In the

Supreme Court of the United States

EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, et al.,

Appellants,

vs.

DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, et al.,

Appellees.

No. 71-1021

Washington, D. C.
January 15, 1973

Pages 1 thru 53

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, et al., Appellants,	:	
v.	:	No. 71-1021
DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, et al. Appellees.	:	

Washington, D. C.,

Monday, January 15, 1973.

The above-entitled matter came on for argument at 11:16 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

A. L. ZWERDLING, ESQ., General Counsel, American Federation of State, County, & Municipal Employees AFL-CIO, 1140 Connecticut Ave., N.W., Washington, D. C., 20036; for the Appellants.

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae.

APPEARANCES (Cont'd):

CHARLES ALLEN BLACKMAR, ESQ., Assistant Attorney General of Missouri, Jefferson City, Missouri; for the Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1021, Employees against the Department of Public Health and Welfare.

Mr. Zwerdling, you may proceed whenever you are ready.

ORAL ARGUMENT OF A. L. ZWERDLING, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. ZWERDLING: Mr. Chief Justice, and may it please the Court:

We are here on certiorari from a five-four decision of the 8th Circuit, granting motion to dismiss a complaint filed by employees of the State of Missouri.

They sue for time and one-half overtime pay, an additional equal amount as liquidated damages, and reasonable counsel fees, as provided for in the Fair Labor Standards Act, known as the Wage Hour Law.

That act was amended in 1966 to apply to such State employees.

Complaint was filed in Federal District Court in 1969, alleging violation of the overtime provisions, commencing in 1967, in February of that year, and continuing thereafter.

The 1966 amendments to the Act, under which these employees of State schools and hospitals sue, was held to be a proper exercise of the Congressional power under the Commerce

Clause in Maryland v. Wirtz by this Court.

And the case today presents the question, which was expressly reserved in Maryland v. Wirtz, as unnecessary to decision there, of whether employees may sue in Federal court to enforce rights given them by the 1966 amendments.

We submit that Congress intended to permit such employee suits against the States for violation of the act, and that Congress had the power under the Commerce Clause to so provide, notwithstanding the Eleventh Amendment.

The Congressional intent is clear. The statute, in 16(b) of that Act provides, and I quote: "Any employer who violates the provisions of Section 6 or Section 7" -- those are the minimum wage and overtime pay provisions -- "any employer who so violates the provisions of this Act, shall be liable to the employees affected in the amount of their unpaid minimum wages or their unpaid overtime compensation, as the case may be, and an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction."

In Section (b), the language so states.

Now, the term "employer" which is used in that section, is defined in Section 3 of the act.

What those amendments in 1966 did was to expand this definition to bring under the statute as employers, within the meaning of that section, the States and their political

subdivisions, with respect to certain institutions, schools and hospitals.

Prior to that year of the amendments, the section said, "Employers shall not include the United States or any State or political subdivision of a State," but when they added the amendatory language, Congress specifically injected a removal of that exclusion of the States from the definition by inserting the language in 1966, quote, "except with respect to employees of a State or political subdivision thereof employed in a hospital, institution or school referred to in the last sentence of Subsection (r) of this section."

And so Congress chose explicitly to remove this previously excluded category, and the subsection to which it refers in this definition is the definition of the word "enterprise."

Here, Congress added to the list of covered enterprises the operation of a hospital, institution or school, and once again in those amendments Congress underlined its express intention by adding these words, quote, "Regardless of whether or not such hospital, institution or school is public or private or operated for profit or not for profit."

Nothing could be clearer or more explicit.

And, again, in the next subsection which speaks of the definition of enterprise engaged in commerce or in the production of goods for commerce, Congress added the same

language, once again stressing, quote, "regardless of whether or not such hospital, institution or school is public or private."

The remedy of the employees' suit in Section 16(b) has existed in the statute since it was enacted in 1938. It reaches the States here because it says, "Any employer who violates these sections shall be subject to such suits."

And by expanding that definition of employer, thus, this remedy comes into play.

Q Do I understand that if there is a recovery it is automatic that the recovery be a double recovery?

MR. ZWERDLING: That is explicit in Section 16(b). It says, quote, "And in an additional equal amount as liquidated damages."

Q And is the law clear that there is no discretion in the trial court?

MR. ZWERDLING: There is some discretion, Your Honor. But the purpose of that liquidated damages is it is instead of interest. It is for purposes of certainty in setting forth damages.

Q I know the purpose, but I wondered and I am asking for information, is the law clear or is it not that when there is a recovery the recovery has to be a double recovery?

MR. ZWERDLING: There is discretion in the courts to reduce it under some circumstances, Your Honor.

Q Is that clear in the law?

MR. ZWERDLING: Yes, Your Honor.

Q And how about the provision further down in Section (b), the court in such action shall, in addition to any judgment awarded, allow a reasonable attorneys' fee to be paid.

That's, of course, in addition to the double recovery.

MR. ZWERDLING: Yes, Your Honor, and costs of the action.

Q And costs. And what is the law as to whether or not there is any discretion?

MR. ZWERDLING: I understand that there is discretion and the specific section is Section 60, that is it is 260 of 29 U.S. Code.

Q Is that, do you know, in the Appendix to your brief?

MR. ZWERDLING: That section is not in the Appendix, Your Honor.

Q I was asking, as I say, for information, because I didn't know how automatic this statutory language had been held to be. It sounds as though there is no discretion.

MR. ZWERDLING: In the brief of the court below, there is citation of that section on page 11-A of the white document which is a petition for certiorari, Your Honor, which

says, quote, quoting the court, "Under Section 260, Remission of liquidated damages in whole or in part is only allowable" quoting the statute now, "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act that was amended."

The court goes on, "and even if the required showing is made, the remission is left to the sound discretion of the court."

Q And there is nothing there about attorneys' fees?

MR. ZWERDLING: No, Your Honor.

Q That discussion could be exercised with respect to erroneous evaluation of the law, for example? If you are correct in your case here, would the judgment of the State of Missouri which is in disagreement with yours, be the kind of factor that would allow the court to exercise that discretion?

MR. ZWERDLING: As to whether or not Congress had exerted its jurisdiction through exercise of the Commerce Clause, Your Honor?

Q Oh, no, on double -- the same subject Justice Stewart has been pursuing with you. On the double damages, on the penalty.

MR. ZWERDLING: Yes, I believe there would be that

discretion.

Q After Maryland v. Wirtz, you would wonder if Missouri could say that it had reasonable grounds for believing that its act was not a violation of the Fair Labor Standards Act of 1938.

MR. ZWERDLING: Then I misunderstood the question. If the question addresses itself to whether there is discretion to be exercised by the court in reviewing whether or not the State exercised the waiver, that is something that is dealt with, as I would point out, and as was pointed out in the brief, in the decision of the court in which it is made clear that that waiver occurs by virtue of continuing to operate, and that that waiver need be neither knowing nor intelligent, to use the citation by the dissent, in that case, of what the court held.

In the case to which we refer, in the Parden case, which is the case which is key to the problem before us, in that case which was Parden v. Alabama Terminal Railroad, that was a case that was decided in 1964 in which the court had before it the Federal Employer Liability Act.

And in that case as here, there was the question of private employees' suit to enforce the rights under that statute.

And there the court held that by virtue of the fact that the statute enacted by Congress in the exercise of

its commerce power, as was the case here in the exercise by Congress of its commerce power here in dealing with the Federal Fair Labor Standards Act.

In the Parden case, which involved the Federal Employers Liability Act, which is the act under which employees can sue for redress for damage to the employee and injury on the railroad.

In that case, involving a railroad, which was State owned railroad at the docks of Alabama, the court held that the Commerce Clause enabled Congress to act in this manner to provide that private employee remedy -- that lawsuit as a means of remedy, and the court held that this occurred by virtue of the continuing operation of that railroad.

Now, the same principal applying here --

Q This is one of those businesses States didn't usually engage in, wasn't it, the railroad business?

MR. ZWERDLING: As to whether it is usually engaged in, Your Honor, I do not believe that is a distinction that the courts have held to make the constitutional difference. That discussion has occurred by this Court in two cases involving the State of California, which we discussed in our brief, and in the Parden case and numerous other cases in which the question -- I think Your Honor is alluding to --

Q You say the waiver doesn't need even to be voluntary? It may not need to be intelligent, but does it have to be

voluntary to be a waiver at all, or --

MR. ZWERDLING: Well, it is voluntary in the sense that, as here, the State of Missouri was well aware of the fact that in the case of Maryland v. Wirtz, in which the validity of the Wage Hour Law amendments here before the Court was dealt with expressly as to their constitutionality --

Q This doesn't have much -- see, a State might have a choice about whether to engage in the railroad business, but it doesn't have much choice about whether it is going to conduct certain operations or to -- it doesn't have much choice about whether it is going to run a mental hospital, probably.

MR. ZWERDLING: Well, I think Your Honor is alluding to what we are familiar with as the ancient argument as to proprietary versus governmental powers --

Q I didn't mention it. You brought those words up, I didn't. I just said that a State doesn't have much choice about whether it is going to run a mental hospital. Does it, or not?

MR. ZWERDLING: I presume that a State doesn't have much choice as to whether it is going to run a mental hospital.

Q So its price for running a mental hospital is to waive its constitutional right to immunity under the Eleventh Amendment, is that it?

MR. ZWERDLING: When Congress enacts this kind of a statute under the commerce power, which is plenary, unlike the Federal taxing power, Commerce can lay down, under the commerce power, the conditions for operation in reference to anything that affects commerce.

And that is what Congress did in this case.

That is what was upheld in Maryland v. Wirtz.

That is what was dealt with in Maryland v. Wirtz, which involved the very State which is before us today, among other States, the State of Missouri.

The State of Missouri was on notice when that decision was handed down in 1968 that Commerce in the exercise of its plenary power under the Commerce Clause, had determined that the problem of labor disputes, the problem of maintaining -- of eliminating unfair competition between the States and the effects on commerce, was best dealt with by that enactment in its wisdom, and it so acted. And the court so upheld the action of Congress in Maryland v. Wirtz.

As I say, that case involved not only the State of Maryland, but the State of Missouri. They were a party to it. It was ruled upon. Theycontinued to operate thereafter. They were on full knowledge of the situation.

But as the majority held in the Parden case, such waiver need be neither knowing nor intelligent. The point is it is a matter of plenary power of Congress, under the commerce

power.

Q What you are saying, in effect, is that under the Eleventh Amendment, the governmental function aspect of the activity is irrelevant?

MR. ZWERDLING: As to the distinction between governmental and proprietary, and if I may now allude to those words, Mr. Chief Justice, Maryland v. Wirtz said, quote, "In the first place, it is clear that the Federal Government when acting within a delegated power may override countervailing State interests whether these be described as governmental or proprietary in character."

That was disposed of many times before.

Mr. Justice Frankfurter in the Indian Towing case, which involved a waiver of immunity question, said, quote, "There is nothing in the Torte Claims Act which was involved there which shows that Congress intended to draw distinctions so fine-spun and capricious," to use the words of the Court, through Mr. Justice Frankfurter, "as to be almost incapable of being held in mind for adequate formulation."

And, again, in the Rayonier case, Rayonier, Inc. v. United States, the court said, "We expressly decided, in Indian Towing, that an injured party cannot be deprived of his rights under the Act by resorting to an alleged distinction imported from the Law of Municipal Corporations between the Government's negligence when it acts in a proprietary capacity,

and its negligence when it acts in a uniquely governmental capacity."

Q Is there reference to what the State traditionally did as a State and the State entering into business?

MR. ZWERDLING: There is reference to that just as in contrast in the Sanitary District case, which I thought Your Honor had in mind, there is reference to the overriding commerce power enabling the Congress to prevent the State from taking water from Lake Michigan which was essential to its inhabitants, because it was in contravention of an enactment by the State by the United States in connection with a commerce power.

Q But that wasn't authorizing any private individual to sue the State, was it?

MR. ZWERDLING: No, and that did not involve a private suit.

Parden, which is the governing case here, we believe, Parden v. Alabama Terminal Railway, did so involve private suit.

And in that case, this Court upheld the, specifically ruled on this very question of the immunity of the States from private suit, and held that that immunity did not fasten to the extent of precluding the exercise of the commerce power to enable this private suit which has its purpose not simply to help the individual, as such, but, more importantly,

as has been pointed out by the courts, including Parden, the purpose of enforcement of the statute of enabling what could not otherwise occur by the Government, the enforcement of this exercise of commerce power --

Q The State operation of a railroad is no different than a State operation of a mental hospital?

MR. ZWERDLING: It depends, Your Honor, on whether one is a mental patient or one who is involved in railroad operation.

I don't mean to be facetious. Whether it is essential or not, and one fixes on mental hospitals, this statute embraces much more than mental hospitals. It involves hospitals, institutions which exist in the private sector as well as the public sector, and its function is, as stated to, by eliminating the differential between what must be paid over 40 hours, time and one-half, and what must be paid minimum wage, for a public employee as opposed to a private employee, by eliminating the unfair competition against private industry by that enactment.

Q You do agree that the State has the constitutional right to immunity from suits by its own citizens or citizens of other States?

MR. ZWERDLING: We believe it is totally unnecessary here for purposes of this suit to -- of this case -- to challenge the Eleventh Amendment interpretation, that is right,

Your Honor.

Q Well, that wasn't Eleventh Amendment interpretation, was it?

MR. ZWERDLING: Hans v. Louisiana.

Q I didn't think that was to interpret the Eleventh Amendment.

MR. ZWERDLING: I believe it is, Your Honor.

Q I thought it said there was a constitutional right to immunity.

MR. ZWERDLING: By virtue of the Constitution, other than the Eleventh Amendment, Your Honor?

Q Yes.

You do agree there is a constitutional right in the State to immunity suit?

MR. ZWERDLING: When it does not collide with a plenary power of Congress over the commerce power, Your Honor.

Q Well, the Congress could certainly -- the issue here isn't whether Congress can impose wage and hour conditions on the State. The issue is whether the private individuals can sue the State to enforce it. Congress can't legislate away the constitutional immunity just by saying it doesn't exist.

Q As far as Federal constitutional immunity goes, isn't it applicable only in Federal courts?

MR. ZWERDLING: This statute, Your Honor?

Q No, no, the Federal constitutional immunity of a sovereign State from suit is applicable only in Federal courts.

MR. ZWERDLING: That's right.

Q Can a private individual enforce -- does the statute prevent these suits from being brought in State courts?

MR. ZWERDLING: No, Your Honor.

May I say what Mr. Justice White wrote in United States v. California, I am sorry in the Parden case, in which statement was made on behalf of the minority, quote, and this was on behalf of the minority, "I agree that it is within the power of Congress to condition a State's permit to engage in the interstate transportation business," which is what was involved there, "on a waiver of the State's sovereign immunity from suits arising out of such business. Congress might well determine that allowing regulable conduct, such as the operation of a railroad to be undertaken by a body legally immune from liability directly resulting from these operations, is so inimicable to the purposes of its regulation, that the State must be put to the option of either foregoing participation in the conduct or consenting to legal responsibility for injury caused thereby."

Q Cases involving a railroad.

MR. ZWERDLING: Yes, Your Honor.

I would like to reserve the balance of my time, if

there are no further questions.

Q And I spoke in dissent.

MR. ZWERDLING: Yes, Your Honor, as I pointed out.

MR. CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

AS AMICUS CURIAE

MR. WALLACE: Mr. Chief Justice, and may it please the Court:

The petitioners here are non-professional employees of State hospitals and of a State school in Missouri. Their complaint, which was dismissed, does not specify their citizenship, but presumably they are also citizens of Missouri, and the suit, therefore, does not come within the literal terms of the Eleventh Amendment.

The protections of the Fair Labor Standards Act were extended to these employees in 1966 amendments to the act which this Court upheld as constitutional in Maryland v. Wirtz.

And they are seeking here to sue their employers in Federal court for unpaid overtime compensation.

As Mr. Zwerdling ably pointed out at the beginning of his argument, on their face, the remedial provisions they invoke under the act apply to these employees and their employers just as they do to any others covered by the act.

And so the question presented is whether

constitutional considerations, none the less, require that this category of employees be discriminated against, by being denied a remedy against their employers provided by Congress and available to all others within the act's coverage.

The answer, in our view, is to be found by putting together this Court's decision in Maryland v. Wirtz with its prior decision in Parden v. Terminal Railway.

What Parden holds is that where a State engages in activities that are validly subject to Congressional regulation under the Commerce Clause, it is subject to that regulation as fully as if it were a private person or a corporation.

And specifically, the Congress can in effect condition the State's continued participation in the regulated activity on constructive consent to be sued under the Federal Regulatory Statute.

And, Maryland v. Wirtz, of course, adds to this, that the activities involved here are activities that are validly subject to Congressional regulation under the Commerce Clause.

It seems to us that these cases have developed that as the relevant test, rather than the old distinctions that were attempted to be drawn between governmental and proprietary functions, or what might be called essential functions or traditional functions.

Q The question is whether you can reasonably say the State has waived, isn't that the basic question, Mr. Wallace?

MR. WALLACE: Well, --

Q Isn't that what Parden was all about?

MR. WALLACE: Well, the defense said that it was a waiver. I don't think that word was used in the court's opinion. It really amounted to a constructive consent.

Q It's a condition.

MR. WALLACE: It's a condition.

Q If you want to do this, you have to do that, so --

MR. WALLACE: Congress has undertaken to regulate the activities in this field whether performed by a State or by a business, and undertake them evenhandedly, and has notified the State that if they continue to engage in this activity they are subject to the same Federal regulation that the business enterprises also engaging in this activity are subject to.

And by continuing to engage in the activity, the State constructively consents to be sued, therefore.

That is what the court --

Q That's what it is all about, is whether it is consented. We reasonably said to have consented to suit in the Federal court.

MR. WALLACE: That is correct, Your Honor, by engaging in the activity.

Indeed, we think that in two important respects this case really follows a fortiori from Parden.

First, the FELA, which was the statute at issue in Parden, made no reference to State owned railroads. It merely said that "every common carrier by railroad while engaging in commerce" is liable to injured employees and subject to suit.

And the court there had to decide whether this general language should be construed to include State owned railroads.

A majority held that it should, although four dissenting justices were of the view that Congress should speak more specifically in order to subject States to suit if they engage in activity subject to regulation under the Commerce Clause.

And here, Congress has explicitly amended a series of definitional provisions in the Fair Labor Standards Act to make the act's provisions apply.

Q Would you say that Parden is basically a constitutional holding?

MR. WALLACE: The court was unanimously of the view in Parden that Congress had the constitutional power to impose, in effect, this constructive consent on the State's activity, but was divided 5 to 4 on whether Congress had in fact done so.

So, it was both a constitutional and a statutory decision. The court was unanimous on its constitutional holding, but divided 5 to 4 on the statutory construction.

There is no question but under this act the State has been put on notice, which was the query raised in the dissent in Parden. It has been put on notice that the provisions apply to it and it has been put on notice that it surely is subject to suit if it violates them by withholding the wages that are due, surely subject to suit by the Secretary, and on the face of the act, also subject to suit by the employees as well.

So --

Q Remedies in a suit by the Secretary are what? An injunction. He can enjoin. He can get recovery of single wages, is that it?

MR. WALLACE: Of the single wages without interest and without consequential damages of any kind.

In the ordinary suit brought by the employee, to fully compensate him, Congress has provided for liquidated damages --

Q Double recovery, plus interest, plus attorneys' fees.

MR. WALLACE: It's not plus interest, Your Honor. It's in lieu of interest and in lieu of consequential damages.

Q Plus attorneys' fees.

MR. WALLACE: Plus attorneys' fees. Otherwise,

many of these suits, I doubt, would be in court, because many of them are for relatively small sums of money.

Q I understand the argument. I am just asking for information.

If the Secretary does move in, then the wage earner's lawsuit is displaced, is that right? Do I remember correctly?

MR. WALLACE: That is correct, in those instances where the Secretary sues.

The court long ago held that the liquidated damages provision is compensatory in nature, that there are many consequential damages suffered by wage earners in low pay categories, such as the nonprofessional employees of hospitals and schools involved here. There are many consequential damages from withheld wages which are difficult to ascertain, and in lieu of either interest or consequential damages, this is the measure of compensation.

Q What happens when the Secretary recovers money? Is that payable immediately to the employees?

MR. WALLACE: That is turned over to the employee, the recovery, yes.

Q Just that much?

MR. WALLACE: Just that much. Just the amount of the withheld wages. So that, in effect, the judgment against the employer in that case is nothing but what he should have

paid --

Q All along.

MR. WALLACE: All along, sometime earlier. And he has had the use of the money in the interim.

Now, there is another important respect in which this case, in our view, follows a fortiori from Parden.

Here, the substantive requirements of the act clearly apply to these State employers, and the only question is whether, in the context of State employment, this substantive right should be separated from the statutory remedy provided for employees.

In our view, even if this kind of divorce of rights from remedies might be plausible in interpreting some statutes, it is particularly inappropriate with respect to the Fair Labor Standards Act, because under the Fair Labor Standards Act, the remedy is not merely compensatory as it is in most statutes, including the FELA, which was involved in Parden, but the remedy itself also accomplishes an important part of the regulatory objective that Congress had.

Since one of the principal purposes of the act is to insure that some employers do not gain an unfair advantage over their competitors by paying substandard wages. That is why this Court has said that Section 16(b) of the act involved here has both a public and a private character, that it is both compensatory and an enforcement provision.

And, significantly, the Senate report on the 1966 amendments specifically said that one of the purposes of extending the act to cover these State run institutions was to bring about a competitive equality with similar activities carried on by business enterprises.

We have the quote,on page 17 of our brief, from the report.

They were attempting to follow through on the act's original basic purpose of eliminating unfair methods of competition in commerce.

Q Does that mean that you are telling us that the operation of a mental hospital or a university by a State is unfair competition against private universities and private hospitals?

MR. WALLACE: Well, this was the view Congress took.

Q I am asking you if you think that --

MR. WALLACE: I think that there is a rational basis for concluding that in many instances they are competing with privately run enterprises, and Congress felt it was unfair for the privately run enterprise to have to comply with the provisions of the Fair Labor Standards Act and to have competing services made available by State institutions at lower cost to users of those services partly because low paid nonprofessional personnel were being paid

substandard wages.

This was one of the conclusions Congress came to in enacting the amendments that this Court upheld in Maryland v. Wirtz.

Another basic purpose of the Fair Labor Standards Act, recited in the act itself, was to avoid labor disputes that interfere with commerce.

Congress wanted to take these controversies about substandard wages and overtime compensation out of the streets and into the courts.

Yet, what could be more calculated to lead to labor strife than a holding that employees whose Federal statutory rights have been violated are to be denied judicial remedy.

So in this respect, too, the remedy here is an integral part of the regulatory objective. It is not merely compensatory and not merely designed to encourage compliance with the act, as are most remedies in statutes.

Of course, it also does encourage compliance and thereby furthers the act's other objectives, such as reducing unemployment, by encouraging employers to hire more people rather than to work their employees at overtime.

This is one of the basic objectives of the act and it is of continuing importance with our persistent unemployment.

Now, the fact that the Secretary of Labor is also

empowered to bring enforcement suits here, which will not fully compensate the employees, does not, in our view, call for a different result than in Parden because of the vast numbers of employees in establishments covered by the act, the Secretary is unable to bring suits except in a small proportion of the cases in which violations occur.

Indeed, the Secretary is not staffed even to be able to investigate all possible violations, let alone to bring suit against all the violations that occur.

Of necessity, the Secretary's limited staff of 50 attorneys in 13 regional offices must concentrate their efforts on cases that involve the greatest public interest.

From the beginning, Congress decided to provide a private remedy in the act, rather than to create the vast Federal bureaucracy that would otherwise be required, if enforcement were to be entirely in the hands of the Secretary.

Q How much of that bureaucracy would you need if you allocated this enforcement just with respect to the States?

MR. WALLACE: Well, of the covered employees, 2.7 million of them are in these covered State institutions, and this involves 118,000 such institutions.

So it is a substantial part. Altogether, we are talking about 2 million establishments and 45 million employees, but it is still a very substantial figure, and the problem would be very much exacerbated, Mr. Justice, by the

same issue which arises under 1972 amendments to the Fair Labor Standards Act, which extends coverage of the Equal Pay for Equal Work Regardless of Sex provisions to professional employees in these covered institutions, including the State institutions.

Those are cases that tend to involve special facts that have to be developed with regard to the particular individuals covered and whether their work is comparable to somebody else's work.

They are quite time-consuming lawsuits, and in many instances of employees denied compensation you have time-consuming factual problems to be developed in the suits.

There is little doubt but what the Secretary could not bring suit on behalf of all who would be entitled to recovery, and the Secretary would then be in a very awkward position when his refusal to bring suit would constitute a final denial of a remedy in particular cases, and there is no reason to believe that Congress intended to give the Secretary that kind of essentially unreviewable authority over the rights of individuals protected by this act.

Thank you.

MR. CHIEF JUSTICE BURGER: Well, Mr. Blackmar.

ORAL ARGUMENT OF CHARLES ALLEN BLACKMAR, ESQ.,

ON BEHALF OF THE APPELLEES

MR. BLACKMAR: Mr. Chief Justice, and may it please the Court:

I think I would discuss, first of all, what is not at issue in this case, the way the State of Missouri views the case.

First, there is no question that Congress has the power to include State schools and hospitals under the definition of employer found in the Fair Labor Standards Act, and there is no doubt that Congress has done so, that is, Maryland v. Wirtz and the 1966 Amendment to the act.

Furthermore, there is no doubt that Missouri has an obligation to obey the act.

And, looking at the Parden case, we do not dispute the fact that Congress has power to require Missouri to waive its constitutional immunity from suit as a condition to entering into activities where Congress has regulated the activities pursuant to its commerce power, if Congress so provides.

And, finally, there is no question presented by this case as to whether a State court would be required to hear at action brought under 216(b) -- or 16(b) -- by a private employee, whether that would be required either by Federal constitutional law or by Missouri law.

Q Do I understand that you concede that an action such as this could be brought in a State court?

MR. BLACKMAR: No, Your Honor. I am saying that that question is not presented by this case. I do not concede that in this case, although I think there are very persuasive arguments that certainly could be made that the State court would, under the -- Article 6 of the Constitution, where it is required to enforce the Federal laws, have a duty to hear such a case.

Q And you do concede, or do you, that so far as the Federal Constitution goes, with its protection of State sovereign immunity, that protection extends only to Federal court actions? Certainly, the terms of the Eleventh Amendment talk in terms of extending the power of the Federal courts.

MR. BLACKMAR: Whether we speak in terms of the Eleventh Amendment or the basic constitutional principle recognized in the Hans case, that that was not the Eleventh Amendment, we would suggest that it only applies to the Federal courts.

What is at issue is one narrow question, that is, whether the remedies provided a private employee by 16(b) were intended by Congress to be available to such employees against the State of Missouri.

Now, in 1938 --

Q (inaudible)

MR. BLACKMAR: That's precisely it, Your Honor.

I feel we have to concede the right, on the basis of both the minority and majority, in the Parden case which recognized that Congress does have a power to require the State to waive its consent to suit as a condition to entering activities regulated by Congress, and the Maryland v. Wirtz case which holds that Congress has the power to regulate wages in schools --

Q You say the only issue then is whether Congress, in fact, required Missouri to enter?

MR. BLACKMAR: Yes, Your Honor, that is Missouri's position.

In 1938, when the Fair Labor Standards Act was initially passed, States were excluded from coverage of the act.

In 1966, an exception to that exclusion was written into the act in the case of State schools and hospitals.

The act has four remedy provisions.

First of all, there are criminal sanctions, in Section 16(a).

Secondly, the Secretary of Labor, by Section 16(c), is authorized to file suit, when requested by employees on behalf of the employees, to recover wages that have not been paid to them.

MR. CHIEF JUSTICE BURGER: We will resume right

there after lunch.

(Whereupon, at 12:00 o'clock, noon, the oral argument was recessed, to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Blackmar.

MR. BLACKMAR: Mr. Chief Justice and members of the Court:

We were discussing the four remedies that Congress has provided under the Fair Labor Standards Act.

We mentioned the first was a criminal sanction under Section 16(a).

Secondly, there is the suit by the Secretary of Labor, when the employees requested him to maintain a suit, where he may recover unpaid wages on behalf of the employees, which he ultimately will turn over to the employees.

Q Does he do that only on request?

MR. BLACKMAR: This is a suit under 16(c).

Now, there is a remedy under Section 17, that's the third remedy, where the Secretary of Labor may seek an injunction against the employer, and, as part of his equitable relief, request restitution of unpaid wages.

It would seem that Section 17 has pretty much eliminated Section 16(b) as an effective remedy by the Secretary of Labor because he can do more under that section with fewer restraints than he can under Section 16(b).

Section 16(b) has a provision that he may not bring

an action when there is a novel legal question undecided by the courts. That restraint is not found in Section 17.

And finally, the remedy of Section 16(b) -- and if I said 16(b) before, I meant 16(c) -- Section 16(c) allows private individuals to sue their employers to recover their unpaid compensation, an equal amount as liquidated damages.

The term "liquidated damages" are the words that Congress has used, and reasonable attorneys' fees.

Q You are talking here only about 16(c)?

MR. BLACKMAR: Only 16(c).

This is the only situation where the employer is required to pay more than has been withheld illegally.

Again, to the question presented in this case, and specifically and expressly left unanswered by the Maryland v. Wirtz question, and the question is, did the inclusion of State employees under the Fair Labor Standards Act automatically result in an intention that Congress would make applicable the 16(b) remedies, of private suit against the State, to such employees?

Really, the question is, did Congress destroy the State's constitutional immunity from suit in this area?

We note that there is not one word in the Fair Labor Standards Act itself, or the 1966 amendments, that indicates that a State is subject to suit by private individuals, notwithstanding its constitutional immunity.

It has often been observed that the Federal courts are courts of limited jurisdiction.

Now, the Fair Labor Standards Act does not, in itself, confer jurisdiction to hear a case arising from the act in the Federal courts.

Jurisdiction is conferred by 28 USC, Sec. 1339, which is a jurisdiction statute that deals with an act of Congress regulating commerce, That is the jurisdictional section that the plaintiffs below brought this case under.

Now, it has been held by this Court that the mere fact that there is a Federal question in a case does not mean that the States are subject to suit by private individuals in the Federal courts, and we would submit that since the basic Federal question, jurisdictional statute, is little different except for jurisdiction amount, than the jurisdiction statute that is involved in cases of Congress -- cases arising out of Acts of Congress, regulating Congress, that it can be argued, and should be argued, that Congress has not intended in one way, to any degree, to change the State's basic position, which is that they are immune from suit in the Federal courts.

Q How is it argued in Parden?

MR. BLACKMAR: Well, Parden, Section 56 of the FELA, specifically allowed the employee to maintain an action in the Federal courts.

I would submit that that is a jurisdictional --

Q That is an expression of Congressional intent that is not present in this case?

MR. BLACKMAR: Yes, Your Honor.

That is the jurisdiction that I think not only shows an intent on Congress --

Q Yes, but doesn't 16(b) permit the employee to sue?

MR. BLACKMAR: In a court of competent jurisdiction, and the Federal courts are not courts of competent jurisdiction.

Q Unless they are otherwise competent.

MR. BLACKMAR: Unless the State has consented to suit, and that's the Eleventh Amendment in the Constitutional principle of Sovereign Immunity.

Now, the Parden case --

Q The employees are practically without remedy?

MR. BLACKMAR: I don't think that that is certainly the situation in Missouri. As our brief indicates, the Secretary of Labor has filed an action under Section 17 against the State of Missouri.

That action included some two or three thousand employees, and they have been successful in that action, and the State has, as a matter of fact, had an appropriation to pay those employees and it has paid those employees.

Q That's not Congress' action, as I understand it.

This private action was in order to get enforcement sufficient for the employees, am I right?

MR. BLACKMAR: To have future enforcement?

Although the court declined injunction and to recover past unpaid compensation.

Q That was the purpose of 6(e). That was the purpose of that section, am I right?

MR. BLACKMAR: The purpose of Section 16(b) was to permit private actions by the employees.

The suit I am talking about --

Q Isn't that just as valid if the State is or is a private person?

MR. BLACKMAR: Pardon me.

Q Isn't that just as valid to protect the employee of a State as it is necessary to protect the employee of a private employer?

MR. BLACKMAR: Well. Except that there has been a traditional principle that the States are immune from suit in the Federal courts.

Q Why did Congress leave it? Section 16(c)?

MR. BLACKMAR: Well, because it would have application.

16(c) is the section that permits the Secretary of Labor to bring suit.

Q Well, whichever section involves, allows the private employee -- what section is that?

MR. BLACKMAR: That's 16(b).

Q That's what I thought.

Under 16(b), is it just as necessary for the employee, working for the State, as it is for an employee working for private individual?

MR. BLACKMAR: I don't know. I would think that there are different considerations between public employment and private employment.

I think, for one thing, that you have a single entity that is generally inclined to obey the law, that is generally not engaged in competition, and as soon as it can administratively solve the problems that exist in complying with the Fair Labor Standards Act is reasonable, and it has been our experience in Missouri that it has.

It seems to me that there are special incentives, possibly to private employers, to violate the act.

Q No need to bring the State under it, was there?

MR. BLACKMAR: Well, Congress has brought some activities of the State under the act, but I think that the congressional purposes, in so doing, can be fully vindicated without finding that Congress intended that the State waive its immunity from suit.

And that is the proposition that I am arguing to the Court today.

Congress did not say that a State would lose its immunity as a condition of continuing to operate State schools

and hospitals, after it became covered with respect to those activities.

And I submit that it is not reasonable to infer that that was the Congressional intention.

Q The Solicitor General's brief, mentioned in the argument, indicated that about 95% of all the employees covered by the Act are private, truly private employees, and perhaps 4 or 5%, more or less, are public.

Do you quarrel with that figure?

MR. BLACKMAR: I would think that would be a reasonable estimate.

Q From your point of view, the only thing supporting, governing the Solicitor General's view, and his friend, is that it is more convenient to let the private -- the employees sue in a private suit rather than have the Secretary sue for them.

MR. BLACKMAR: That appears to be the Solicitor General's argument, and I thought he had advanced a rather novel proposition, which was, because of the limited staff available in the Solicitor of Labor's office, that Congress must not have intended that they would be the sole vehicle by which the act could be enforced against the State.

As a matter of fact, the Department of Labor has sued Missouri, and has sued, to my knowledge, at least 10 other States to recover unpaid overtime compensation.

I think that in this area that one or two suits against the State pretty much forces the State into compliance. And when that is done, the State gives its employees what they have coming under the act.

Since there are only 50 States, I think sooner or later if any State persists in disobeying the Act, that it will be compelled, by the remedies available under the Act, to comply, whether it likes it or not, and may not be particularly difficult for the Secretary of Labor to maintain such suits.

Parden recognizes that a State must consent to suit. And the court, in that case, went on to find and Alabama when it commenced operation of a railroad, twenty years after the FELA was enacted, necessarily consented to such suit.

In this case, we would have to ask when did Missouri consent? Did it consent when Congress passed the Act and the Act became effective?

Did it consent after Maryland v. Wirtz was decided? Or was it some other date at which it consented.

It is known and recognized by the court below that Missouri operated schools and hospitals prior to the effective date of the 1966 amendments.

At some point, according to the arguments advanced by the petitioners, Missouri must have consented to the Act.

But I do not see how you can say that a State

continuing activities that it has historically engaged in, and which have been recognized as functions of State government, consented to waive its Constitutional immunity from suit in the Federal courts.

Certainly, the Act did not advise Missouri in express language that it was going to have to make what the district court in Idaho has termed a "Hobeson choice" of either foregoing the operation of its schools and hospitals before consenting to suit by private individuals in the Federal court.

Congress, very easily could have provided an express waiver provision, where it would advise the States that they would lose this immunity, but it has not done so.

And that leads me to three factors which the Court below distinguished this case from Parden. I think each of these factors are very important in considering the question of what did Congress intend when it made the State subject to the Act.

First of all, there is the very nature of schools and hospitals. They are traditionally activities States engage in.

Considering the nature of those activities, is it reasonable to infer that Congress would intend that an employee would recover double before the State were to expend funds on the care of the patients, or the students, of

the institutions covered?

And, of course, there is the fact that there are double damages and attorneys' fees that are available to the private employees, if they are permitted to maintain the suit.

It does not seem, again, that Congress would intend that this type of remedy be available against the State.

I think that there are more -- at least it is a policy judgment that should be made expressly and not found by a court on the basis of silence.

And, finally, the court --

Q Would you make that argument, that there was a suit brought under the Act in the State court?

MR. BLACKMAR: I would consider making that argument. I don't know.

Q It would be very difficult for you to do so, wouldn't it?

MR. BLACKMAR: It would be very difficult to argue that if the State court had jurisdiction that the provisions of the Act did not apply.

And, as I mentioned earlier, I am not necessarily conceding --

Q So your argument really is, should be, whether the Congress intended to make the remedy available in the Federal court?

MR. BLACKMAR: Well, the argument -- yes.

Q Rather than at all.

MR. BLACKMAR: This goes to the fact that there are the double damages, I think, goes to the intent of Congress, and I think when you have an extreme remedy of that nature, that it certainly raises a question as to whether Congress intended that that type of remedy would be available against the State.

Q Enlighten me on this. What does that have to do with whether the suit is brought in the State court or the Federal Court?

MR. BLACKMAR: Well, the Parden case -- it's whether Congress intended that a State waive its immunity.

Q Well, but you have indicated,or at least I thought you had, that you would not have this defense that you are arguing to a suit in the State court.

MR. BLACKMAR: Yes, sir.

Q Could they recover double damages and all those statutory remedies in the State court?

MR. BLACKMAR: They would certainly be in a position to argue that they could.

Q Is there anything in the Act which indicates that you wouldn't get the same remedy in the State court as in the Federal court?

MR. BLACKMAR: No, there isn't.

Q So you are really just arguing the forum, aren't you?

MR. BLACKMAR: I am arguing the forum and I think, in view of the remedy, it certainly raises the question as to whether Congress intended that the forum be available.

Q As I understood you, Mr. Blackmar, you haven't conceded, however, that this kind of suit could be brought in a State court, you simply pointed out that question is not before us.

MR. BLACKMAR: Yes, I have tried to limit it to that question.

The final factor that the 8th Circuit relied on, and I think it is significant, is the fact that there are alternative remedies which will vindicate the Congressional purpose behind the Fair Labor standards Act amendments.

Now, in the Parden case, if the court had not found that the Federal forum was available to the employee, suing the State of Alabama, he would have been left without a remedy.

The whole purpose of the Federal Employees Liability Act was to permit injured employees to recover.

Now, I think, the Fair Labor Standards Act, and it has been discussed by the others, permits suits in State courts as well as Federal court. It expressly says either court.

This Act, Your Honors, only says a court of competent jurisdiction.

Q That certainly doesn't give any intimations of excluding State courts, State courts being courts of general jurisdiction.

I thought earlier in your argument you had virtually conceded that, not in this last colloquy but --

MR. BLACKMAR: Well, I do not believe the question is before the Court.

Q I know.

MR. BLACKMAR: But I would say that it is a difficult question and that Missouri, based on several cases, would be hard pressed to argue that the State court did not have jurisdiction to hear the action.

Q Mr. Blackmar, I am thinking that there might be two separate inquiries as to whether a suit like this might be entertained in the State courts of Missouri, the first being whether under Missouri State law you could sue this particular public institution, the second being whether Congress might have by implication required the State courts to entertain such action.

MR. BLACKMAR: That would be right. I would probably reverse the order as to -- the order in which you asked the questions -- but there would be two separate inquiries.

Q Let me ask you, is there a forum in Missouri for employees of the State to sue for back wages? Has Missouri waived its own sovereign immunity in its own courts?

MR. BLACKMAR: Missouri has been very, very reluctant to yield one bit of its sovereign immunity.

Now, there is a fairly recent case involving a State contract where the court --

Q Is this almost entirely a judicial construct in Missouri or is it statutorial?

MR. BLACKMAR: Basically judicial. We do not have constitutional provisions like Alabama does, and I believe Illinois, which are very express on that question of sovereign immunity.

Q I suppose you can therefore make the argument that a State court would not be a court of competent jurisdiction?

MR. BLACKMAR: Well --

Q In any event, it was pointed out at the outset --

MR. BLACKMAR: I would hate to lead myself into the position of arguing against the position I may have to argue sometime in State court.

Q In any event, that question is not before us, and that is your real point.

MR. BLACKMAR: Finally, the 8th Circuit did consider the alternative remedies that are available, which I think really will vindicate the act and certainly have in Missouri.

After the Secretary of Labor filed his action, the Missouri Legislature, for the first time, took cognizance of the problem. They appropriated a sum of money which was sufficient to satisfy the judgment. The people who had compensation coming to them were paid, and the State was able to pay them reserving its traditional practices of paying on appropriations and warrants drawn by the State Treasurer, after action by the State Legislature.

It was asked as to whether the State of Missouri would have a defense to the double damage provisions.

Section 11 of the Portal to Portal Act allows an employer to make a defense that the act -- or admission giving rise to such action was in good faith, that is not the act or admission giving rise to the failure to pay wages.

After reading the Portal to Portal cases, I am not at all sure, and I am rather pessimistic, that Missouri would have any defense that would meet the traditional Portal to Portal Act arguments, that Missouri has acted in good faith and should be permitted not to have to pay the double damages.

This is a serious question and it is a question that goes to the heart, I think, of our Federal system.

It may not be fair from a strict equity sense that States are immune from suit in the Federal courts for their wrongs, but it is established law.

When the Court held otherwise, back in the case of Chisholm v. Georgia, there was an immediate response by -- on the part of Congress and the States with the enactment of the Eleventh Amendment.

Ever since that date, the courts have been very respectful of the States' sovereign immunity.

Congress has not expressly said that the States are to lose that immunity. I don't think it is fair to read that into the act by implication.

I would like to close my argument with this observation. When the Portal to Portal Act was enacted, the Congress started out with this finding: "The Congress finds that the first effort of the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs and precedents."

I would think that if the Court were to find that Missouri has lost its Constitutional immunity, that that would be a holding that would be contrary to long-established customs and precedents.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Blackmar.

Mr. Zwerdling, you have a few minutes left.

REBUTTAL ARGUMENT OF A. L. ZWERDLING, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. ZWERDLING: Thank you, Mr. Chief Justice.

My approach to the statutory intent here was perhaps more pedestrian than that of my brother at the bar.

I went to the statute and I cited very carefully and explicitly to this Court the language that Congress injected in 1966 by its amendments, and I traced carefully the result, by virtue of that set of statutory amendments.

And nothing could be more explicit than the Congressional intent there.

I will not yield to the temptation of wandering into the thicket of the question of whether the State courts are in or are out.

I would merely observe that assuming, for the sake of argument only, that the State courts are available as a remedy, Congress chose to give the employees access to the Federal system, to the Federal courts, with all of the advantages that flow therefrom, including --

Q They were explicit, I think you said, in stamping a Federal suit against a State in Federal court.

MR. ZWERDLING: I was saying that in a definition, in the amendment of Section 3 of the definitions, giving access to Section 16(b) to these employees covered by the amendments, where it says in Section 16(b), "any court of

competent jurisdiction."

Q Do you think that is explicit enough to take care of the --

MR. ZWERDLING: It is particularly explicit in the light of the fact that the statute has been on the books since 1938 and almost invariably these suits occur in Federal court.

And Congress had the experience of all the years since 1938 of the exercise of this statutory language in thousands and tens of thousands of private employee suits in Federal court where they almost invariably go under Section 16(b).

And in the light of that experience, Congress, in its amendment of the definition, chose to pass on to the public employees covered, as it had in '38 to the private employees, that access.

Q Does this show any discussion or consideration of the Eleventh Amendment problem?

MR. ZWERDLING: Not as such, Your Honor.

Q You wouldn't think that that would escape their attention.

MR. ZWERDLING: It would escape their attention, I believe, if it were not in question as it appeared not to be in question since they enacted these amendments in 1966, barely two years after this Court handed down Parden, which

laid down the disposition of this question, and in the light of thatknowledge, Congress enacted the amendments of 1966.

There are 50 States, as counsel points out, but there are some 118,000 establishments in question here, which is a horse of somewhat different color in terms of the problem of the Secretary of Labor enforcement.

And just to illustrate, in the facts of this case, the complaint here was filed when? The complaint was filed by these employees in August of 1969 for back pay and liquidated damages commencing in February of 1967.

The Secretary of Labor came in later in January of 1971, reaching back only to January of 1969, and then only because of the course of this litigation and its disposition.

Let me just conclude by reemphasizing, once again, that as was said in Parden, quote, "by empowering Congress to regulate commerce, then, the States necessarily surrender any portion of their sovereignty that would stand in the way of such regulation."

Such regulation involves two sides of the coin. It involves reaching the substantive matter by exercise of the commerce power to achieve this coverage that we are talking about, but at the same time there goes with that exercising commerce power to reach the remedy which is the chosen means which has been utilized successfully since 1938

which Congress, in the light of that long experience with millions of situations around the country with some 40 million people, decided to extend to certain limited classes of State employees, as they did here, we believe that Maryland v. Wirtz and Parden govern.

And, as was said in Maryland v. Wirtz, and I conclude on this, if I may, it said, quote, "This court was, of course, concerned only with the finding of a substantial effect on interstate competition and not with the consequent policy decisions."

Quoting another case, Katzenbach, this Court said, "Where we find that the legislatures have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."

May I submit that in Parden, when that case was concluded, the court had already determined as to this situation that that case -- that this investigation is at an end.

Thank you.

Q Would you think, as an another factor to be taken into account, the greater uniformity that might be achieved in dealing with these cases in eleven circuits as distinguished from 50 State courts?

MR. ZWERDLING: Mr. Chief Justice, that argument is better than mine. All the aspects of the Federal

jurisdiction, the availability of liberal discovery which is very important to employees in these suits, the uniformity that you point out, the fact that there is more expertise in interpreting Federal laws, all of the panoply of reasons which would cause Congress to be moved to make this remedy available in any court of competent jurisdiction.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Zwerdling.

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:28 o'clock, p.m., the oral arguments in the above-entitled case were concluded.)