Nos. 82-1913 and 82-1951

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOE G. GARCIA, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE SECRETARY OF LABOR

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TABLE OF AUTHORITIES

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The question in this case is whether provisions of the 1966 and 1974 amendments to the Fair Labor Standards Act (FLSA) that progressively extended minimum wage and overtime wage protection to employees of publicly owned mass transit systems are a permissible

exercise of Congress's authority to legislate under the Commerce Clause. This question was not resolved by the Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), because the statutory provisions that were at issue there are distinct from those now before the Court. See Gov't Br. 2-5.

In our opening brief we have explained that operation of a transit system is not a "traditional governmental function[]" within the meaning of *National League of Cities*, 426 U.S. at 852, and that application of the FLSA to transit systems poses no threat to the separate and independent existence of the states. Appellees' counter-arguments generally were anticipated in our opening brief and, for the most part, require no reply. Several points do warrant further comment, however.

A. 1. *National League of Cities* declared the Tenth Amendment principle that the National Government may not "'devour the essentials of state sovereignty'" (426 U.S. at 855 (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting)). Thus Congress may not apply its vast power to regulate commerce directly upon activities of the states in a "'fashion that impairs the States' integrity or their ability to function effectively in a federal system.'" *National League of Cities*, 426 U.S. at 843 (quoting *Fry* v. *United States*, 421 U.S. 542, 6547 n.7 (1975)).

In this and in other areas of state immunity from federal legislation, however, the Court has been sensitive to the expanding "activity of state governments into new fields * * * [undertaking] the performance of functions not known to the states when the constitution was adopted" (*National League of Cities*, 426 U.S. at 870 n.10 (Brennan, J., dissenting)) and the tendency of state and local enterprises to make economic choices af-

fecting interstate commerce restricted only by parochial interests. See *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 422-424 (1978) (Opinion of Burger, C.J.). Because a restraint on national power erected to prevent the destruction of state sovereignty might become a vehicle for the erosion of national authority and the integrity of federal power, the Court has been careful to limit areas of immunity to circumstances where federal control might "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" (*National League of Cities*, 426 U.S. at 852). The Court subsequently explained that its repeated "emphasis on traditional government functions and traditional aspects of state sovereignty" 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.'" *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678, 686-687 (1982) (quoting *National League of Cities*, 426 U.S. at 851).

The Court has refused to recognize any "sacred province of state autonomy," but has carefully limited the states' immunity to "core state functions" (*EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 9). Rejecting "pernicious abstractions" (*Graves* v. *New York*, 306 U.S. 466, 489-490 (1939) (Frankfurter, J., concurring)), the Court has delimited the sphere of Tenth Amendment immunity from Commerce Clause legislation to what is actually necessary to preserve the separate and independent existence of the states (*EEOC* v. *Wyoming*, slip op. 9).

Appellees suggest that Tenth Amendment immunity must be extended to publicly operated transit enter-

prises simply because they are publicly operated and because the services provided are needed by the persons who use them. See APTA Br. 9, 16; SAMTA Br. 33-34. But this submission represents a radical departure from the Court's prior decisions. The importance of transit or any other service to those who use it simply does not provide a measure of the impact *upon state sovereignty* of federal legislation applying uniform wage standards to enterprises in the public and private sector. In today's society, many goods and services are "essential" to public welfare. Yet a decision by the states to take over the provision of food, clothing or the channels of communication to their citizens plainly could not justify abrogation of the authority of Congress to legislate, in the national interest, regarding these vital components in the stream of commerce.

2. Fifty years ago, in *Helvering* v. *Powers*, 293 U.S. 214 (1934), this Court unanimously held that the municipal operation of a street railway, "[w]hile * * * for the public benefit, * * * is still a particular business enterprise" (*id.* at 223) and not a field of activity which required protection from federal taxation in order to protect the independence of state government. The operation of such an enterprise was described by Chief Justice Hughes as "distinct" from "usual governmental functions" (*id.* at 227). Appellees brush *Powers* aside as an antique, conveniently overlooking that they are trying to prove that municipal transit systems are "traditional" governmental functions. *Powers* establishes at minimum that more than a century into this Nation's existence no member of this Court viewed a public transit system as even a "governmental," much less a "traditional" governmental, function.

Just a term ago, in a decision that appellees are unable to characterize as out-of-date, this Court again

unanimously remained unconvinced that a publicly owned and operated commuter railroad is a traditional government function. *Long Island R.R.*, 455 U.S. at 686. The holding of *Long Island R.R.* leaves little room for appellees' argument that operation of a transit system free of the requirements of uniform federal legislation regulating commerce is essential to preservation of state sovereignty. The Court there rejected a virtually identical claim, stating:

> "[T]here [is] certainly no question that a State's operation of a common carrier, even without profit and as a 'public function,' would be subject to federal regulation under the Commerce Clause. . . ."

455 U.S. at 685 n.11 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 422 (1978) (opinion of Burger, C.J.)). Appellees struggle to find factual distinctions between a commuter railroad and a transit system (see page 12 & note 7, *infra*). But even if these technical distinctions had substance, they simply could not justify adopting disparate rules of constitutional law for commuter railroads and other transit operations; the dispositive fact is that neither commuter railroads nor other transit operations "provide[] 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).[1]

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[1] APTA stated in 1981 that commuter railroads "are rapidly being merged into the transit industry" and without exception "are now either publicly owned or receive financial support from public agencies." *Transit Fact Book 1981*, at 18. And in its amicus curiae brief in *Long Island R.R.*, APTA remarked (at 21) that "this Court should not evaluate commuter trains in isolation, but rather it should consider them as an integral part of local urban mass transportation systems throughout the United

B. 1. The government's opening brief canvassed the numerous attributes of publicly operated transit systems that set them apart from the "traditional governmental functions" held to be immune from the operation of the Fair Labor Standards Act in *National League of Cities*. These include: the historic predominance of the private sector in providing local transit services, the infant status of the public sector of the industry, and the continuing role of private carriers (Gov't Br. 16-24); the critical role of federal financial aid in making possible the acquisition and operation of transit services by local governments in recent years (Gov't Br. 26-38); the existence of substantial federal regulatory legislation governing labor relations and terms of employment in the local transit industry that was in place by the time significant numbers of local governments began to acquire transit systems (Gov't Br. 39-43); the absence of any untoward impact upon state prerogatives resulting from application of the FLSA to public transit employment (Gov't Br. 43-46); and the potent federal interest

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States." Respondent (see Br. 7, 18-24 & nn.22-23) and the other amici supporting it in *Long Island R.R.* made the same point (see Nat'l League of Cities Br. 10-12; Nat'l Inst. of Mun. Law Officers Br. 3, 10-17). Of course, as APTA observes (Br. 14 n.15, 26 n.38), we pointed out in *Long Island R.R.* that the question presented in this case did not have to be resolved there, and that differences existed between the role of local government in commuter rail operations and in other forms of transit. But nothing in our earlier brief suggests that mass transit operations meet the test for Tenth Amendment immunity. Moreover, it is difficult to understand how APTA can maintain (Br. 15-16) that transit services are an inseparable part of a city's larger transportation network, yet that different constitutional rules should apply to a commuter railroad and bus or subway operations conducted by the very same governmental entity. (The Long Island Railroad is operated by New York's Metropolitan Transportation Authority, which also operates New York City's buses and subways. See Resp. Br. 1-2, *Long Island R.R.*)

in preventing unfair competition in commerce, which, Congress determined, required FLSA coverage of public transit employment (Gov't Br. 46-48). In the aggregate these factors show that the transit provisions of the FLSA pose no threat to state sovereignty.

Appellees' response, by and large, is to suggest one example or another of a service, claimed to be immune from operation of the FLSA under the teaching of *National League of Cities*, that allegedly shares one of the special attributes of the local transit industry.[2] The particular analogies drawn by appellees generally are dubious, at best. A more significant and revealing consideration, we submit, is that appellees do not—and cannot—identify any state or local governmental activity recognized to be within the protected sphere delineated in *National League of Cities* that possesses anything like the combination of distinguishing attributes that set the public sector of the local transit industry apart.

For example, appellees observe (APTA Br. 25 n.33; SAMTA Br. 35-37) that hospitals and schools, like transit, currently are found in the private as well as the public sector.[3] But appellees forget that the public sec-

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[2] See generally SAMTA Br. 33-40, 43-44; APTA Br. 25 n.33, 33-34, 38 n.57, 39-40 & n.61.

[3] We note that appellees utilize incommensurable statistics in making these comparisons, highlighting for instance (APTA Br. 25 n.33) the proportion of *schools* that are privately operated. But the data that we have presented (see Gov't Br. 16-18) reflect the proportion of American *communities* that have assumed responsibility for local transit service. Appellees have not identified a single community in the United States that relies exclusively on private schools. The states' and municipalities' perception that education is a service they have a sovereign duty to provide—irrespective of the availability of private sector alternatives—reflects that education, unlike transit, is among the "functions * * * which governments are created to

tor in these fields was well established before the enactment of the FLSA—and long before its extension to cover public employment. And there is no evidence whatsoever that public participation in these fields resulted from governmental takeovers of private enterprises previously subject to the FLSA, much less that such a transformation was materially assisted by substantial federal funding.

Similarly, appellees adduce other examples of state or local governmental activities that have been substantially assisted with federal funds (APTA Br. 38 n.57; SAMTA Br. 43), such as construction of wastewater treatment plants.[4] But in none of these examples was a service traditionally performed by the private sector subject to the FLSA converted to public operation, thereby eroding federal constitutional authority. In other instances cited by appellees, such as the education of handicapped children (see APTA Br. 38 n.57), federal funds have encouraged or made possible the augmentation of existing services or provision of public services to an expanded client population within an existing area of local governmental responsibility. Such enhancement or expansion of existing services is hardly comparable to the dramatic conversion of the entire field of local transit service from the private sector to

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provide" (*National League of Cities*, 426 U.S. at 851). Cf. *Plyler* v. *Doe*, 457 U.S. 202, 221-223 (1982).

[4] If, as appellees assert, these plants simply would not exist but for the availability of federal funding, it might well be entirely proper for Congress to require FLSA protection for the employees of such plants. Contrary to appellees' assumption, the mere characterization of "sanitation" as a traditional government function in *National League of Cities*, 426 U.S. at 851, does not resolve this issue. Cf. 29 C.F.R. 775.3(b) (FLSA may be applied to production and sale of organic fertilizer as a by-product of sewage treatment; see Gov't Br. 6).

the public sector that occurred in many communities in recent years. Unlike the former, the latter serves—if the decision below should stand—to repeal the established federal wage and hour protections applicable in an entire industry.

The wholly artificial exercise of examining in isolation particular facets of the complex of attributes that distinguish the public sector of the transit industry from the protected "traditional governmental functions" identified in *National League of Cities* cannot assist appellees. The ultimate inquiry required by *National League of Cities* and its progeny is "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.'" *Long Island R.R.*, 455 U.S. at 686-687 (quoting *National League of Cities*, 426 U.S. at 851). This heavy burden cannot be met by a showing that transit shares selected attributes of activities previously identified as protected.[5]

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[5] Appellees seek (APTA Br. 12-14; SAMTA Br. 15-17) to foreclose consideration by the Court of whether application of the FLSA to public transit systems unduly intrudes upon the states' "ability 'to structure integral operations'" (*Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981) (quoting *National League of Cities*, 426 U.S. at 852)) or whether "the nature of the federal interest advanced" here is "such that it justifies state submission" (*Hodel*, 452 U.S. at 288 n.29). But it would be improper to read *National League of Cities* to prevent examination of any element of the established tests for Tenth Amendment immunity.

The transit provisions of the FLSA amendments of 1966 and 1974 were not before the Court in *National League of Cities*. Moreover, the Court carefully canvassed the effects of the wage and hour requirements as applied to the traditional governmental functions involved in *National League of Cities*. It determined that they entailed "a virtual chain reaction of substantial and almost certainly unintended consequential effects on state

2. a. In their efforts to portray local transit service as a "traditional governmental function," appellees engage in a substantial exercise in historical revisionism (see APTA Br. 23-24; SAMTA Br. 26-28). This is best demonstrated by tracing the course of APTA's own utterances on this subject. As recently as December 1979, contemporaneous with the filing of the complaint in this action, APTA's official public literature proclaimed bluntly: "Public ownership of transit is a recent development." *Transit Fact Book* 55 (1978-1979 ed.). Less than two years later, with this litigation going forward, APTA reversed its assessment 180 degrees, stating, based on the very same data, that "[p]ublic ownership of transit *is not* a recent development" *Transit Fact Book 1981*, at 27 (1981) (emphasis added). Similarly,

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decisionmaking" amounting to a "wide-ranging and profound threat to the structure of State governance" (*EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1984), slip op. 13). Only then was the Court able to conclude that the states' ability to set wages for employees performing these particular governmental functions free of the impact of federal law was an integral part of state sovereignty. See 426 U.S. at 845-852. By contrast, we have presented substantial arguments, not answered by appellees, that no such impermissible effect is portended by the distinct statutory provisions at issue here (see Gov't Br. 43-46). And the transit provisions of the FLSA rest upon Congress's determination that application of the FLSA to the public sector of the transit industry is required in order to prevent unfair competition (see Gov't Br. 46-48)—a consideration nowhere addressed in *National League of Cities*.

The presumption of constitutionality that cloaks the 1966 and 1974 transit amendments to the FLSA (see *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)) accordingly cannot be overcome without consideration of all the factors that bear upon the question presented. Indeed, to artificially constrict the range of the Court's inquiry in this case would be inconsistent with the Court's explanation in *National League of Cities* (426 U.S. at 852-853) of its refusal to overrule *Fry* v. *United States*, 421 U.S. 542 (1975).

while appellees now attempt to minimize the significance of federal financial assistance (APTA Br. 38), APTA acknowledged in 1981 that federal funding for local transit in the 1960's saved transit in "many cities" from "extinction," and that federal aid has since increased "many times." *Transit Fact Book 1981*, at 29-30. Indeed, even today, amici curiae National League of Cities et al. appear to acknowledge (Br. 5-6) that although some public transit systems existed prior to the advent of federal assistance, the major shift of transit service from the private sector to the public sector followed, and was dependent to a critical degree upon, the availability of substantial federal financial assistance. Appellees' effort to characterize the public sector of the local transit industry as an independent creation of state or local government of long standing accordingly should be greeted with skepticism.

b. As an alternative to this effort to recast history, appellees fall back upon the district court's observation (J.S. App. 4a) that transportation-related activities such as road building are historically associated with the public sector (see SAMTA Br. 45-46; see also APTA Br. 15-17, 23). But there is no warrant for treating all transportation-related activities as a single service for purposes of Tenth Amendment analysis. Plainly, that approach was not followed in *Long Island R.R.* (see Gov't Br. 20-21). And *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, No. 81-827 (Feb. 23, 1983), slip op. 3 & n.6, rejects any such indiscriminate approach to the contours of Tenth Amendment immunity.

In any event, appellees' argument is simply factually insupportable. The employees whose eligibility for minimum wage and overtime protection is at issue here are those who operate, service and administer a transit sys-

tem. Such employees are in no respect interchangeable with those engaged in road building or planning a transportation infrastructure. A tradition of state responsibility for road building or maintenance is accordingly no more relevant in determining the availability of Tenth Amendment immunity for transit operating and administrative employees than is private sector performance of the function of manufacturing motor vehicles, which undoubtedly provide the bulk of local transportation.[6]

c. Like the district court (see J.S. App. 5a), in its effort to establish the elements of Tenth Amendment immunity, SAMTA seizes upon (Br. 24-26) state *regulation* of local transit service as a substitute for the absent tradition of state *operation* of transit systems (see also NLC Br. 4-5). We have already explained (see Gov't Br. 21-24) why this reasoning is alien to this Court's Tenth Amendment teaching. SAMTA, however, points (Br. 24) to this Court's observation, in *Long Island R.R.*, at the end of its recitation of the long history of federal regulation of employment rela-

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[6] Appellees' reliance (SAMTA Br. 5-6 n.3, 45-46; APTA Br. 5 n.8, 23) on *Molina-Estrada* v. *Puerto Rico Highway Authority*, 680 F.2d 841 (1st Cir. 1982), is misplaced. There the court held, as a matter of statutory interpretation, that the FLSA does not apply to employees of the Puerto Rico Highway Authority whose "work is related to the Authority's road building and maintenance activities" (*id.* at 846). Tenth Amendment principles were invoked only by analogy to guide the court in statutory interpretation (*id.* at 846-847). Although the court observed that the Puerto Rico Highway Authority "*plans to build* a mass transit system" (*id.* at 845; emphasis added), its decision rested upon the individual plaintiff/employees' jobs—in road building and maintenance (*id.* at 846)—and in no respect suggests that *operation* of a transit system should be regarded as a traditional governmental function inseparable from responsibility for road construction. As noted in our opening brief (at 10 n.13), the courts of appeals uniformly have rejected the claim advanced by appellees in this case.

tions in the railroad industry, that "[t]here is no comparable history of longstanding state regulation of railroad collective bargaining or of other aspects of the railroad industry" (455 U.S. at 688). But the Court's comment, read in context, hardly suggests that the existence of such a tradition would suffice to override the federal interest in application of a uniform regulatory scheme. See also *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 289-292 & n.31.[7] At most this would be one factor that might be considered in balancing the federal and state interests. See *id.* at 288 n.29.

As it happens, however, there is no need to undertake a refined balancing analysis here. As explained in our opening brief (at 39-43), substantial federal regulation affected wages, collective bargaining, and other aspects of labor relations in the private sector of the transit industry by the time the bulk of the recent conversions of transit operation to public ownership occurred.[8] By contrast, state regulation of private local

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[7] SAMTA generally makes the mistake of treating each of the observations offered to buttress the holding of *Long Island R.R.* that the Railway Labor Act may constitutionally be applied to a state owned commuter railroad as a negative pregnant prescribing a different result if any of the facts of the case were altered (see SAMTA Br. 17-29). But, as the unanimity that attended the Court's decision in *Long Island R.R.* attests, the multiplicity of factors supporting the Court's decision simply reflects that the decision was a relatively clearcut one. Application of the teaching of *Long Island R.R.* requires more than mere mechanical comparison of the facts of the two cases.

[8] SAMTA suggests (Br. 22-23) that, because the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, applies to certain private sector counterparts to protected functions enumerated in *National League of Cities*, that statute may not be considered in determining whether a state takeover of services previously performed by the private sector impermissibly erodes federal authority. But the problem of erosion of federal

transit operations did not, even by appellees' account (see SAMTA Br. 25-26 & n.20; see also NLC Br. 4-5), extend to any facet of labor relations, much less to wages and overtime.

3. Appellees devote a considerable portion of their argument (APTA Br. 35-45; SAMTA Br. 41-45) to disputing what they mischaracterize as a "Spending Power argument in a Commerce Clause case" (SAMTA Br. 42-43). But the significance to our argument of federal grants to local public transit systems is hardly "elusive" (compare APTA Br. 35-36). It is simply this: to the extent that Tenth Amendment immunity may extend to local governmental functions that are manifestly not "traditional" in the strict historical sense (see Gov't Br. 24-26), it necessarily is pertinent to inquire how the "new" function came to be established in the public sector.

On that question appellees cannot dispute the historical record. Private transit systems in many cities were taken over by local government with substantial federal financial assistance. The representatives of local government told Congress, and Congress found as a fact, that, in many cities, local transit service could not survive without federal financial assistance that made possible public acquisition and improvement of existing private systems. In view of the critical role of federal

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authority arises only when a new public sector endeavor is created by conversion of private sector activities. Moreover, contrary to SAMTA's further suggestion, to bar such erosion of federal authority is not to impose a fixed view of state functions inconsistent with *Long Island R.R.* Rather, there is an important distinction between genuinely new state services that may, in some instances, reshape the protected sphere of state activity without vitiating federal sovereignty, and functions taken over from the private sector that were previously subject to federal regulation. See *Long Island R.R.*, 455 U.S. at 686-687.

funding in establishing mass transit in the public sector, it is unrealistic to portray transit as the kind of "core state function" (*EEOC* v. *Wyoming*, slip op. 9) that cannot be covered by uniform federal legislation establishing fair wage standards without critically endangering the survival of the states as independent entities. See *Long Island R.R.*, 455 U.S. at 686-687; see also *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 815 (1976) (Stevens, J., concurring). Appellees simply cannot have it both ways, stressing the non-"static" aspects of state sovereignty while ignoring the path that led from past to present.[9]

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[9] As we have previously explained (Gov't Br. 24-26), nothing in *Long Island R.R.* should be understood to adopt an ahistorical approach to the scope of state immunity from federal enactments under the Commerce Clause. Indeed, the additional evidence canvassed in that case (455 U.S. at 687-688) was largely historical in nature.

Nor, contrary to SAMTA's suggestion (Br. 31-32), is a different rule required by *Brush* v. *Commissioner*, 300 U.S. 352, 370-371 (1937). Subsequent decisions in the area of tax immunity make clear that the language cited by SAMTA represented only an interpretation of the applicable Treasury regulation, which adopted an ahistorical standard. See *Helvering* v. *Gerhardt*, 304 U.S. 405, 422-423 (1938). And in *New York* v. *United States*, 326 U.S. 572 (1946), a plurality of the Court, speaking through Chief Justice Stone, rejected an ahistorical approach, at least to the extent that it would "accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning" (326 U.S. at 588). At the same time, Justice Frankfurter, joined by Justice Rutledge, condemned an ahistorical standard as "too shifting a basis for determining constitutional power and too tangled in expediency to serve as a dependable legal criterion" (326 U.S. at 580).

The Court has recently recognized the hazards of adopting such shifting rules of law. *First National City Bank* v. *Banco Para El Commercio Exterior*, No. 81-984 (June 17, 1983), slip op. 22 n.27. In our opening brief we also noted (at 50-51) the burdens that would be imposed upon Congress by judicial ac-

Contrary to appellees' contention (APTA Br. 39; SAMTA Br. 42), nothing in *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981), suggests that the federal funding that made possible much of the growth of the public sector of transit industry must now be disregarded. *Pennhurst* embodies a rule of statutory construction useful in determining otherwise ambiguous legislative intent, when it is argued that a federal statute enacted under the spending power imposes requirements on states that accept federal funds. Cf. *EEOC* v. *Wyoming*, slip op. 16 n.18. Here, of course, there is no question but that Congress intended to extend the FLSA to publicly operated transit systems. The only question presented is whether Congress exceeded its constitutional power in doing so, a question as to which *Pennhurst* has no bearing. Federal funding is relevant to the constitutional question because it is critical to assessing the nature and significance of recent growth of the public sector of the transit industry. Because we do not contend that compliance with the FLSA was a requirement imposed upon the states by the Urban Mass Transportation Act of 1964 (UMT Act), and because the authority of Con-

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ceptance of a formless and ahistorical standard for Tenth Amendment immunity. We explained that our constitutional regime assigns to Congress both the competence and the primary responsibility for making adjustments in federal legislation to reflect altered social or economic circumstances that affect the exercise of federal commerce power. It is sheer sophistry to respond, as APTA does (Br. 32 n.49), that the public transit provisions of the FLSA became unconstitutional on the date *National League of Cities* was decided. Undoubtedly that decision marked a significant departure in this Court's Tenth Amendment jurisprudence. But APTA nowhere takes issue with our observation (Br. 49) that the transit provisions of the FLSA were valid when enacted, even under the law as established in *National League of Cities*.

gress to enact the FLSA rests on the Commerce Clause, the rule of statutory construction reflected in *Pennhurst* has no application here.

Appellees' reliance (APTA Br. 41; SAMTA Br. 41) on *Jackson Transit Authority* v. *Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982), is also misplaced. The issue in that case was whether Section 13(c) of the UMT Act, 49 U.S.C. 1609(c), creates a federal cause of action to enforce an agreement between transit labor and management, entry into which was contemplated by the federal statute. Because we do not rely in this case on the legislative effect of Section 13(c) or any other provision of the UMT Act, the Court's comment in *Jackson Transit*, 457 U.S. at 27, that the UMT Act did not create a body of federal transit labor law is likewise irrelevant.

4. APTA argues (Br. 20-21; see also NLC Br. 9-10) that, contrary to Congress's considered judgment (see Gov't Br. 46), application of the FLSA to transit operating employees would cause certain poorly defined special hardships for public transit systems because of work scheduling practices common in the industry. Deference to the legislative judgment is particularly appropriate in this instance. Appellees have not shown any flaw in Congress's determinations that overtime pay comparable to that required by the FLSA was generally required by collective bargaining agreements in the public transit industry and that any special problems of application could be resolved through collective bargaining or in the administrative process (see H.R. Rep. 93-913, 93d Cong., 2d Sess. 30-31 (1974)).

In sum, appellees have wholly failed to demonstrate concrete burdens upon their sovereign prerogatives that would flow from application of the FLSA to public transit systems. The power of Congress to regulate

commerce may not be interdicted on so flimsy a foundation.

For the foregoing reasons, and the reasons set forth in our opening brief,[10] the judgment of the district court should be reversed.

Respectfully submitted.

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MARCH 1984

[10] Appellees have, for the third time (see Gov't Reply Mem. at the jurisdictional stage 2 & n.1), pressed their argument (APTA Br. 46-47; SAMTA Br. 47-50) that the public transit provisions of the FLSA are not severable from the applications of the Act that were invalidated in *National League of Cities*. We have responded to this argument in our Reply Memorandum at the jurisdictional stage (at 2-5). It is wholly irrelevant, in this regard, whether SAMTA itself was subject to the 1966 FLSA amendments (compare SAMTA Br. 49 n.41). Even if it were not, Congress's intention to bring transit employment under the umbrella of the FLSA independently of its application to other public employees is readily apparent from the 1966 and 1974 FLSA amendments, which made special provision for covering transit employees (see Gov't Br. 2-4). In fact, however, the 1966 amendments to the FLSA covered employees of a local transit system "if the rates and services of such [system] are subject to regulation by a state or local agency (regardless of whether or not such [system] is public or private or operated for profit or not for profit)." 29 U.S.C. (1970 ed.) 203(r)(2). There is no warrant for reading this language to exclude from FLSA coverage transit systems operated by local government entities that regulated their own fares and services.