In the

# Supreme Court of the United States

ERNEST FRY AND THELMA BOEHM,
PETITIONERS,
V.
UNITED STATES
RESPONDANT.

No. 73-822

Washington, D. C.
November 11, 1974

Pages 1 thru 35



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

IN THE SUPREME COURT OF THE UNITED STATES

| | | |
|---|---|---|
| ERNEST FRY and THELMA BOEHM, Petitioners, | : | |
| v. | : | No. 73-822 |
| UNITED STATES, Respondent. | : | |

Washington, D. C.,

Monday, November 11, 1974.

The above-entitled matter came on for argument at 1:56 o'clock, p.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:

JOHN A. BROWN, ESQ., Lucas, Prendergast, Albright, Gibson, Brown & Newman, 42 East Gay Street, Columbus, Ohio 43215; on behalf of the Petitioners.

MRS. JEWEL S. LAFONTANT, Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Respondent.

# C O N T E N T S



- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 73-822, Fry and Boehm against the United States.

Mr. Brown, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN A. BROWN, ESQ.,

ON BEHALF OF THE PETITIONERS

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

Excuse me for not getting up, that's something I do less well.

We are here today on a case that is, at least in our judgment, extremely important to all fifty States. We are here on a petition for a writ of certiorari granted by this Court last February.

The matter all began in the State of Ohio. The Ohio 109th General Assembly passed a bill, Amended Substitute Senate Bill No. 147, and it was signed by Governor Gilligan, and to be effective on the first day of the pay period which included January 1, 1972.

The bill provided for a pay increase for all State employees of either 38 cents per hour or ten percent, whichever was more. It averaged out to be a pay increase of roughly 7.7 percent for all State employees.

After the statute was passed, signed by the Governor, the State of Ohio asked the Federal Pay Board for authority

to pay the increase the Ohio General Assembly had enacted.

The Pay Board heard the petition, granted the authority to make the increase effective, March 10, 1972. So there was a period of roughly two and one-half months when the pay increase was not paid. The Federal Pay Board decided that the amount that would be paid then, from March 10, 1972 through the remainder of the biennium would equal an amount that would be consistent with the Federal Pay Board's standards.

Thereafter we filed an action in mandamus in the Supreme Court of Ohio in which we asked the Ohio Supreme Court to order, direct the State officials to pay the increase that the Ohio General Assembly said they should pay.

The Ohio Supreme Court issued the mandate that we requested. Immediately the Federal Government sought and obtained a temporary restraining order from the Federal District Court in Ohio, which was then continued by the Temporary Emergency Court of Appeals here in Washington. And when the matter came to the Temporary Emergency Court of Appeals, they ruled that the pay increase was beyond the scope of Ohio to get, that the State of Ohio was enjoined from doing what the Supreme Court of Ohio had ordered the Governor in the order to do.

We then filed our petition hereunder the Tenth Amendment to the United States Constitution, and we filed the motion not as an academic matter but because we seriously,

honestly contend that the Tenth Amendment to the United States Constitution prevents the Federal Pay Board and the Temporary Emergency Court of Appeals from doing what it did do.

Now, after this Court granted the petition last February, the United States has filed a motion asking that the writ now be ruled to have been improvidently granted -- to use the words of the Solicitor General. They argue that it be, even though that since the decision of the TECA a situation has occurred in California, in which a situation very similar to this occurred, when the California General Assembly passed a pay increase for its employees, and the California Governor went to the Pay Board, as the Ohio Governor did, got authority, which was only partially what the statute said, the California employees went to the California Supreme Court in mandamus, as Ohio did. The California Supreme Court granted the writ, again as Ohio did, then the Federal Government filed a petition for an injunction in California, again as they did in Ohio.

The injunction was granted, and thereafter an appeal was taken to the TECA, and to the government's surprise -- or we guess it's their surprise -- the TECA reversed in the Coan case in California, saying that the reason they reversed is the injunction was applied for on May 14, 1974, which was two weeks after the Economic Stabilization Act had expired.

And we understand, although it is not in the record, that the government has filed a petition for a writ of certiorari in that case, and it seems to us anomalous, to say the least, that the government would, on the one hand, contend that our writ should be dismissed as being improvidently granted and, on the other hand, contend that a case of almost exactly similar import should be admitted by this Court in Coan vs. State of California.

QUESTION: Mr. Brown, did I understand you to say then that was during a period of time that the government has or plans to file a writ of certiorari to review the judgment of the Temporary Emergency Court of Appeals of September 19, 1974, in the case of United States of America v. State of California?

MR. BROWN: That's my understanding.

QUESTION: Because I was going to ask you -- now that I have you interrupted -- what effect -- assume that the decision in the California case of the Temporary Emergency Court of Appeals remains undisturbed, what effect would that have upon the viability, continued importance, or even continued viability of your litigation?

As I understand it here, under this decision -- now you tell me if I'm mistaken -- your clients will get everything they're asking for, won't they?

MR. BROWN: Well, there is no question but that when

the TECA acted in our case, the Act had not expired, so that the injunction that was issued remains. In the Coan vs. State of California, TECA decided that the application for the injunction came two weeks after the Act had expired.

So that I think the answer is that Ohio is enjoined and California is not.

QUESTION: Well, is that the reasoning -- is that the reasoning of this Court of Appeals?

MR. BROWN: Of the Emergency Court of Appeals? I think so.

QUESTION: They talk about an enforcement proceeding. I just glanced at this, I haven't read it carefully, but I -- you think, therefore, that this -- assuming that this decision remains unchanged, that it would have, give your clients no benefit at all?

MR. BROWN: Not in the present posture. We would have to do something more than has been done.

Now, I think I'm obligated to say to the Court that we filed an action six weeks ago in the Ohio Supreme Court again, asking for another mandate, saying: Pay the money now.

Now, if the Supreme Court of Ohio, in December '74 or February of '75, issued another order to Governor Gilligan and Auditor Tracy and said, Pay the money now.

QUESTION: It wouldn't be Governor Gilligan in February of '75.

[Laughter.]

MR. BROWN: As a great many of my friends have reminded me, that's true.

If they said, Governor Rhodes, pay the money, or Auditor Tracy, pay the money -- or Ferguson, rather, pay the money, the Federal Government would not be able to enjoin that mandate now.

Unless it would be interpreted that the order of September of '73 from the TECA was broad enough to cover what the Supreme Court might do later.

QUESTION: But certainly that's not going to be your position?

MR. BROWN: That's true.

QUESTION: In that litigation.

QUESTION: At least they could give a prospective wage increase without interference by the Federal Government now.

MR. BROWN: True.

QUESTION: And make up for it indirectly that way, assuming they had the same employees that they had before.

MR. BROWN: Yes, and of course the employees will be markedly different, because we're talking about some 55,000 State employees, or thereabouts, and in two years they have changed markedly. But the Ohio General Assembly could, when it goes into session in January of 1975, grant a pay increase

to, in effect, make up for what the employees, some ten and a half million dollars that they did not receive two years ago, plus.

QUESTION: Could they give it retroactive -- under Ohio law, could your Legislature now give a retroactive pay allowance, Mr. Brown?

MR. BROWN: I don't know the answer to that.

QUESTION: Well, if they could, do you think there's anything -- any barrier to that in the federal law?

MR. BROWN: No.

QUESTION: Or in this injunction?

MR. BROWN: That I'm not sure of. The injunction, by its terms, and the Court will see on the last paragraph of the Order of the TECA, is very broad, and how that might be interpreted to apply, if the State of Ohio now tried to pass a retroactive pay increase, I simply don't know.

I would not like the question to occur.

QUESTION: As a general rule in periods when there were pay freezes, it would make a mockery out of the efforts to control wages and prices, would it not?

MR. BROWN: I'm sorry, I didn't hear all your question.

QUESTION: Well, if it is true that after a pay freeze is off, such as we had during, I think, the Korean War and various other emergency periods, if afterward the

employers could come along and make it up, and it was identified as such, it wouldn't have very much meaning in terms of the power of the government to deal with emergencies, would it?

MR. BROWN: Agreed. And of course there have been ample precedents which say that if Company A and Labor Union B agree that a pay increase will be made to employees of X dollars per hour, X cents per hour, after the freeze expires, that agreement is no good at all.

Now, the question about what would happen if Ohio now tried to retroactively do something in January or February of 1975, I don't think it has been answered.

The point we want to emphasize most, we think, in oral argument is that what the TECA seemed to say was that Maryland vs. Wirtz, decided by this Court, answered the appeal we made to the TECA a year ago. We contend it certainly does not.

That Maryland v. Wirtz decided that the amendments to the Fair Labor Standards Act, as applied to State schools and State institutions for the mentally retarded, et cetera, limited the State's authority to act and that the FLSA amendments were constitutional. But in both the majority and the minority -- or the dissent in Maryland v. Wirtz, there is a great deal of language indicating that if the United States Congress had in the FLSA said that the minimum wage that the

State of Ohio shall pay to all its employees shall be $2.20 per hour, that this would not have been permissible under the Tenth Amendment.

We maintain that you cannot read the Tenth Amendment as having any meaning at all, and say that the Congress of the United States may do that.

Now, Chief Justice Hughes, many years ago, in this Court said that the Tenth Amendment of the United States Congress is meaningful and, to an argument a lawyer raised, that if some Act of Congress was not restrained it would harm the courts or harm the States and destroy the States or devour their sovereignty, Chief Justice Hughes said: Not while this Court sits.

But we submit that if here the argument or the contentions of the TECA would be supported by this Court, then the Tenth Amendment will have very little meaning left in what not only Chief Justice Hughes but Justice Cardozo and many others have warned against would certainly be occurring.

I would like to save what remaining moments I have to reply.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Brown. Thank you.

Mrs. Lafontant.

ORAL ARGUMENT OF MRS. JEWEL S. LAFONTANT,

ON BEHALF OF THE RESPONDENT

MRS. LAFONTANT: Mr. Chief Justice, and may it please the Court:

The Economic Stabilization Act was brought into effect in August of 1970, and expired of its own terms on April the 30th, 1974.

The Act, under Section 203, authorized the President to issue orders and regulations to stabilize, among other things, salaries and wages at levels not less than those that were prevailing on May 25th, 1970.

And pursuant to such orders and regulations, the Pay Board issued its own regulations which limited the annual wage or salary increase to 5.5 percent for all persons subject to the regulation.

On January the 15th, 1972, the Ohio General Assembly passed Senate Bill 147, known as the Pay Bill Act, which provided for an average increase of 10.6 percent beginning January the 1st, '72, for 65,000 employees of the State of Ohio, the State universities, and the county welfare departments.

Subsequent thereto, Ohio filed an application to the Pay Board for an exception. They asked that they be permitted to pay the 10.6 percent increase. The Pay Board permitted them only to pay 7 percent from January the 1st, '72 to March 10th, '72; but thereafter the Pay Board approved the increase in its

entirety of 10.6 percent.

The Ohio Supreme Court, pursuant to application of Ohio, issued writs of mandamus, commanding the officers of the State to pay the entire increases. The officers of the State of Ohio to pay the entire increases.

The United States instituted this action in the United States District Court for the Southern District of Ohio, to enjoin Ohio and its officers from paying out the increases that were in excess of those authorized by the Pay Board.

And the District Court restrained Ohio from paying the increases, and the Temporary Emergency Court of Appeals issued a permanent injunction on October 25th, 1973, restraining Ohio and its officers from paying these increases.

I might add that since the termination of the Economic Stabilization Act on April 30th, 1974, there's been no application by petitioners for dissolution of that injunction, which is still in full force and effect.

But, mind you, the injunction was entered before the expiration of the Act.

Now, this Court --

QUESTION: Would the government resist an application to dissolve that injunction?

MRS. LAFONTANT: Would we resist?

QUESTION: Unh-hunh.

MRS. LAFONTANT: I would assume so, based on the particular facts we would perhaps resist it. I think it would turn upon the briefings that are brought to us, whether or not we would still be in good stead in resisting it. We would still have the authority, and we might not resist it, but certainly we would have that right, and I can't see at this point whether we would or would not.

But I am saying that the petitioners were in a position at that time to move to dissolve the injunction, because the Act was no longer in effect.

Now, this Court has consistently refused to pass upon the constitutionality of the statute where, at the time that it comes before the Court, the statute has expired by its own terms or has been repealed, or has ceased to be of any effect. And of course we know so many of the cases that substantiate that, and I have in mind in particular the Rice vs. Sioux City Memorial Cemetery case, where, after this Court had granted a writ of certiorari, upon learning that the particular State had repealed its law, this Court dismissed the writ of certiorari for being improvidently granted.

At this point I would like to say, too, that the government has not asked that this case be dismissed for being improvidently granted. Our exact language is that we want it to -- we think it should be dismissed because it's no longer of continuing importance.

QUESTION: But either way would leave the judgment of the TECA in effect, would it not?

MRS. LAFONTANT: Yes, it would.

Now, in the instant case the Economic Stabilization expired on its own terms, as I said, on April 30th of '74, but of course this writ of certiorari was issued before that time.

Now, beside the purely abstract question of the right of Ohio to pay wages to its employees without any restraints or interference from the federal government, the only matter before the Court is the residual pecuniary interests of these employees to the amount of the money; that is, some $15 million, and when spread over all the employees amounts to around $200 or more for each employee.

The immediate restraint upon Ohio that prevents it from paying the money to the employees is the injunctive order of the Temporary Emergency Court of Appeals.

Because of the fact that the purpose of the Act and of the injunctive order in support of the Act was to reduce during the effectiveness of the Act the supply of money in circulation by putting a limit on pay increases, it would seem to me that a very substantial question of law is now raised, and that question is: whether upon the termination of the Act application for dissolution of the injunction should not be granted, as a matter of right to the

petitioners. This is a legal question that should be determined.

We respectfully submit that at the expiration of the Act, the petitioners should have made application to the Temporary Emergency Court of Appeals for dissolution of the injunction. They did not, but instead they chose to pursue the attack on the constitutionality of the Act itself.

We submit that the constitutionality issue is of no longer continuing importance. The writ of certiorari was properly granted, because at that time the Act was in full force and effect; but since it has been granted, the Act has expired. And we say it's of no continuing importance, it's not very likely that this case can -- this issue can arise in any other courts concerning wages and salaries for periods after April 30th, '74.

QUESTION: Does your argument take into consideration what I read in the newspapers?

MRS.LAFONTANT: I don't know what you're reading in the newspapers, if you please.

QUESTION: Well, prices have gone up through the ceiling, and this thing might be back in effect within a day or so.

MRS. LAFONTANT: Well, that's not before this Court at this point, but I do --

QUESTION: I can't forget it.

MRS. LAFONTANT: I think a lot -- you cannot forget it.

What can happen in the future, or what will happen in the future, I don't know. Whether or not there is going to be a further need for any kind of legislation like this, I don't know who can say. But I don't believe that this Court has to determine the constitutionality of an Act that may be put into effect at some time in the future.

I think the Court has to act on what is before it.

QUESTION: I wish you could give a better word to it --

MRS. LAFONTANT: And, of course, if you can decide it without going into the constitutionality, I think --

QUESTION: If you can get a better word than "may", I might go along with you.

MRS. LAFONTANT: A better word than "may"?

All right.

I don't know where I had the "may" at this point.

[Laughter.]

QUESTION: Now, before you resume --

MRS. LAFONTANT: And second --

QUESTION: Mrs. Lafontant, perhaps you have already told the Court, but if so I missed it. Has the government petitioned for certiorari, or does it plan to , for this September decision of the Emergency Court of Appeals?

MRS. LAFONTANT: I can speak very honestly to you, and when I read this in Mr. Brown's reply, I checked all over the Department. We have not filed any petition for writ of certiorari in the California case. We have filed a motion for rehearing, which is going to take place, I think, next Tuesday or Wednesday, --

QUESTION: Then the time --

MRS. LAFONTANT: -- when there will be a hearing on that.

But we have not filed a petition for writ of certiorari, and I think before I could even answer that, the Department would have to look into all the aspects of the case to see if one would be warranted.

QUESTION: Well, I suppose you wouldn't even begin to face that question until the Court acts on your petition for rehearing, wouldn't that be it?

MRS. LAFONTANT: That's right. That's right. Exactly.

And it hasn't. We have filed our petition for rehearing and --

QUESTION: And that's under submission, is it?

MRS. LAFONTANT: -- I understand -- yes. I understand it is hoped that it will be heard Tuesday or Wednesday; but I think at that time we would make a determination what we should do.

QUESTION: I see.

MRS. LAFONTANT: But we have not filed it, and I was intending to clear it up a little later, but I'm glad you asked me that now.

QUESTION: I suppose you feel this case is governed by Maryland v. Wirtz?

MRS. LAFONTANT: Yes, I do, very much so. And before I got into that I had one other issue I wanted to cover, but would you prefer that I get into it now?

QUESTION: Well, I just wanted a flat answer and then --

MRS. LAFONTANT: Yes. Very definitely we feel that Maryland v. Wirtz is controlling, and if there was any interference into the role of State sovereignty, perhaps it was more interference in Maryland vs. Wirtz than here.

But even before we get to that, as you may have noticed, three of the amici raised for the first time an issue which was not raised by the petitioners. They contend that the Economic Stabilization Act of 1970 doesn't even apply to the States.

But since this was not raised in the petition, we don't feel that it's properly before the Court, but perhaps does require some response.

In any event, we feel that both the language and the legislative history of the Act show that Congress intended to include State employees in this Act.

And I will turn to page 12 of our brief, just to point to a few of the things that was said that would indicate that.

The regulationed define "person" to include "any State or local government unit or instrumentality of such government unit."

In Section 203(b)(5) they speak of -- it sets out very definitely that the standards to be adopted governing acceptable levels of wages and salaries were to "call for generally comparable sacrifices by business and labor as well as other segments of the population."

And, further, when Senator Proxmire, at the Senate hearings, prefaced his remarks when he was introducing a bill to have the States exempted, he conceded that ordinarily higher salaries for State and local workers result in a greater demand on the economy, and higher wages drive prices up, and that this is largely responsible for the inflation we are suffering.

But he tried to make a distinction -- yes?

QUESTION: How far may a State go in this respect, or could Congress go? Could Congress impose a ceiling on State spending, on State budgets? Could Congress say State salaries not only shall not be increased during this period but they should be lowered 15 percent? Would all this be valid, do you think?

MRS. LAFONTANT: I think it all would have to go back to the question whether it would be -- Congress would have a rational basis for determining that under the commerce powers this is a necessity.

QUESTION: Some thirty-odd years ago, it seems to me the federal government reduced the salaries of all government employees some ten percent or something of that kind?

Suppose in such a period they said this is across-the-board: all federal employees, all public employees everywhere else. To pursue Mr. Justice Blackmun's question.

MRS. LAFONTANT: You mean, you said the federal government reduced it by ten percent for --

QUESTION: Its own employees and all other public employees.

MRS. LAFONTANT: I think it would all have to go back to the question of rational basis and whether it was necessary under the --

QUESTION: Well, it doesn't need a rational basis to cut the salaries of its own employees, does it?

MRS. LAFONTANT: Oh, no, of course not.

But, in carrying it over to the States --

QUESTION: So that it wouldn't gain much weight for the State, reduction in State salaries out of the fact that they reduced them for federal; perhaps some but not

conclusive, would you agree?

MRS. LAFONTANT: Yes, definitely. And they wouldn't have to follow.

QUESTION: Supposing, to follow up another one of Mr. Justice Blackmun's question, that Congress decides that what we need to hold down are not just wages but spending in general by States, and so they said that no State during fiscal year 1975 could exceed its total expenditures for fiscal year 1975 [sic] and there were findings that would pass the rational basis test, that that would help in the exercise of commerce power control over the inflation.

Now, do you think that's the end of the inquiry?

MRS. LAFONTANT: No, I think -- if I understand your question correctly, I don't think Congress could set up, in other words, the State's budget and say, and control it completely and say that you can spend so much and no more.

QUESTION: You don't think, then, even under a rational basis commerce power test that it could set a ceiling on the State budget?

MRS. LAFONTANT: I don't. I think we're getting pretty far -- we're getting to the question now of how far is too far; and I think at that point I would believe we were getting a little too far. And it certainly goes much further than this case or Maryland vs. Wirtz.

QUESTION: Perhaps Congress would try to accomplish

that in a more -- that result in a more practical way, by saying it would terminate all federal grants-in-aid to States unless States conform with a certain policy on budgets, and get at it around Robin's barn.

MRS. LAFONTANT: I think even that might cause -- be a problem.

QUESTION: Some equal protection problems?

MRS. LAFONTANT: It would be a problem; I would think so.

Well, Senator Proxmire, in going further to show that the States -- that the Congress really intended to include the States, offered his amendment to specifically exempt from the Act salaries of State employees. And Senator Tower responded -- and that's on page 15 of our brief, and the Congressional Record at 117 -- Senator Tower said: I don't believe it is fair to other employees to single out one particular group for exemption; I believe the State and local government employees should be subject to the same standards as other employee groups.

QUESTION: Where are you reading from?

MRS. LAFONTANT: It's Senator Proxmire, 117 Congressional Record, 43673 and 43677.

QUESTION: And is it in your brief or in the Appendix?

MRS. LAFONTANT: It's referred to in the brief.

QUESTION: I see the reference on page 15 of your

brief to the Committee's Report.

MRS. LAFONTANT: Yes. That's what it is.

QUESTION: And that's what it is.

MRS. LAFONTANT: Yes.

I might add that the Proxmire amendment was defeated by a vote of 56 to 35, so it's no question in our mind that Congress intended to include the States under this Economic Stabilization Act.

And even beyond that, it's just inconceivable that you would think that Congress would deliberately exempt, say, 14 percent of all employees when we were in such an emergency situation and we know what effect 14 percent of the population would have on the rest of the nation. But they seem to make a lot out of the fact that since States were not definitely set out in the Act, that it was intended to omit them.

But we have cases that show that, and Case vs. Bowles is one of them, that shows very clearly that just the fact that you did not include the word "States" doesn't mean that you intended to exclude them.

Now, the only question that is really before the Court, because, as I said, the three amici raised this and not the petitioner, the only question presented in the petition is whether Congress, under its commerce clause, constitutionally may apply economic controls over the wages and salaries of State employees.

Petitioners contend that if Congress intended to include the States, then Congress is violating the Tenth Amendment, the sovereign rights of the States.

And they go so far as to say that by doing this we're permitting the federal government to devour the essentials of State sovereignty.

Whatever may have existed with respect to the power of Congress under the commerce clause, to regulate State activities, has been decided by Maryland vs. Wirtz, where this Court established the validity of this exercise of congressional power in appropriate circumstances in inter-state commerce.

QUESTION: Of course, there that was a minimum wage, wasn't it?

MRS.LAFONTANT: Yes, and overtime.

QUESTION: Here it's a maximum amount. I'm still a little bit bothered if the Congress said to the State of Ohio, You can pay your employees no more than $3.94 an hour, what about those that had been getting $5 an hour, the Governor himself, or something?

Could Congress do this?

MRS. LAFONTANT: I think on the rational basis test, except for the -- you could even extend it that far, I would believe; except that most times they do exclude the administrative offices, like Governor or what-have-you; but I

would say that once you would open the door, and if there was this emergency and if there was a rational basis for it, and in order to regulate the commerce among the States, and to defeat inflation and fight unemployment, I think Congress could actually do this.

But I think it has to be done on a case-by-case basis. But I think in some instances it could be accomplished.

QUESTION: Where did this rational basis test come from? I don't know if this is a matter of congressional power under the commerce clause, and the other, and your brothers talk about the Tenth Amendment on the other hand.

Rational basis is something that sometimes is used, I think sometimes rather loosely and wrongly used in connection with due process, and sometimes perhaps equal protection; but where does rational basis come into this?

MRS. LAFONTANT: Well, in the cases that I have been reading, even though there are some Acts that say that you don't have to show a relationship, I would believe that the courts would have the power to go behind the actions, the decision of the Congress.

QUESTION: Behind the judgment of Congress.

MRS. LAFONTANT: To go --

QUESTION: To go further than saying that this is within the commerce power of the Congress, but, nonetheless, it's invalid because it lacks a rational basis; I don't know

of any case that holds that.

MRS. LAFONTANT: Well, it wouldn't -- but there are cases that say that Congress -- I mean that the Court does not have to accept the final say of Congress just because they say it's within the commerce clause.

QUESTION: Do you think the taxing power and the commerce power are the same? I ask this because I think --

MRS. LAFONTANT: No, I do not think it's the same. And the cases --

QUESTION: And why shouldn't they be the same?

MRS. LAFONTANT: -- that may be -- you're asking me why shouldn't they be the same, or --

QUESTION: Unh-hunh.

MRS. LAFONTANT: -- if they are the same, the courts have distinguished between the taxing power and the commerce power.

QUESTION: There's no provision for the power to --

MRS. LAFONTANT: Right. And they're completely different. The commerce power is plenary and goes much further.

QUESTION: Well, the Constitution doesn't say it's plenary.

QUESTION: The taxing power certainly can seek -- conferred in very, very broad authority, the power to levy and collect taxes without any textual limitations, as I recall.

MRS. LAFONTANT: But the case law has restricted the taxing power much more so than the commerce power. The commerce power is a much broader --

QUESTION: Of course, this is the implication of my question, as to whether there isn't a limitation even on the commerce power. As I think you have more or less conceded, there must be some, although --

MRS. LAFONTANT: Yes. But we don't know where it stops. All we can say is that we know that this isn't the case that would stop it. And the cases have said that there is a limitation on the commerce power. But we haven't reached that limitation, I believe, in this case.

QUESTION: The limitation is if it's not commerce.

MRS. LAFONTANT: Well, that's pretty broad. What is commerce? Because many --

QUESTION: Yes, that's always a question.

MRS. LAFONTANT: Is there anything other than the collecting of your garbage that's not commerce?

QUESTION: Well, interstate commerce, I mean, of course, by commerce.

MRS. LAFONTANT: Right. Right.

QUESTION: Well, there's little doubt that the total amount of wages paid to State and local employees in this country has an enormous impact on the commerce of the United States, can there be?

MRS. LAFONTANT: Oh, no doubt, yes.

QUESTION: Suppose, since we've gone quite far afield, suppose a State, hypothetically, decided to pay the members of its Legislature $100,000 a year, and that same Legislature was asking the Congress of the United States to appropriate money for large grants to the State for highways or dredging or whatnot, do you think there is much doubt about the power of the United States to say that States who are going to pay $100,000 a year to their Legislators --

MRS. LAFONTANT: Right.

QUESTION: -- aren't going to get the same treatment on federal grants-in-aid as States who are more reasonable?

MRS. LAFONTANT: I don't think there's any doubt about that. No doubt about it at all.

The thing that is still worrying me is the case I wanted to find, which I can't find right now, on the point of Mr. Justice Stewart's question.

In fact, it's Mr. Justice Stewart's dissent in Perez vs. United States.

QUESTION: Yes, and that said that that was --

MRS. LAFONTANT: No, that was the one that had to do with the loan-sharking, I'm sorry.

QUESTION: That's right.

MRS. LAFONTANT: Right.

But there are --

QUESTION: The censor of subversive literature, anyway.

[Laughter.]

MRS. LAFONTANT: Well, as my -- as my opponent said in his reply brief, that it was obvious that we had not read the dissent in Maryland vs. Wirtz, because we had not quoted from it, but he did, extensively.

QUESTION: Well, Mrs. Lafontant, if what we had here were employees of private employers, doing exactly the work and potentially receiving exactly the amount of wages as these employees, I take it that commerce clause, extent of Congress's power just measured by the commerce power would be exactly the same, whether they were private employers or State employers.

MRS. LAFONTANT: True.

QUESTION: The rub comes from the fact that it may be that Congress can't exert the commerce power to the same extent against States as it can against private employers.

MRS. LAFONTANT: Well, there's no doubt about it, yes, because of the Tenth Amendment.

QUESTION: You don't think we need get into that region for this case?

MRS. LAFONTANT: No. I hope not. I think --

QUESTION: But isn't that what this case is all about?

MRS. LAFONTANT: Well, let's say -- no, this is not what this case is all about. It could be, if you reject the

argument that there is no other way out for the petitioners.

My main point is that you do not even have to get to the constitutionality of this Act and the Tenth Amendment, because of the pending injunction which I believe a motion should be made to dissolve it, because the law has expired.

But once we get into the constitutionality of the Act, the Tenth Amendment certainly is part and parcel of that whole thing.

But I don't see how, even in the Tenth Amendment, how the State can really -- Ohio can really argue that its sovereign powers are being impinged upon, or that it's being forced to cut back on certain services, or they have to operate a certain way just because the salaries have been cut.

If we look at Maryland vs. Wirtz, there the State had to pay out money, additional money to reach the minimum wage.

In this case, the wages are cut back. The only thing that you can really say that the State might be suffering, and which they allege that they are suffering, when they say that there is a disparity between State employees' salaries and private employees' salaries.

The Economic Stabilization Act is saying we're treating you both the same. So the level of attractiveness for employees remains the same. They are not being discriminated

against.

And both private and the State employees are treated the same. So the only argument that I would think they would have is if -- would be the argument that they couldn't attract employees or couldn't keep their employees. But I don't think that that can stand up.

MR. CHIEF JUSTICE BURGER: Thank you very much.

Do you have anything further, Mr. Brown?

REBUTTAL ARGUMENT OF JOHN A. BROWN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BROWN: Yes. Thank you.

You know we have argued this matter now several times. And I think this is the first time I have heard anyone for the United States agree that there is a limit on the commerce power. That's comforting to hear.

Because we certainly agree with counsel for the appellee, that unless there is a limit on the commerce power, then we may as well remove the Tenth Amendment, and it simply does not mean what it says.

Now, Judge Mosk of the California Supreme Court, in the Coan vs. California case, said: "Perhaps the trend toward centralized authority and judicial acquiescence in it are irreversible; nevertheless I suggest that a fait accompli is not necessarily desirable or constitutionally permissible."

We agree with Justice Mosk, and there was a great

deal of dialogue between the Court and me and the Court and my delightful counterpart, in asking whether or not Congress had done something -- and I don't think the question is whether they had, but whether they may. Because the question that is before the Court, as indicated by Mr. Justice Marshall's question, is that a year from now it may very well again come that federal wage and price controls may again be sought. And again we will have the question of: Are salaries of employees of New York, Ohio, California to be limited again as they purported to be in this last confrontation we had.

We believe that you cannot say to the State of Ohio, under the Tenth Amendment, that your budget for 1975 may be no more than five percent more than your budget for 1974. And you may not say that salaries for State employees are required to be the same in '75 as they were in '74.

Or that you may not say that salaries for employees in '75 must be ten percent less than they were in '74. Because if you say that they can do one thing, you must say that they will do the other thing.

QUESTION: Do we not now, at present, under Davis-Bacon, in effect say to the States, indirectly at least, that you must pay the prevailing wage on any contract in which there is a contribution by the federal government?

MR. BROWN: Yes, but again that's a different matter than saying to the State of Ohio that you cannot pay tax

collectors, judges, officials that have no counterpart in private industry at all.

Now Maryland v. Wirtz made the point and made it very well, that there was a matter in competition with private industry. Davis-Bacon deals primarily with private industry or at least jobs comparable to private industry. We're not -- we're much further than that in this case.

Here we're talking about 100 percent of the jobs; for the State Highway patrolman who may arrest me going home because I'm driving too fast. He would be limited, as would be a handy man in a school. And that's much, much broader than Wirtz was.

QUESTION: Does this apply to elective public employees in Ohio as well; to Governor Gilligen himself, for example?

MR. BROWN: The Governor's salary is regulated by Constitution in Ohio.

QUESTION: And it was not covered by this wage increase, was it?

MR. BROWN: True.

QUESTION: And on judicial salaries, it's the same, isn't it?

MR. BROWN: True.

QUESTION: They are separately covered.

MR. BROWN: True.

QUESTION: And legislative salaries, the same; not covered --

MR. BROWN: In Ohio, yes. Now, that may or may not be true in other States.

QUESTION: Yes. But in this case --

MR. BROWN: In Ohio, it is.

QUESTION: -- elective officials were not covered by this pay increase; is that correct?

MR. BROWN: True.

Thank you very much.

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

Thank you, Mrs. Lafontant.

The case is submitted.

[Whereupon, at 2:52 o'clock, p.m., the case in the above-entitled matter was submitted.]

- - -