No. 82, 88th Cong., 1st Sess. 19 (1963).

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

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

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

Despite the presence of a standard severability clause in the FLSA, 29 U.S.C. § 219 (1976), it is not probable that Congress would have intended to enact a law only directed at a small class of public employees if it could not carry out its intent to cover all state and local employees.[39] *See Sloan* v. *Lemon*, 413 U.S. 825, 834 (1973). *But cf. Immigration and Naturalization Service* v. *Chadha*, 103 S. Ct. 2764, 2775 (1983). Moreover, what remains after severance is not a "fully operative" and "workable administrative machinery." *Id.* Such federal intervention in wage and hour decisions for a small number of state employees and not for others is divisive and may undermine the States' leverage in labor negotiations with its employees not subject to federal law. Therefore, the minimum wage and overtime compensation provisions of the FLSA cannot be applied to publicly owned local mass transit since, even if public transit is not a traditional function, these requirements are not severable from the unconstitutional provisions of the statute. This Court may rely on this alternative argument to grant APTA's Motion to Affirm even though it was not the ground relied on by the lower court. *See Fusari* v. *Steinberg*, 419 U.S. 379, 387 n.13 (1975).

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[39] *National League of Cities* eviscerated coverage for what is currently 73 percent of state and local government employees. *SAUS: 1982-83*, Table 501 at 303.

CONCLUSION

The district court correctly concluded that, like protected activities expressly mentioned in *National League of Cities*, publicly owned local transit services are "important governmental activities," 426 U.S. at 847, which are "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services," *id.* at 851 (footnote omitted). Indeed, these are precisely the kinds of public welfare services that "States have traditionally afforded their citizens." *Id.* Since this Court has held, and repeatedly confirmed, that the precise federal regulation at issue here impermissibly interferes with an essential attribute of state sovereignty—the power to fix wages and overtime compensation—and that as such it "endangers [the States'] 'separate and independent' existence," *LIRR*, 455 U.S. at 690 (*quoting National League of Cities*, 426 U.S. at 851), when applied to traditional governmental functions, it follows that publicly owned local mass transit, as a traditional governmental function, is exempt.

Accordingly, this Court should grant APTA's Motion to Affirm.

Only one Justice of this Court has suggested that *National League of Cities* should be overruled. *EEOC*, 103 S. Ct. at 1067 (Stevens, J., concurring). Substantial deprivation of decision-making authority by the hundreds of public agency members of APTA would result if the FLSA were applied to their activities. These public bodies also might be subject to tremendous back-pay and liquidated damage claims. *But cf.*, *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation* v. *Norris*, 51 U.S.L.W. 5243 (U.S. July 6, 1983). Therefore, should this Court not summarily affirm,

particularly if the reason is that, as appellants discuss, some other lower federal courts have found *contra* to the holding of the court below, APTA respectfully concurs with appellants' suggestion that the question is substantial and the case should be set for full briefing and oral argument on the merits.

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