No. 82-1913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

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

---

APPELLANT'S REPLY MEMORANDUM

LAURENCE GOLD
815 - 16th St., N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

LINDA R. HIRSHMAN
201 N. Wells St., Suite 1900
Chicago, Illinois 60606
(312) 372-1646
Attorneys for Appellant

Of Counsel:

EARLE PUTNAM
5025 Wisconsin Ave., N.W.
Washington, D.C. 20016

GEORGE KAUFMANN
2101 L St., N.W.
Washington, D.C. 20037

No. 82-1913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

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

---

APPELLANT'S REPLY MEMORANDUM

Of Counsel:

EARLE PUTNAM
5025 Wisconsin Ave., N.W.
Washington, D.C. 20016

GEORGE KAUFMANN
2101 L St., N.W.
Washington, D.C. 20037

LAURENCE GOLD
815 - 16th St., N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

LINDA R. HIRSHMAN
201 N. Wells St., Suite 1900
Chicago, Illinois 60606
(312) 372-1646

Attorneys for Appellant

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1913

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

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

---

APPELLANT'S REPLY MEMORANDUM

The appellees' two motions to affirm, though elaborately argued, maintain almost total silence concerning the decisions in point of the Third,[1] Sixth[2] and Eleventh[3] Cir-

---

[1] *Kramer v. New Castle Area Transit Authority*, 677 F.2d 308 (C.A. 3), *cert. den.*, —— U.S. ——, 51 L.W. 3533 (Jan. 17, 1983), hereafter *"Kramer"*.

[2] *Dove v. Chattanooga Area Reg. Transp. Auth. (CARTA)*, 701 F.2d 50 (C.A. 6), hereafter *"Dove"*.

[3] *Alewine v. City Council of Augusta, Ga.*, 699 F.2d 1060 (C.A. 11), hereafter *"Alewine."*

cuits (see J.S. 7),[4] each unanimously holding that the Fair Labor Standards Act ("FLSA") may constitutionally be applied to publicly owned and operated mass transit systems. Appellees' inability to provide a reasoned response to those opinions warrants particular notice because that inability not only demonstrates the insubstantiality of their motions for summary affirmance (SAMTA Br. 30, APTA Br. 29), but also reinforces our submission that plenary consideration is unnecessary before reversing the isolated contrary ruling of the court below (J.S. 7-12).

Appellee APTA, which filed a brief in each of the aforementioned cases, cites, but does not discuss them. (APTA Br. 4, n. 6) Appellee SAMTA's treatment, while somewhat less cursory, is equally unsatisfactory.[5] SAMTA would

---

[4] "J.S." refers to our Jurisdictional Statement in No. 82-1913, "SAMTA Br." will refer to the Motion to Affirm of the San Antonio Metropolitan Transit Authority; "APTA Br." will refer to the Motion to Affirm of the American Public Transportation Association.

[5] Both appellees refer to *Molina-Estrada v. Puerto Rico Highway Auth.*, 680 F.2d 841 (C.A. 1). That case, however, involved only the application of the FLSA to employees (the plaintiffs therein) who "work on highway construction projects and 'highway upkeep.'" (*Id.* at 842.) The First Circuit decided that these are " 'traditional' or 'integral' government activities" (*id.* at 845):

> Certainly governments have built and maintained roads from time immemorial. Let any who doubt the deep-rooted and traditional connections between roads, commerce, communications and society read, for example, V.W. von Hagen, *The Roads That Led to Rome* (1967) or M. Bloch, *"Feudal* Society" in N. Cantor & M. Werthman, *Medieval Society* 8-11 (1967). [*Id.*]

The constitutional status of public mass transit systems—the operation of motor or rail carriers—was not discussed by the Court in *Molina-Estrada* since the defendant Highway Authority had not exercised its statutory power to operate such a system. SAMTA points to the First Circuit's reliance on *Amersbach v. City of Cleveland*, 598 F.2d 1033 (C.A. 6) (operation of a municipal airport immune under *National League of Cities*), but in *Dove* the Sixth Circuit itself concluded, notwithstanding *Amersbach*, that the FLSA may constitutionally be applied to public mass transit systems. (See 701 F.2d at 52-53). Appellees also fail to acknowledge that *Molina-*

dismiss *Kramer* and *Alewine* on the ground that these decisions "were based on an historical approach, which was eschewed" by this Court in *Transportation Union v. Long Island R. Co.*, 455 U.S. 678 (hereafter "*UTU*"). (SAMTA Br. 5, n. 3.) But *UTU* did not "eschew" an "historical approach"; indeed, the Court there relied on the "historical reality that the operation or railroads is not among the functions *traditionally* performed by state and local governments." (455 U.S. at 686, emphasis in original.) The *UTU* Court explained that the constitutional concept of "traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a *static* historical view of state functions generally immune from federal regulation." (*Id.*, emphasis supplied). The Third and Eleventh Circuits were entirely cognizant of this Court's approach (see *Kramer*, 677 F.2d at 309, and *Alewine*, 690 F.2d at 1068, each quoting the foregoing passage from *UTU*) and were faithful thereto in their analysis (see 677 F.2d at 309-310, quoted at J.S. 9-11, and 690 F.2d at 1067-1069). SAMTA says also that "*Dove* relied in large part on this Court's denial of certiorari in *Kramer*" (SAMTA Br. 5, n. 3); this characterization of the opinion on the basis of a portion of a footnote (701 F. 2d at 52, n. 3) ignores the Sixth Circuit's careful analysis of the constitutional issue (see *id.* at 51-53).

SAMTA notes also that the Third, Sixth and Eleventh Circuits each relied on federal funding of public mass transportation (SAMTA Br. 5, n. 3); indeed they did, and correctly so. (See J.S. 9-11.) "Massive state involvement with mass transit was *created* by the national government and the states are precluded from claiming, at this date, that mass transit is a service which they traditionally provide." (*Kramer*, 677 F. 2d at 310, emphasis in original.).

Estrada and *Amersbach* were both decided before this Court distinguished *National League* in *Transportation Union v. Long Island R. Co.*, 344 U.S. 678.

SAMTA's *ipse dixit* that this reasoning is "foreclosed" by *Jackson Transit Authority v. Transportation Union*, 457 U.S. 15 is wholly without substance. *Jackson* decided only that a union does not have a right to sue in federal court to enforce an arrangement required by the Urban Mass Transportation Act of 1964 (or of a collective agreement between the union and the transit authority). No constitutional issue was addressed in *Jackson* and neither *National League of Cities* nor *UTU* was mentioned.

The appellees' response that the federal funding of public mass transit pertains exclusively to Congress' powers under the Spending Clause and is irrelevant to Commerce Clause analysis under *National League of Cities* is equally fallacious. (SAMTA Br. 26-27, APTA Br. 23-24.) The Spending Clause cases establish that Congress may, as a condition for funding activities of state and local governments, regulate such activities even though Congress would not otherwise have the power to do so under the Commerce Clause or other provisions of Article I, § 8 of the Constitution. But of course, the existence of such power under the Spending Clause does not *limit* the scope of the other sources of congressional power. As construed in *National League of Cities* and its progeny, in order to invalidate legislation under the Commerce Clause, "it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'" (*Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 288, quoting *National League*, 426 U.S. at 852.)[6] Under ap-

[6] *Hodel* makes clear that a claim of unconstitutionality under this theory must also satisfy two additional tests, not immediately relevant here. (See 452 U.S. at 287-288.) Moreover, "Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission." (*Id.* at 288, n.29.)

pellees' view, activities that have historically been undertaken by private parties (and were thus subject to regulation under the commerce power) are transmuted into "traditional governmental functions" (and immunized from regulation under the commerce power) when federal funds enable state governments to assume the previously private activities. Congressional grants of federal largesse under the spending power are thereby treated as a forfeiture of its authority under the commerce power. Appellees have not, and cannot, square that position with any rational theory of "Our Federalism". The Sixth Circuit was surely right in *Dove* in holding that "where a traditionally private activity has become predominantly a public service due to federal aid", as with public mass transit, the "concerns stated in *National League of Cities* are not implicated." (701 F.2d at 53.)

CONCLUSION

For the reasons stated in the jurisdictional statement and this reply memorandum the decision below should be summarily reversed.

Respectfully submitted,

LAURENCE GOLD
(Counsel of Record)
815 - 16th St., N.W.
Washington, D.C. 20006
(202) 637-5390

LINDA R. HIRSHMAN
201 N. Wells St., Suite 1900
Chicago, Illinois 60606
(312) 372-1646
Attorneys for Appellant

Of Counsel:
EARLE PUTNAM
5025 Wisconsin Ave., N.W.
Washington, D.C. 20016

GEORGE KAUFMANN
2101 L St., N.W.
Washington, D.C. 20037