No. 82-1951

In the Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
ET AL.

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

REPLY MEMORANDUM FOR THE APPELLANT

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TABLE OF AUTHORITIES

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In our Jurisdictional Statement, we have explained that the decision of the district court holding the minimum wage and overtime provisions of the Fair Labor Standards Act unconstitutional as applied to publicly owned transit systems works an unwarranted extension of the doctrine of Tenth Amendment immunity articulated in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), and refined in subsequent cases. We have reviewed the traditional preeminence of private enterprise in the local transit industry, the growth in recent times of the public sector of the transit industry *through takeovers of pre-existing private systems*, the significant role of federal funding (especially capital assistance) in nurturing the trend toward public ownership, and the substantial edifice of federal regulatory legislation affecting transit employment, all of which set the public

transit industry apart from the services characterized as "traditional government functions" in *National League of Cities* itself.

In response, each appellee has filed a lengthy motion to affirm. Appellees take issue with our characterization of the history of the transit industry, the respective roles of the federal and local governments therein, and the contrasting history and patterns of government responsibility respecting the core government functions addressed in *National League of Cities*. But appellees recognize (APTA Mot. to Aff. 4 n.6; SAMTA Mot. to Aff. 5 n.3), however grudgingly, that the three courts of appeals that have considered the precise question in this case since *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678 (1982), have, unlike the court below, upheld the application of the FLSA. Moreover, appellees' arguments reveal substantial differences between the parties (and between the appellees and the courts of appeals that have addressed the issue in this case) as to the proper reading of *National League of Cities*. In short, appellees' submissions themselves confirm that the question presented by the Jurisdictional Statement is of sufficient importance to warrant plenary consideration. Accordingly, we see no need for further briefing of that question at this stage of the proceeding. We therefore confine our reply to the alternative ground for affirmance advanced by appellees.

Although the court below did not reach this contention, appellees suggest (APTA Mot. to Aff. 27-28; SAMTA Mot. to Aff. 28-30) that this Court should summarily affirm the judgment on the ground that the FLSA is not severable, and that its wage and hour standards accordingly may not be enforced in any sector of public employment absent an amendment to the Act to limit its scope in conformity with

National League of Cities. Even if correct, this alternative contention would not support summary affirmance.[1] In any event, appellees' contention has no merit.

As the three-judge district court observed on remand in *National League of Cities*, the unusually broad severability clause in the FLSA, 29 U.S.C. 219, makes clear that Congress intended that the Act be enforced as to public employees to the extent permissible under this Court's decision. *National League of Cities* v. *Marshall*, 429 F. Supp. 703, 705 (D. D.C. 1977). The severability clause — which APTA blithely labels "a standard severability clause" (Mot. to Aff. 28) — is in fact far from mere boilerplate, and unequivocally resolves the severability question (29 U.S.C. 219 (emphasis added)):

> *If* any provision of this chapter or *the application of such provision to any person or circumstance is held invalid,* the remainder of this chapter and *the application of such provision to other persons or circumstances shall not be affected thereby.*

Because a finding of severability is favored, and the contrary finding is to be made only where "it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not" (*Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932)), this clear expression of legislative intent is dispositive.

Appellees have not adduced any legislative history or other indication suggesting that Congress did not intend to

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[1]Appellees suggested summary affirmance on precisely the same alternative ground on the prior occasion when this case was here for review. 81-1728 & 81-1735 SAMTA Mot. to Aff. 25-28; 81-1728 & 81-1735 APTA Mot. to Aff. 28-29. The Court instead vacated and remanded for reconsideration in light of *Long Island R.R.*, 457 U.S. 1102 (1982).

be taken at its word. To the contrary, Congress's intention to apply the provisions of the FLSA to employees of public transit agencies, notwithstanding the constitutional limits on its power to afford such coverage to some other classes of public employees, is especially clear, because (as explained at pages 2-4 of our Jurisdictional Statement) coverage under certain provisions of the FLSA was afforded to public transit employees in 1966, prior to the general extension of coverage to most public employees in 1974.[2] And the extension of overtime coverage to the operating employees of public transit companies in 1974 was effected by provisions of the 1974 FLSA amendments separate from those at issue in *National League of Cities* v. *Usery* (see J.S. 4). Indeed, even after enactment of the 1974 FLSA amendments, the provisions of the Act embracing public transit employees are distinct from those embracing other public employees. See 29 U.S.C. 203(r)(2) and (3). Thus, appellees' contention that what remains after severance "is not a 'fully operative' and 'workable administrative machinery' " (APTA Mot. to Aff. 28, quoting *INS* v. *Chadha,* No. 80-1832 (June 23, 1983), slip op. 13) or would "create a program different from the one Congress actually adopted" (SAMTA Mot. to Aff. 30) ignores Congress's deliberate determination to the contrary.[3]

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[2]For this reason, SAMTA's assertion (Mot. to Aff. 30) that Congress relied on *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), "when it extended the FLSA to the entire public sector" is simply irrelevant to this case.

[3]*Sloan* v. *Lemon*, 413 U.S. 825 (1973), upon which appellees rely (SAMTA Mot. to Aff. 29; APTA Mot. to Aff. 28), does not support their contentions. In *Sloan* the Court declined to sever a state statute providing for reimbursement of private school tuition, which had been held to violate the Establishment Clause because of its primary and intended effect of advancing religion, so as to preserve its benefit for parents of children attending nonsectarian schools. But the Court's conclusion that to sever that particular statute would "create a program quite different from the one the legislature actually adopted" (*id.* at 834) cannot be divorced from the Court's determination that the statute's

Appellees' argument rests, moreover, upon the incorrect premise that this case presents a conventional severability issue arising from the invalidation on constitutional grounds of discrete provisions of the FLSA. But in *National League of Cities* v. *Usery, supra*, this Court did not hold any provision of the FLSA unconstitutional on its face, but merely held that the provisions of the 1974 amendments to the Act that covered public employees generally were unconstitutional as applied in certain circumstances. 426 U.S. at 852 ("We hold that *insofar* as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3" (emphasis added; footnote omitted)).Thus, this Court's decision itself clearly contemplated that the FLSA would remain enforceable in all other circumstances. Appellees' argument, if accepted, would largely obliterate the distinction between adjudications of facial unconstitutionality and decisions invalidating a statute as applied.

"intended consequence is to preserve and support religion-oriented institutions" (*id.* at 832). Here, by contrast, there is every indication that Congress's purpose to extend FLSA protection to transit workers was an objective distinct from the protection of public employees generally. And the entire history of the FLSA reflects Congress's interest in extending wages and hours protection incrementally to discrete groups of wage earners based upon the particular attributes of their employers. See, *e.g., National League of Cities* v. *Usery, supra*, 426 U.S. at 837-839; *Maryland* v. *Wirtz, supra*, 392 U.S. at 185-187. Thus, the analysis of *Sloan* is entirely consistent with enforcement of the FLSA to provide minimum wage and overtime protection to public transit workers. In any event, the severability clause at issue in *Sloan* was markedly less explicit than the provision at issue here. See 413 U.S. at 833 n.10.

For the foregoing reasons and the reasons stated in the Jurisdictional Statement, it is respectfully submitted that probable jurisdiction should be noted.

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