In the

Supreme Court of the United States

THE NATIONAL LEAGUE OF CITIES, et al., Appellants, v. JOHN T. DUNLOP, Secretary of Labor, Appellee,	)	No. 74-878
and STATE OF CALIFORNIA, Appellant, v. JOHN T. DUNLOP, Secretary of Labor, Appellee.	)	No. 74-879

Washington, D. C.
April 16, 1975

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Appellants,		
v.	:	No. 74-878
JOHN T. DUNLOP, Secretary of Labor,		
Appellee,		
and		
STATE OF CALIFORNIA,		
Appellant,		
v.	:	No. 74-879
JOHN T. DUNLOP, Secretary of Labor,		
Appellee.		

Washington, D. C.

Wednesday, April 16, 1975

The above-entitled matter came on for argument at 11:14 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

CHARLES S. RHYNE, ESQ., 400 Hill Building, 839 Seventeenth Street, N.W., Washington, D.C. 20006, for the Appellants in No. 74-878.

TALMADGE R. JONES, ESQ., Deputy Attorney General of California, 555 Capitol Mall, Suite 550, Sacramento, California 95814, for the Appellant in No. 74-879.

ROBERT H. BORK, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, for the Appellee.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in The National League of Cities against Dunlop, No. 74-878, and California against Dunlop, No. 74-879.

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

ORAL ARGUMENT OF CHARLES S. RHYNE ON BEHALF OF APPELLANTS IN 74-878

MR. RHYNE: Mr. Chief Justice and may it please the Court: The appellants here, States and cities, challenge the constitutionality of some 1974 amendments to the Fair Labor Standards Act which covered all the remaining employees of States and cities under that Act. The way it was done was by declaring all States and all cities to be commercial enterprises, and under that enterprise interpretation, to apply all of the regulations of the Act to the States and cities.

I would first of all like to point out that this is not a minimum wage case. It isn't a case involving the low-paid people. It's the application of this Act to the relatively high-paid people, the wiping out of State and local government civil service laws, processes,procedures, the forced restructuring of the way that they will render fire service, for example. It results in enormous increases in cost. These are the things that the States and the cities complain of and say to this Court that this Act is really a very massive

complex regulatory Act which in effect reaches every employee, be he working in the executive, legislative, or judicial branches of State government. Now, there are some exemptions for elected officials and their confidential aides and for professional people. But the interesting thing about the application of this Act and the claim repeatedly that it's to correct substandard labor conditions is that in the entire record made over three or four years in the Congress, the appellee's predecessors in the Department of Labor were only able to find, they claim, 95,000 people out of 11,400,000 who in 1973 they thought could be covered by this Act who were getting less than the minimum wage, and we doubt frankly that figure, because it shows here in the record that firefighters get $12,000 a year, the highly publicized New York garbage collectors and sweepers get up to $24,500, out in San Francisco they get almost as much. So we are not talking about minimum wages, we are not talking about substandard conditions.

What we are talking about is a basic restructuring of government in the United States of America, a big change in our Federal system of government, whereby for the first time in all history the Federal Government is asserting power over every State, over every city and every employee they have. There can be no question about that because, as appellee admits, you have to keep a record for even the exempt people. So this is a massive takeover, it's a massive overlapping, duplication,

nullification of civil service, debt limit, tax limit, budget limit laws, and it affects this vast change in power. And we talk mostly about power. Appellee talks about payroll costs and say they are nothing, but we talk about power of government. And we say here that the Federal Government is asserting jurisdiction for the first time over the most important element in every State and local budget, the personnel cost.

Cities have 80 to 85 percent of their budget in personnel cost. States -- California has 76 percent. And other States are similar.

So we say that this Act is a massive takeover of functions that had been performed on the local level since the founding of our nation.

I use one illustration of the wiping out of ballot box control. In the record at pages 414 and following, there is a copy of a New Jersey statute. That statute applies to the platoon system for firemen. It says you have the firemen on 24 hours or off 24 hours, and they can work 56 hours a week, but only after that has been approved by referendum of the local voters. And no one can look at the regulations that were promulgated on the 20th of December 1974 by the Wage and Hour Administrator or the Secretary of Labor and not see that this New Jersey statute is wiped out completely. And all across this nation, from the New England town meeting to the referenda that are so popular out West where they have a

referendum on almost anything, every time we have had a fundamental increase in money or fundamental change in providing unique services uniquely needed by a particular city or State because of geography and other reasons, there is always the possibility now of the people voting on it as they did in New Jersey. But under this Act and under the actions of the appellee, that ballot box control is gone forever.

This Act, as I say, is a massive imposition down from the top of massive legislation that's already in effect affecting States and cities. This is where we spend most of our money. They spend, as I say, 85 percent of their money on personnel, and they have very carefully down through the years developed civil service and tenure laws for their people, and now, instead of -- I think this illustrates it best -- instead of looking to the City Council, looking to the local processes, procedures, the Civil Service Commission of the City of New York or the Civil Service Commission of the State of New York, what they do here is they look to the appellee, the Secretary of Labor, and they look to the Congress because once this power is established, every kind of employee in this whole nation has to go to Congress, or can go to Congress to get their employment status changed. So they no longer look to City Hall, they no longer look to the State Capitol. This is a vast change in the outlook, in the power, and it's a centralization here in the Federal Government of power over the most important group.

Cities are of legal power. They can only act through people. And this Act reaches every one of them. It's an assertion of sovereign power over every employee of a State and city throughout the nation.

One of the experts that I would like to call the Court's attention to, to nail down how complex, to nail down how massive, to nail down the fact that this is a double standard of hours and wages,is the Chairman of the Civil Service Commission.

The Chairman of the Civil Service Commission appeared -- and I quote from about three sentences from page 9 of our brief -- appeared on the 26th of February of 1975 before the Committee on Post Office and Civil Service of the House of Representatives, and this is what he said, "The extension of the Fair Labor Standards Act of Federal employment is a case in point. It adds a new set of complex provisions to the already existing provision of title V. It creates two standards governing pay and hours of work. It results in double recordkeeping and double work. It is an extremely high administrative cost --

QUESTION: What are you talking about?

MR. RHYNE: I am reading three sentences from page 9 of our brief, Mr. Justice Brennan.

QUESTION: Your reply brief.

MR. RHYNE: Yes. I am sorry.

QUESTION: Filed April 12.

MR. RHYNE: Yes.

On page 9, down in the middle of the page, I am reading three sentences from the testimony of the Chairman of the Civil Service Commission, who spoke of how complex this Act when it's imposed down upon the civil service system of the United States of America and how it imposes double standards, double bookkeeping, double work for negligible benefits.

Now, it's even worse for States and cities because while the Congress gave this regulatory power to the Civil Service Commission so that disruption could be avoided, just think of what it's doing to the States and cities who are all placed in with commercial enterprises before the Secretary of Labor.

We have in the Act and in its application and this power shift so many instances similar to the one I cited in New Jersey where the existing law of States is wiped out, where the existing processes, procedures and such with respect to employee rights is wiped out.

Now, another thing this Act does, it brings a whole new set of definitions of overtime, of who is an expert. There are 51 pages in the Code of Federal Regulation about what overtime is. There are 42 pages defining who is an exempt person. Now, the Civil Service Commission, and we quote it in our brief, said they are going to define themselves who is an

exempt person. But my major point is that there is such a vast shift in power to say what overtime shall be, to say who shall be exempt, all these kinds of things. When you impose those down on the area where States and cities spend the majority of their money, where they have developed all these rules and regulations, as in New Jersey, for years and years, and the people have voted them in or voted them out, and that's all gone now. You are going to have it imposed from on high by the Secretary of Labor or by the Congress.

The big impact in one area, I think, is most dramatic. And that is in the area of volunteerism. In the United States of America in government areas we depend more on volunteers than any other system of government in the world. And at the local level we have volunteer firemen, we have volunteer police, we have volunteer this and volunteer that. There are millions of them.

Now, this Act when it was written defined employ, e-m-p-l-o-y, as to suffer or permit to work. Now, that's all right insofar as private industry is concerned, because they don't have this volunteer element. But look at the States and cities who sometimes pay a volunteer fireman $2.50 to go on each fire. Look at the situation that exists where they sometimes give the volunteer policemen uniforms, and they sometimes pay insurance on them.

Now, the only answer to that appellee gave is well,

you have to take it case by case as to where a volunteer crosses over the line from being a volunteer to being an employee. So that creates this consternation all across our nation.

And another area that is going to be very, very damaging, at the local level we use thousands of interns. Now, frankly, the interns are not worth much to local government. It's more of a favor to the intern to bring them in than to really benefit a State or city. But now they are going to have to be paid if certain things occur, because interns have to live and you pay them a little bit, you are going to have to pay them a lot.

But there is another area where this whole thing really hurts. Many of the volunteer firemen, as the record shows, many of the volunteer policemen are already city engineer or school teacher. Now, if they go out as a volunteer on a fire or for as a policeman and they work in addition to their 40 hours as an engineer or school teacher, a few more hours, and they are ruled to be an employee during their volunteer time because they receive some minor compensation, well, the Act says that you have got to pay them time and a half for overtime at their same rate of pay. They may be a highly paid engineer getting $25,000 a year, and when you look at paying him overtime for his volunteer fire work or his volunteer police, you just mess up the structure of volunteerism throughout our nation. I don't think there has ever been anything that has so caused

confusion and this mass of confusion was referred to by Mr. Allen Pritchard, the Executive Vice President of the League of Cities in the record here, saying that no one could really tell where you are and where you are going because you have all of these complex regulations imposed suddenly down on already complex, already regulatory regulations of the status and tenure of city employees.

But perhaps one of the most devastating fears of States and cities is that this Act creates class action. You don't have class actions against cities under their current setup, but they do have fair hearings, they do have cases, and as we pointed out so many times, one-third of all litigation before State courts is really involving personnel matters. So here you have this Act saying that you can,either the appellee or an employee can bring a class action. He gets attorneys fees, he gets costs, and you get double time, triple time if you win.

Now, for a mistake in determining whether a man has crossed that line as a volunteer, or for a mistake as to whether the intern gets too much, the damage is enormous because they can make a mistake of fact or law in a city like New York, it can run up to enormous, enormous costs.

QUESTION: Mr. Rhyne, I suppose the Darby Lumber Company made most of the arguments you are making now when it sought to challenge the exercise of Congress under the

commerce for passing the Fair Labor Standards Act applicable to private businesses. Certainly, private business, when the Act went into effect in 1938,had to make very, very significant changes. I take it your point is that not only are there changes, but that this is somewhat different than just Congress imposing regulation on a private business.

MR. RHYNE: Yes, Mr. Justice Rehnquist, it certainly is. I think commerce is commerce and business is business. And in this area here, you didn't have a lot of private business that had laws. You see, private business can't legislate, adjudicate, tax, so they are an entirely different category than the private businessman. He can immediately adjust to take care of any costs. Cities and States have to give all kinds of notices or wait until you come around to the next budget year, and things like that. So I am not sure at all that Darby presented the same kind of impact. I don't think so, because you didn't have the civil service laws in States similar to the Federal civil service law. You didn't have all of these appeals that you have there to civil service commissions or personnel commissions. You didn't have all of that kind of thing. And you certainly didn't have the volunteer situation in Darby. So I think this is entirely different, and actually the basis of our whole argument is a distinction between government and commerce.

QUESTION: Have you made any arguments that weren't

made in Maryland v. Wirtz?

MR. RHYNE: I think we have, your Honor. I think that we have here presented the massive impact of this Act upon States and cities looked upon as an entirety.

QUESTION: So you would leave Maryland v. Wirtz alone?

MR. RHYNE: I would not. I would not. I would say --

QUESTION: So you think we must overrule Maryland v. Wirtz?

MR. RHYNE: I would say I would like to see it overruled. There are some distinctions, but I can tell you what are the distinctions I draw.

QUESTION: But to hold for you we must overrule Maryland v. Wirtz?

MR. RHYNE: No. But I think it should be. I think like the lower court which said it was troubled and that the broad language of Wirtz, that this Court might want to pull back from.

QUESTION: I suppose you could think of a lot of cases in the book that you think ought to be overruled.

MR. RHYNE: I am just thinking of this one right now.

QUESTION: I know you are thinking of this one, but why is it involved in this case, Maryland v. Wirtz?

MR. RHYNE: Why isn't it?

QUESTION: Why is it? Why do you think we should overrule it?

MR. RHYNE: All right. I think you should overrule it, number one, because it is so fuzzy you can't really tell -- I am going to the ultimate now -- what it decided. You left open, for example, the ultimate consumer question.

QUESTION: Why is it involved in this case?

MR. RHYNE: Why is it?

QUESTION: Yes.

MR. RHYNE: Because after looking at the enterprise system and upholding it as applied to all these private business criteria and all these private business cases, the next thing the Court did, majority opinion, was say, now that we have upheld that Act as applied to these criteria of nexus to commerce, it's always been applied in a private business thing, we don't find enough of an impact on States here to bring the tenth amendment into focus.

Now, of course, hospitals and schools, they don't legislate, adjudicate, or tax, so there is -- and then, too, the court pointed out there, the court below, that these schools and hospitals were in competition with private business. So I would say to you, Mr. Justice White, we are presenting an entirely different, in many ways, factual picture to you, and we think that distinguished Wirtz there. But we also think that as the dissent in Wirtz said, if we uphold this

enterprise system as to schools and hospitals, then the Congress can declare an entire State an enterprise and the Federal Government can regulate its entire budget.

QUESTION: Well, if you can distinguish it, that seems to be one of your objectives, why not tell us what --

MR. RHYNE: Well, the distinctions I would draw, Mr. Chief Justice, are these: Number one, the Court didn't decide the ultimate consumer question you had here now before you in Brennan v. Iowa.

Number two, it seems to limit the application of the Act to those schools and hospitals which are in competition with private schools and hospitals.

And then, finally, it seemed to say to the dissenters when they say you can take over a whole State by declaring it an enterprise, the comment was not while this Court sits.

So I think there are factual distinctions there which show that Wirtz hasn't had the impact on State and local governments that this massive takeover has here. But I still think that the Court should have in Wirtz considered the principles of constitutional federalism which we urge upon this Court. And it didn't. I just said because we have already upheld this commercial enterprise, the tenth amendment doesn't mean anything. Go ahead and apply it.

So I would say to Maryland v. Wirtz that it does not control this case because I draw from the principles of

constitutional federalism, and certainly we have in our briefs gone into this very, very deeply, this general rule that under the Constitution as it was written even prior to the tenth amendment all of the framers of the Constitution were enunciating this idea that the Federal Government could not and would not interfere with the States in their area of operation, as Mr. Chief Justice Marshall said in McCulloch v. Maryland, and vice versa, there would be no interference.

And where do I find that rule? I find it in the debates on the Constitution of 1787. I find it in Federalist papers. I find it in the decisions of this Court. I find it in statements of two Secretaries of Labor who oppose the application of this Act to States and cities because it would be an undue interference, and undue disruption and might bankrupt some of the small cities of this nation. I find it in the veto message of one President. I find it in the statements by the Intergovernmental Relations Commission, which is the expert commission set up to look at these things. I also find it overwhelmingly in the interpretation which the Congress itself has given to this intergovernmental relationship from the beginning of our Constitution to now. In statute after statute, they have exempted States and cities for this very constitutional reason. And even in this Act up until 1966 there was a complete exemption. They didn't take out that complete exemption until they brought public agencies in

now as commercial enterprises.

So I think our founding fathers understood the difference between government and private business;all through that Constitution there are more than a hundred mentions of States. Only States can bring an original action here. No private person can do that. I believe there has been an awful lot of fuzzy thinking about everything in our whole nation being commerce, and it isn't. Certainly the act of a policeman in making an arrest isn't commerce. The act of a fireman in putting out a fire isn't commerce. The act of a judge of a State or of a city in deciding a case isn't commerce. The action of a zoning board in deciding a zoning isn't commerce.

Now, all of this kind of thing, Mr. Justice White, was not presented in Maryland v. Wirtz. As far as I can tell, and I have read all the briefs in that case, and there is no reference to it in the majority opinion, and I think these are the kind of thing that the dissenters were concerned with. They were saying you get a mighty small perspective on this whole problem when you are just looking at hospitals and schools, and now we are presenting the whole picture, and when you look at the whole picture, there is certainly a massive intrusion, a massive control by the Federal Government for the first time in the history of our nation of every person, every service rendered by States or cities, because what this Act does is it rescrambles the way they are going to do fire

service, it rescrambles the way you are going to do a lot of things. And we say it imposes enormous cost. And when you impose enormous costs, that's one thing. But the big thing we talk about is the shift in power from the States to the Federal Government.

Now do we want it? Isn't this a massive interference with our constitutional system of shared power, our Federal system? We talk about federalism, federalism, federalism. Well, federalism has served this nation very well and up until now States and cities have fairly taken care of their employees who have collective bargaining statutes and agreements and thousands of their members belong to unions, as you can see from the amicus briefs here. All of that was never forcefully presented, as far as I can tell, in Maryland v. Wirtz, and here I could not say more strongly than I have, I just think that we are looking at such a major shift of governmental power in our nation, something we have never had before, and when you look at the necessity of it, what does the appellee say? He says that in 1973 when they were considering this Act, it would only increase the payroll cost of States and cities .3 of 1 percent. He says also, in 1974, it would only increase the payroll cost -- and that would be $120 million a year, incidentally -- and in 1974 it would increase the payroll cost only one-half of 1 percent or $165 million. He says these police and fire regulations that

he put out in December will only cost $37 million.

QUESTION: How many employees are covered by these amendments?

MR. RHYNE: Mr. Justice Rehnquist, all employees of States and cities are covered because you have to keep a record on each one of them.

QUESTION: How many are those?

MR. RHYNE: 11,400,000.

QUESTION: The ones exempt from the --

MR. RHYNE: Under the professional exemption and such?

QUESTION: Yes.

MR. RHYNE: We have a great dispute among us as to how many that is, the elected people. So I think the safest thing for me to say is we are looking at the whole of it because they require that a record be kept with respect to State court judges, all the exempt people. So I think that the pervasive nature of it, the fact that it touches everybody that is a State or city employee, I don't think can be disputed.

QUESTION: What if you look at it from the point of view most favorable to the government, that is, the most limited number of people who are actually affected by the minimum wage and overtime provision?

MR. RHYNE: Your Honor, I don't believe that that

changes in the slightest because a de minimis impact doesn't create constitutional power. And as I read all the background of the Constitution and the history of it up until now --

QUESTION: Does this record show how many would fall into this exempt class out of the 11,400,000?

MR. RHYNE: It doesn't show it absolutely, your Honor. They try to contend, of course, there are very few covered, and we say everybody is covered. And we don't have figures as to the exact numbers. Now, they claim that very few were covered under the hospital thing, very few covered here, I think they claimed less than half of all the 11,400,000 are covered. But I say that has no constitutional significance because they claim power over them all.

QUESTION: If less than half are covered, that would still be four or five million?

MR. RHYNE: Yes. I think they will admit up to 6 million.

QUESTION: I wouldn't call that de minimis.

MR. RHYNE: Well, they say that has only a showing that they are not covering everything. I don't call it de minimis either. But they are attacking the statement made by Congress that because in the overtime area, for example, States and cities have such fair overtime premium laws now that there would be less than 1 percent added to the payroll by the new overtime provisions of this Act, and things like

that. Now, I just think that de minimis, de minimis, de minimis doesn't create constitutional power, and I find here in all of this history of constitutional federalism a sturdy, steady, unwavering adherence by everyone up until now, including the decisions of this Court, that the constitutional federalism is something that limits everything in the Constitution where you have a conflict between two governments. You have the tax power, you have the bankruptcy power where time and time again this Court has said hands off States, hands off cities. You have cases like in the transportation field where over -- Maryland v. Johnson, for example, where the Court held, and Mr. Justice Holmes wrote the opinion, said don't try to get us to decide this on these commerce cases involving private industry. It has nothing to do with it. What we are talking about here is government. And so on the basis of that, he held it was invalid for Maryland to charge a postal truck driver a $3 driver's license fee.

So the amount regardless of how many you have on either side should not decide this case because I think on this record it is beyond question that the Congress is claiming power to regulate every State and city employee, and I believe that the factual picture of this overwhelming massive change in government, the centralization here of everything, with everybody running to the Congress if they want a change in their personnel status.

Thank you.

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

Mr. Jones.

ORAL ARGUMENT OF TALMADGE R. JONES ON BEHALF OF APPELLANT IN No. 74-879

MR. JONES: Mr. Chief Justice, and may it please the Court: I bring to the Court what must surely be a simple and true proposition, but which has nevertheless escaped the attention of our distinguished Congress, namely, that the States are governments, not commercial enterprises.

We examine today the constitutionality of the 1974 amendments to the Fair Labor Standards Act, an effort to convert the States into enterprises and thereby regulate and control the minimum wages and the maximum hours of their respective employees.

I wish to briefly outline the unforeseen consequences of the amendments on the California civil service system and then, time permitting and if really necessary, to point out the unconstitutional dimension of this unprecedented intrusion into the sovereign sphere of State government in the name of commerce. If I may, I would like to turn to a purely governmental function of State government, namely, fire suppression. Certainly that is unique to the States and the cities and the counties. I think our brief has adequately pointed out the fiscal impact, but let me give you a few statistics and show

you why a fireman is not a fireman.

California does not operate a Norman Rockwell type fire department with the friendly dalmatian sitting in front of the station house. We are 700 miles in length and we have 61 million acres of forest that we protect out there. You could squeeze in eight of the Northeastern States into the State of California and still have room left over. We have more wild land undeveloped acreage than the Library of Congress has books. It's rugged topography. It takes you three hours to get to a fire many times. Sometimes you have to come in by parachute. Forty percent of the United States Forest Service budget is spent in the State of California in 18 national forests, and when we have fires, we have fires. We don't extinguish fires, we have wars against fires. They last for weeks. In 1970 we lost over 500,000 acres. At one point in one single period in a 13-day period at one peak, we had nearly 20,000 firefighters on duty in the State of California fighting fires.

QUESTION: Were these full time or does that include volunteers?

MR. JONES: These were professional firefighters, your Honor.

QUESTION: Full time.

MR. JONES: Full-time firefighters from the cities, the counties, the State all joined together to fight these

tremendous holocausts we have in California.

QUESTION: What are the total number of employees in California, if the record shows this?

MR. JONES: The total number of permanent personnel, your Honor, is over 2,000 in the California Division of Forestry.

QUESTION: I am not speaking of just the forests. I am speaking of all public employees who would be subject to having their wages fixed under this Act, not just reporting.

MR. JONES: I can't give you the exact statistics on that, although I think the Court can take judicial notice of the fact that in California there are more Indians than there are chiefs, namely, the supervisory and professional executive exempt, what the Department of Labor claims are exempt, and we still don't know who those are, those are far less than the number of employees that are covered.

QUESTION: Well, the State of California must know how many public employees there are in State and local governments.

MR. JONES: If you want the raw numbers, we have over 200,000 total State employees.

QUESTION: That is what I was trying to get at.

MR. JONES: And I am sure that if we can extrapolate, I am sure we have over 100,000, at least 100,000 that will be covered by the FLSA amendments.

Now, what's the point of this dramatic recitation of

mine on the fires in the State of California? Well, mainly, these firemen run up a lot of overtime, and our practice has been, according to State law, to give these men a premium during the entire fire season of 15 percent. They suddenly jump grade 15 percent during the whole season. And the overtime they work they take in the winter months which they prefer so they can work secondary jobs and visit with their families during the holidays and the like, and you don't hear the California Employees Association complaining about the current arrangement.

Yet according to the Fair Labor Standards Act now we have got to reduce these men to 60 hours per week and pay them time and a half for every hour in excess of that and our ability to recognize this overtime in other than cash is completely eliminated because the Fair Labor Standards Act requires that if you are going to give them compensating time off, you have to do it within 28 days or pay the bill.

Now, what possible business is it of the Federal Government to dictate how we run our fire service program in the State of California when it has been proven satisfactory for all these years? The impact is $23.6 million annually to change our practices in accordance with the Fair Labor Standards Act.

What about volunteerism? Mr. Rhyne mentioned volunteerism. In California the cities and the counties work

side by side in a mutual aid program that is unmatched any place in the country. They furnish these services to each other gratuitously. In some of the type of fires I mentioned a moment ago, the big one, the uncontrollable fires, the Fair Labor Standards Act is going to wipe that out. The impact on mutual aid alone in California is $6 million, because volunteerism -- because these firemen are firemen, when they are pulled in to cover a reserve unit while the rest of the crew goes and helps a neighboring jurisdiction, overtime rules start applying, and the bill is a big one.

We may point out that the National League statistics on this thing, on the effect of this Act nationally, is very conservative. They estimate it at $200 million, and they base that on paying overtime to all the firemen affected. That's a conservative figure. What the Fair Labor Standards Act would like us to do, and what we based on statistics on in the State of California, is reducing those hours and hiring new employees. The Act wants us to hire new employees. So if you take that figure, if the National League had gathered those figures, we would be talking about $400 million annually to State and local governments.

The other adverse effects on civil service have been demonstrated by Mr. Rhyne, I think, very well during his argument.

Another thing that you don't realize when you start

fooling around with the working class salaries at State levels is that you suddenly create compaction problems in the supervisory classes, too. Let's remember that if you start paying overtime and adjusting the wages of the working line fireman in State and local service, you are going to be paying the Indians more than the chiefs, and that's not going to last very long. So the rippling effect all the way up through civil service is going to be felt, and we have no idea what those figures are going to run, but they are going to be big ones, and ones which we think can't be supported in fact or in the Constitution.

QUESTION: Mr. Jones, about a generation ago the State of California was back here saying it was none of the Federal Government's business how it ran the Beltline Railway. And this Court in a unanimous opinion gave fairly short shrift to its argument, said that if Congress wanted to exercise the commerce power, that was Congress' prerogative.

MR. JONES: My distinguished colleagues in the Office of Attorney General have taken the brunt of this Court on three different occasions, on the federalism issue. And the Solicitor General argues these are the wrong facts. This is the wrong time and the wrong place to draw any lines in the commerce clause. I disagree. I think if you look at those early cases you will see they are easily distinguished from what we are talking about here.

Let me emphasize that virtually all State employees

are covered under this Act.

QUESTION: I suppose one difference is that the State of California, or any other State, can run or not run a railroad, but they have no choices about running or not running police departments and fire departments, isn't that one difference?

MR. JONES: That is correct, your Honor, and that is the very next point I was getting to. The Solicitor General argues that the FLSA does not affect the policy-making powers of local government but merely the means by which we implement that policy. Your point, your Honor, is right on site, namely, there is no election, there is no election. We have to provide fire service and police and law enforcement.

Mr. Justice Marshall said in his concurring opinion in the Employees of the State of Missouri v. the Department of Public Health when we were talking about Article 3, immunity of the States, that the States couldn't waive their immunity because they have no election, they have no option. You can't waive what you have no opportunity to waive. You have to provide fire service, you have to provide police service. Therefore, any imposition by the Federal Government is a mandate. It has nothing to do with discretion. So let's be clear that this Fair Labor Standards Act is a direct intrusion, a mandate, into State and local governments.

We would like to see the Wirtz case overruled, because

Congress when they read your words, what we think are clear words, they misconstrue them. Thus, in Wirtz you warned in the response to Justice Douglas and Justice Stewart that under the enterprise theory you can convert the entire State into an enterprise. That's exactly what Congress has done. They have turned the States into a commercial enterprise. Look at footnote 27.

QUESTION: What you want this Court to do is to decide this case on its facts and then in the last sentence say, and while we are at it, we will overrule Maryland v. Wirtz. That's really what you want.

MR. JONES: That's an excellent suggestion, your Honor.

(Laughter.)

Of course, in brief, at least, on behalf of the State of California I haven't said that directly, but I have attacked Wirtz from so many sides that you have to draw that conclusion. This is not a Wirtz case. The State is not an enterprise. This Court has specifically held in many cases involving Federal Acts that if we are going to talk about what affects commerce and you want to talk about enterprises affecting commerce, then be specific. And I talked about two recent cases of this Court, very recent cases not two months old, that lament the lack of specificity in these Federal Acts.

QUESTION: You want us to overrule those,too, while we are at it?

MR. JONES: No, it's not necessary, your Honor. I think that you held in one of those cases that Congress had not been specific. They have not been specific here either. They are not talking about schools and hospitals. In fact they took schools and hospitals right out of the Act and now they say all State employees, except who the Department of Labor at its pleasure decides should be exempt. We think that Wirtz, of course, is irrelevant, it could be overruled simply on the fact that because a State purchases its goods in interstate commerce, it's thereby engaged in interstate commerce.

A question this Court has never addressed itself to is what do the States and cities and local governments do with the goods they purchase in interstate commerce? Do they mark them up and sell them to the public? Absolutely not. Even the Fair Labor Standards Act itself recognizes that ultimate consumers of goods purchased in interstate commerce are exempt. This has been an implied recognition, at least on our part, that people like States who consume goods, they don't pass them on, are ultimate consumers, exempt from the Act.

Of course, California doesn't compete. The lower court found that to be true. We don't compete in interstate commerce. You won't find California recruiting State employees. They are waiting in line in the civil service rolls in the

State of California to join State service. Our State employees are among the five highest paid in the country. So don't tell me about competition. We don't compete. We don't run ads in the New York Times, which I have seen in one of the amicus briefs.

What about labor strife? That's another rationale they are trying to hit us with. No labor strife in California. State employees go out on strike, we get things called injunctions, and they go back to work. And nobody has pointed out to me showing that there is any labor strife in California that requires the Department of Labor to regulate local activity.

Your Honors, the Fair Labor Standards Act touches the very heart of State sovereignty and is a patent denigration of the constitutional right -- yes, I said the constitutional right -- of the sovereign States to deal with their employees in a manner best suited to local needs. Simply stated, the Act is unconstitutional, and we hope and we trust that this Court will so hold.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, there is only one minute remaining before lunch, I think we will not ask you to speak for one minute. We will resume at 1 o'clock.

(Whereupon, at 12 noon, a luncheon recess was taken.)

AFTERNOON SESSION

(1 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF ROBERT H. BORK ON BEHALF OF APPELLEE

MR. BORK: Mr. Chief Justice, and may it please the Court: I take it that the crux of the argument we are having today is really the impact of the 1974 amendments of the Fair Labor Standards Act upon State and local government sovereignties, or to put it another way, upon the system of federalism established by the Constitution.

I think the issue, therefore, is whether Maryland v. Wirtz should be overruled and the position of the dissent there become the new law.

I intend to devote myself primarily to that question because the preliminary matters seem to me to be too plain to require much additional extended discussion.

QUESTION: I take it that means you see no difference between policemen and firemen on the one hand and hospital attendants on the other, as far as constitutional purposes.

MR. BORK: Not for the purposes of this case, Mr. Chief Justice. This does not -- this statute does not require a State to give up any payments, or any number of policemen and firemen. A State, if it does feel financially pinched, and

I think it will not for reasons I will come to, can give up peripheral services which are not inherently governmental, which in no sense of the word are inherently governmental.

QUESTION: Should it become the business of the Congress of the United States that they should give up peripheral services.

MR. BORK: It's not the business of the Congress of the United States to tell them what they must give up, and this statute does not.

QUESTION: Is it the Government's position that that's the balm on this wound that we heard about this morning?

MR. BORK: No, no. I think in the first place, Mr. Chief Justice, I fail to see the wound for reasons I will develop. But in the second place, I think this is a very unintrusive statute, much less intrusive than many kinds of statutes that are concededly valid under the commerce power. As we have said, this statute does not tell a State that it must give up any objective or that it must pursue any substantive objective or any program. It leaves the States free entirely to choose all of its programs, keep them all, abandon any one it sees fit, but it does not have any policy control over the State, as many Federal statutes do, which are valid under the commerce clause.

But I thought I would spend a moment upon the commerce clause predicate here before coming to the issue of

whether federalism is in some sense threatened. I think there can be no doubt that interstate commerce is involved when State and local governments in 1971 purchased goods and services worth $135 billion which was at that time 12 percent of our gross national product. And I think there can be no doubt of the significance of these 1974 amendments to interstate commerce when we realize that they extend the coverage of the Act to an additional 3.4 million State and local government employees. The 1966 amendments upheld in Maryland v. Wirtz extended the coverage to 2.9 million employees. So that there are now a total of 6.3 million employees protected by the Fair Labor Standards Act.

And there are a variety of reasons why this wages and hours law is rationally related to Congress' power to control commerce, and I will merely sketch them because I think they have been upheld in so many decisions of this Court that they need not be argued at length.

The first, of course, is simply that substandard working conditions can lead to labor disputes which interrupt the flow of goods and services across State lines.

QUESTION: Of course, the kind of reasons you are giving now are equally applicable to a private business.

MR. BORK: That's what I meant, Mr. Justice Rehnquist, when I said I would spend just a moment on the predicate treating this as a commerce power case before we come to the special

problem appellants raise about the fact that it's State and local governments.

That labor strife theory, of course, is in the congressional findings in the original Act. It is the basis of this Court upholding the 1966 amendments and their application to State and local government in Maryland v. Wirtz. It was advanced by Senator Javits in debate in advancing the 1974 amendments, and of course, it is the theory under which the National Labor Relations Act was upheld in Jones v. Laughlin?. Competition again between governmental units and private industry, which is required to comply with the Labor Standards Act is an unfair method of competition.

Third, competition between governments exist. And if some governments use substandard labor conditions and compete with other governments for new industries, new residents, tourists, rather than raise taxes, lower working conditions, they will tend to spread those working conditions to other governments that are trying to compete for the same industries and residents and tourists.

And in that connection I would call the Court's attention to the brief amicus curiae filed by the State of Alabama, Colorado, Michigan, and Minnesota, States who apparently feel that their sovereignty is not seriously threatened here, and at pages 6 and 7 of that brief, which I will not go through, they explain the competition between

governments and why that competition justifies the kind of statute, amendments, we have here.

And particularly I would call the Court's attention to the advertisements in the appendix which show the State of Massachusetts advertising in the Sunday New York Times in March of this year to attract industry with tax incentives and the State of New York advertising in Fortune Magazine.

QUESTION: Your earlier argument to the Chief Justice, as I understood it, was that this law has no effect on State policy choice. Now you are in effect, it seems to me, saying that the State is to be precluded from the sort of thing that Massachusetts is doing. It's not to promote tourism at the expense of employee salaries.

MR. BORK: What I meant by that, Mr. Justice Rehnquist, was simply this: It says a State may follow any policy it wishes. The only limitation upon that is any policy it wishes to follow may not be done at the expense of workers being paid substandard wages. But it does not attempt to dictate the policy that must be followed or tell the State that it must eliminate any policy.

QUESTION: General Bork, for which States was this brief filed?

MR. BORK: There were two briefs filed. The original one, it's the identical brief, all that happened is that in the second filing the State of Minnesota was added. It's

Alabama, Colorado, Michigan, Minnesota.

QUESTION: I just don't have the second filing. I wanted to be sure about the red brief.

MR. BORK: The red brief. There were two red briefs filed. They are identical as far as I can see.

QUESTION: Minnesota didn't take the trouble to supply enough at least so that I got one.

MR. BORK: The fourth theory that supports the commerce power here, of course, is the one cited in Katzenbach v. McClung, which is that the increase in purchase power that follows from setting a floor upon wages and so forth does benefit interstate commerce.

And, finally, of course, Congress believed, as the Senate report said, that raising a minimum wage rate at a level which at least helps assure the worker a decent income at or above the poverty level is essential to the reduction of welfare roles and overall reform of the welfare system in the United States. And I would think that obviously spreading the work through overtime requirements and requiring minimum wages is a way of getting people off welfare rolls and trained as productive workers, and that is of obvious importance to interstate commerce.

But these considerations, these various theories, have been so many times accepted by this Court and so overwhelmingly support that commerce clause predicate of the '74

amendments that I think the real argument and the one I want to spend my time on is the argument about federalism.

Now, there is no doubt, of course, the States enjoy no absolute immunity from commerce clause regulations, and the cases to that effect were cited in both the majority and the dissent in Maryland v. Wirtz and in fact there is no doubt that the commerce clause may be used to regulate what one might think of as an essential governmental function similar to fire or police protection. For example, in Sanitary District v. United States, Chicago was prohibited under the Federal power to control navigation in the aspect of commerce from diverting water from Lake Michigan in order to carry away sewage, which I would think is an essential governmental function.

The real argument is not that there is an essential governmental function that may not be touched. It's that these amendments sweep so broadly and have such an impact that they imperil State sovereignty and our entire constitutional system of federalism.

Now, that contention is advanced here in very heated terms, indeed, in apocalyptic terms, so that at first glance one might think that this was a very serious constitutional case. But I think upon calm analysis, it will be seen that the only substance to appellants' argument here is a mixture of misunderstanding of the statute and a capacity for unlimited hyperbole. Appellants ask this Court to overrule Maryland v.

Wirtz, and I will not dwell upon the doctrine of stare decisis, nor will I dwell upon the reliance of Congress and a variety of individuals upon the 1966 amendments and upon Maryland v. Wirtz, although those are obvious factors which support the appellee Secretary of Labor here.

But I want to go to the policy question, and I want to speak to the constitutional policy question, and I want to speak to those issues under the Constitution which indicate that Maryland v. Wirtz should be followed.

The question raised by the dissent in Maryland v. Wirtz, and I take it it is the same question being raised by the appellants here, is does this Federal regulation overwhelm State fiscal policy? Does the principle that must necessarily underlie the validity of the 1974 amendments permit the Congress virtually to draw up each State's budget?

The answer to that, I think, is unqualifiedly no, it does not. The commerce power does not permit Congress to destroy federalism. Federalism is also a constitutional principle.

QUESTION: You would concede, then, that Congress does not have the same freedom under the commerce power to regulate activities of States and cities as it does those of private businesses?

MR. BORK: I wouldn't use the word "concession", Mr. Justice Rehnquist, because I think --

QUESTION: You would affirm it.

MR. BORK: I would affirm it. Congress could, under the commerce power, I take it, perhaps, nationalize private, much of private industry, with compensation, of course, but they could nationalize it. I take it there is no doubt that Congress could not take over State government and make the States merely administrative satrapies. No, there is no doubt of that. And if this case involved anything like that, appeallants would have a very strong point. This case involves nothing of the sort.

QUESTION: Do you agree with the figures that were suggested this morning that the pay of personnel working for State and local governments in the country, in municipalities generally, is about 80 percent of the total cost of government?

MR. BORK: As I understand it, in municipalities the budget is 80 to 85 percent wages. However, the effect of these amendments upon that share of the budget is under 2 percent, which means that we are talking about less than 2 percent of 80 to 85 percent of the budget.

QUESTION: Are you measuring that 2 percent by the increase that will be involved to bring them up to FLSA standards?

MR. BORK: Yes. I think that is correct. The best estimates, minimum wage law and overtime regulation.

QUESTION: But it reaches into by the figure you

mentioned 85 percent of the total cost of government of municipalities, is that the figure, 85?

MR. BORK: Yes. I believe California's figure was 70 percent.

QUESTION: 76, I think he said.

MR. BORK: He said 76. I think in the brief it is 70.

QUESTION: Was that for State and local?

MR. BORK: No, I take it that was State. It reaches into in the sense that it applies to about half of the State employees now, and it will have an effect upon 80 to 85 percent of the State budget. But I don't regard that as a meaningful figure because the effect it will have is very slight. It is spread very thinly across a large part of the State budget.

QUESTION: Is there anything that would limit the power of Congress to raise the ante, just double the wages arbitrarily, or treble them or quadruple them?

MR. BORK: Yes, I think there are a variety of things that prevent that. One thing that prevents it is -- and this is not my whole answer, but I think it is a realistic answer that is worth giving -- is the political make-up of Congress. Congress is drawn from the States. State parties are quite powerful.

QUESTION: You are talking about a practical, political consideration. I am talking about is there anything

constitutionally to prevent --

MR. BORK: I think there is. I think there is. The practical political consideration I regard as constitutional in the broader sense, the way our political parties and our nation is constituted. We have a structural protection against that kind of thing happening.

The second line in the constitutional law sense is, of course, this Court, and I think if this Court ever sees that States are being deprived of political autonomies so that they are no longer vital policy-choosing and policy-making centers, this Court can say the value of federalism is being impaired and strike down the statute involved.

QUESTION: How could we make a principle distinction if we uphold this law and the case posited by the Chief Justice then does by some perhaps fluke of the political system come to us?

MR. BORK: You can make a principle decision only in this sense, Mr. Justice Rehnquist. When this Court has over the centuries attempted to find a formula for confining the commerce clause, they have never found an adequate formula. I suggest to you that you will never find a mechanical, bright line distinction which will tell the Congress, you may do this to the States, but you may not do that. It is necessarily, as in many constitutional matters, a question of degree, a question of balancing. And I think it is not unprincipled to

make judgments of degree, to say there is a spectrum here, we will cut it at this point. That,I think,is not unprincipled. And that, I think, is the only kind of test that's available in this area.

But let me, in approaching this matter and showing why if this Court were to draw a line and say we are going to strike down a statute of Congress to preserve federalism, I would think that this statute would be one of the last choices this Court would make. There are other statutes which this Court has upheld which I think are far more intrusive upon federalism than this statute, for reasons I will develop.

But I would like to add a dash of realism to the discussion so far, just to put the matter in perspective. And the first point about that is that it is true that the Federal Government contributes far, far more of the State budget than this measure will ever cost them. In 1975 Federal aid to State and local governments is expected to total $52 billion.

QUESTION: They can stop that any time they want to.

MR. BORK: They can stop that any time, Mr. Chief Justice. I am just suggesting that realistically in terms of the drastic impact we are being asked to see here. This is not much of -- and in fact, I would suppose the kinds of conditions upon employment here could have been added as conditions to the grants.

QUESTION: How does that furnish support for a constitutional argument in this area, Mr. Solicitor General?

MR. BORK: I think it does it only in the sense we have heard this morning extensive argument about policy issues and Congress shouldn't do this because it's going to cost us the following amounts of money. I agree that those arguments perhaps have been addressed by the appellants to Congress rather than to this Court because they are not constitutional arguments as they were put. But I think it's relevant at least in counterbalancing that to realize that we are talking about a Fair Labor Standards Act which would have less than 2 percent impact upon a State budget, and the figure I just cited means that the Federal Government is financing about 22 percent of State and local expenditures. So that these 1974 amendments are not, as matters now stand, going to swamp any fiscal policy. They hardly begin to measure up to what the Federal Government pays the States and local governments.

The other item of realism that I would like to inject is that this cry of the destruction, the imminent destruction, of federalism has been raised in this Court in commerce clause cases ever since John Marshall was Chief Justice, and I think it's no more accurate here than it was in Gibbons v. Ogden.

One of the more recent poignant examples of this

kind of rhetoric appeared in fact in the plaintiff State's brief in this Court in Maryland v. Wirtz. I enjoy this particular line. The States then said in Maryland v. Wirtz, "Never before in the history of this nation has the Federal Government presumed to enact a law which both in theory and in practice serves as a basis for the utter destruction of the State as a sovereign political entity."

Now, that rhetoric so closely resembles the rhetoric of the briefs here and of the oral argument here that I begin to think that perhaps it must be boiler plate somewhere for resisting the exercise of the commerce power.

QUESTION: Isn't it a camel's-head-in-the-tent kind of argument?

MR. BORK: Yes, Mr. Chief Justice, it is a camel's-head-in-the-tent kind of argument in part, in part. The brief referred to this, and the oral argument does, as massive takeover, complete usurpation, et cetera, et cetera, which I take it is not camel's nose, I take it that's the whole camel. But then they back off and say, well, it is camel's nose because you allow this, then you must go all the way.

QUESTION: Well, whatever it is, more of the camel is getting into the tent under this Court of Appeals holding than was in the tent before, is that not true?

MR. BORK: Every time a commerce clause regulation is passed of any kind more of the camel is in the tent. I

would suggest to you that this statute is less intrusive than most of the other kinds of Federal regulations under the commerce clause upon the area of State sovereignty than the other kinds are, and that therefore if one is looking for, is calibrating the camel's nose for the danger point, one would not choose this statute as the place to see the danger point.

But oddly enough, despite this rhetoric in Maryland v. Wirtz, which as I say so closely parallels the rhetoric here, the States were not destroyed, they were not even damaged, and I take it they seem to be healthier in many ways than they were at that time. So I think just in terms of the rhetoric we are talking about and in terms of the money we are talking about -- I mention this merely to suggest that the appellants' argument about the imminent fall of the Republic is entitled to be taken with a large dollop of skepticism.

Now, I would like to make just three points about federalism. First, in enacting these 1974 amendments, Congress was very responsible with a very responsible process, and indeed it was very sensitive to State and local problems and to State sovereignty.

Second, I will argue that the law here involved is simply not of the type which is most threatening to State sovereignty and is by nature much less intrusive than other concededly valid exercises of the commerce power.

And third I will argue that even if one ignores

completely Federal assistance to State budgets, the financial impact of the 1974 amendments is far too small to be thought threatening to State sovereignty in any way.

Since the appellants accuse Congress essentially of negligence and failing to make estimates and make a credible study of the cost impact and so forth, it's important to realize what Congress did and the responsibility of the process. This is not a case of an unconsidered statute wreaking unpredicted havoc, it's not that at all. I would draw the Court's attention to the amicus brief filed in this case by Senators Williams and Javits and particularly at pages 5 to 13 the Senators describe the process which Congress went through here. They had before them a detailed study of the cost impact of the 1966 amendments so that they could be guided by experience. They had before them a detailed study of the feasibility of extending the Act's coverage as was done in the '74 amendments. They had calculations of cost and they held lengthy hearings. The National League of Cities, an appellant here, expressed in those hearings the concern about the overtime requirements as applied to firemen. In response the Senate-House conference wrote section 7(k) which I will discuss later and which permits a departure from the Act's other overtime requirements precisely to meet the kind of problem the National League of Cities and California are talking about. And Congress also exempted from coverage, I might say, not only executive, administrative,

and professional personnel, but also persons who hold public elective office, members of their personal staffs, persons who serve at a policy-making level, and so on.

QUESTION: Could Congress include them if they chose to do so?

MR. BORK: I would assume, Mr. Chief Justice, that the question -- they probably could include, for example, administrative or supervisory personnel. I don't think it's necessary to reach that today to decide this case. I would assume they could. I think the question is, is the State seriously hurt, is the State no longer a viable policy-making, policy-implementing center because of what Congress has done, rather than a question of the category of persons covered.

QUESTION: When we talk about Congress could do it, it really brings you back to the conventional test and constitutional adjudication of any enactment of the Congress of the United States. Inquiry one always is, is this enactment within the expressed or implied powers of Congress conferred upon it by the Constitution of the United States? That's your first inquiry when you talk about could Congress do this, and you spent briefly the first part of your argument saying, yes, so far as the commerce power goes, yes, it can, Congress could do this.

The second inquiry always in the conventional procedure of constitutional adjudication when what is involved

is the validity of an act of Congress, is even if within the power, does it run into some other prohibition or impediment contained in the Constitution of the United States, be that impediment or prohibition in the bill of rights or in some other provision explicit or implicit in the Constitution?

So in answer to the Chief Justice' question, you said it could, and I suppose it certainly could from the point of view of the power of Congress under the commerce clause. The question is could it from the point of view of some other impediment in the Constitution?

MR. BORK: I had meant, Mr. Justice Stewart, to answer that by saying it could obviously in terms of the commerce power per se, and when I said --

QUESTION: The question is something may well be clearly within the commerce power, but also a clear violation, for example, of the first amendment.

MR. BORK: I had meant to say when I said that I didn't think it depended upon the category of person, but depended upon more that the States were in some sense destroyed as sovereign entities. That was a case where you are running into the countervailing interest of federalism, which I fully concede or affirm, it is a countervailing constitutional principle which must be taken account of.

QUESTION: And I gather you concede that there is a point with any similar legislation where that impediment or

prohibition would make an act of Congress unconstitutional even though within its commerce power.

MR. BORK: That is entirely true, Mr. Justice Stewart. If Congress passed a statute tomorrow which says that every State employee should be paid $50 an hour and it so became impossible for State governments to operate, I would think that that would be not only seriously in question, but I would expect that it would be unconstitutional as a destruction of federalism. And that's why I say these things --

QUESTION: Would it also perhaps implicate a violation of the obligation guaranteeing the States a republican form of government?

MR. BORK: I think it might. It seems to me the republican form of government clause has a lot more in it than we have conventionally taken out of it.

QUESTION: Well, I suppose in the situation you posit that it would certainly be implicated whether or not the Congress had betrayed its obligation to guarantee, would it not?

MR. BORK: I didn't mention that one solely because it leads one into the argument about whether a republican form of government is a political question and whether it is justiciable and so on. But I quite agree with you that I think whether or not it is justiciable, that would be a violation of the obligation that it states to guarantee every State a

republican form of government. But also it runs back into the principle of federalism.

QUESTION: The structure of the Constitution.

MR. BORK: That's correct. Well, the principle of federalism, as appellants quite rightly point out, is built into the structure of the Constitution. Nothing is more basic. And my argument here has in no way suggested it is not basic and must not be protected. It simply is that this statute does not threaten that principle.

So my point is the Congress was concerned with the preservation of State and local autonomy in terms of general financial impact, in terms of particular local problems which they adjusted the statute to take care of, and in terms of exempting anyone in any degree of proximity to policy-making. And they tried to preserve the value of federalism and my remaining two points are that they completely succeeded.

The first one is that this amendment, these amendments, are by their nature less of a threat to State sovereignty than most concededly valid exercises of the commerce power. This is a conceptual argument. I will come to the financial impact in a moment which is a factual argument. These amendments do not tell a State other than paying standard wages instead of substandard wages, they do not tell a State it must follow any policy objective. It does not forbid them to follow any policy objective. The law merely says that

whatever policy you choose, you will not carry it out by paying the workers who carry it out substandard wages and putting them under substandard working conditions, which I think is a quite modest constraint.

Now, that constraint conceptually is a much smaller interference with State sovereignty than a Federal substantive statute which tells the State that from now on you may not have a State law on this subject, it must be the Federal law. Now, that is an intrusion upon State sovereignty.

QUESTION: I am not at all sure I agree with you on that point, General Bork. Under the supremacy clause if you are talking about Federal regulation of a universe of private individuals versus State regulation of the universe of private individuals, certainly the implication -- not implication, but the provision of the Constitution says that the Federal Government acts within its delegated authority of the commerce clause, it shall be supreme. But I don't regard those preemption cases as being necessarily a guide to the situation where Congress seeks to work its will not just on private individuals or businesses who happen to be in a State, but on the State itself.

MR. BORK: Mr. Justice Rehnquist, I would urge upon you that they are identical in that sense. Let me put it in two ways: One is -- between two individuals. If individual A is doing 50 things which he enjoys, wants to do, and individual B

has some power over him and says, "You will not do item 3 any more. From now on you will do what I want." So he is left with 49 that he wants to do. Or individual B says, "I don't care which one you give up, but you have to give up any one you choose." I take it the first is a far more coercive, intrusive interference with an individual's autonomy and hence by analogy with State sovereignty than the second.

QUESTION: If you are right, then you are wrong in conceding that there is any federalism limitation on the commerce part because this Court has said time and time again where it is simply a private business challenging Congress' regulation under the commerce clause without asserting any affirmative constitutional defense of his own, the power of Congress is plenary, there is no limitation whatever.

MR. BORK: I doubt that that would be -- I know that the Court said that in those cases, Mr. Justice Rehnquist, and I think they are quite distinguishable cases in this sense: Perhaps I can illustrate it by going to Maryland v. Wirtz. The dissent there was afraid that if the power to set a floor under wages and set a ceiling over hours was conceded, the same principle might be extrapolated to the point where the Congress could draw up the State's budget which would be a destruction of federalism.

Now, I suggest to you that the same thing might have been said about the National Labor Relations Act which

was upheld in Jones v. Laughlin and deals with much the same subject matter as this. People come in and say you are ousting a State policy in the area of labor-management relations completely. Whatever the State wants in this area doesn't matter any more, the Federal Government will tell them what the law is.

Now, the objection could have been made, if we once admit the principle that the Federal Government can do that, then it follows that the Federal Government can draw up the entire legal code of the State, and I suggest to you, Mr. Justice Rehnquist, if the Federal Government acting under the supremacy clause suddenly decided to draw up the entire legal codes of all the States for them, that this Court would say that goes too far, you have destroyed federalism.

QUESTION: Well, so long as it was able to tie it to the commerce clause and certainly a lot of congressional legislation has gone far to supersede otherwise valid State legislation.

MR. BORK: I know it has, and I think the question is always one of the aggregate impact. The question is always one of degree. I cannot believe that this Court is really willing to concede that using the commerce clause Congress can write every law a State has. And it can virtually do that under modern interpretations of what affects commerce. At some point you can turn a State into nothing more than a geographical

area.

QUESTION: And you say that a private individual could assert that to the same extent that a State could.

MR. BORK: I don't see why not if the private individual happened to be hurt and a major constitutional value was in play, of course, perhaps a State would come in. But I take it if a State came in and brought an action to have the National Labor Relations Act declared unconstitutional rather than a private individual because it interfered with State sovereignty, I take it--and made the same argument I just made, that this principle would allow the Federal Government to draw up the entire State code, I take it that this Court would have upheld the Act just as much as it did when a private individual brought the lawsuit.

But that is indeed my point that a law which does not oust a State policy but merely says choose your own policies, there is going to be a slight additional cost in standard working conditions, is a less coercive, less intrusive less threatening to State sovereignty form of law. And if you uphold the Federal statutes which actually oust State policy from whole areas, then this law, I should think, is not the law to start being concerned about federalism.

QUESTION: The difficulty is in the other examples you have given us the State often just isn't aware of the threat or even relaxes and enjoys it.

MR. BORK: Well, I assume --

QUESTION: We don't get the argument from the States, we get it from private individuals. I am thinking about the things such as the validity of the Federal anti-loan-sharking law which was upheld in this Court with only one dissent, or this Federal Labor Relations Act, for another example. The States don't see their interest affected. And you are telling us they are more gravely affected by that sort of legislation than by this. But here the State sees the threat, and therefore we get the argument in these cases. In an adversary system perhaps we don't fully consider the argument or apprehend it in the other cases in which you have already told us you see a greater threat to federalism.

MR. BORK: I think the kind of thing is greater. I would trust that when a private individual comes in and says that State sovereignty is being destroyed, that the Court would not say, well, the States seem to be relaxing and enjoying it, so we will uphold the statute on that ground. I would trust the real consideration is what is happening to the system of federalism, not are the States willing to consent.

QUESTION: But in an adversary system of justice you have to have adversaries, and in those other cases the State has not been an adversary.

MR. BORK: That is true. That is true, but I take it the same value is in play, and I take it that the Court

purports in those cases to address often the question of interstate or intrastate, which is a way of protecting federalism. So that they do pay attention to the principle.

QUESTION: Of course, in many of those cases where the commerce clause legislation was upheld, the States were happy to have it upheld because there had been a no-man's land before. The States couldn't regulate because it was interstate commerce, and the Federal Government couldn't regulate because there was some defect in congressional authority. So your cases in the thirties that uphold commerce regulation by Congress, that was basically with the full approval of the States.

MR. BORK: It may be, Mr. Justice Rehnquist, with the full approval of the States. I think the labor-management relations was not a no-man's land, there were State laws, there were State courts, Congress was not happy with what the State courts and the State laws were doing to labor-management relations and ousted the States from that field.

QUESTION: In 1938 how many States had comprehensive labor laws of that kind?

MR. BORK: Well, they may not have been comprehensive, Mr. Chief Justice, but they certainly had a common law --

QUESTION: Even skeletal?

MR. BORK: Well, they had common law labor relations. As I recall, one of Congress' complaints was that it was too

easy to get injunctions out of State courts. It was a developing law in labor-management relations, it wasn't a very happy law of labor-management relations, which I think was the reason Congress entered the field.

QUESTION: Your point is well made if the State policy is to have no law.

MR. BORK: That's right. If a State chooses to have no law and let the thing be fought out by the adversaries, still the entry of the Federal Government is an intrusion upon a State's policy choice.

I do not quarrel with those cases. I think upholding those statutes was the correct decision. All I say is that this statute is less of an intrusion upon sovereignty than those statutes and therefore if one is to draw the line, one would not draw it with this statute. This is my sole point about it.

And I should say that it's hardly even theoretically possible that one could use a wage and hours law in a way that would destroy State sovereignty because they are tied necessarily, as long as they are similar, to the wages and hours required of private employers and indeed of the Federal government as an employer. The impact upon State and local government cannot be so severe that State sovereignty is destroyed.

These theoretical distinctions or considerations

seem to me in and of themselves sufficient to rebut appellants' predictions of impending doom, but I would like to move on to point out that appellants have also rather thoroughly misunderstood the statute and its impact upon them so that the extravagant figures, claims of takeover, and so forth,are not really accurate. The charges made are so plentiful and reflect such a rich and varied misunderstanding of what's involved here that I can only touch upon the major items.

First, the charge is that the 1974 amendments would cost some unspecified number of billions of dollars. There doesn't appear to be any foundation for that at all. The 1966 amendments had no impact even beginning to do that, and there is nothing in this case that supports any such speculation. We have had a breakdown of the items.

Now, the impact, as I said, is on 409,000 workers, 95,000 new workers covered by the statute and 314,000 workers covered by the '66 amendments now have the minimum wage raised to $2 from $1.80. But the appellants' theory of this case would, of course, strike down the 1966 amendments also, so that I assume about 409,000 workers would be vulnerable to substandard wages.

But their principal concern appears to be the overtime requirements of the Act, and that concern, I must say, is greatly exaggerated. The premium for work over 40

hours a week can be avoided by using additional employees on a straight time basis. That will spread employment and that is what Congress intended. When they complain about that, I can only say that, of course, this statute does require States to do some things, not very many, differently than they might otherwise do them. That is the purpose of the statute.

But the only specific national figure they give for the overtime cost is an estimate of $200 million for fire protection services, and we agree that most of the costs of this statute will be indeed overtime costs. But this $200 million that is mentioned is a vastly inflated figure. It is based on the assumption that local governments will not take advantage of the exemption of section 7(k) which I mentioned earlier which was put in in the Senate-House conference on this bill, specifically because of the concerns expressed about firemen and overtime. And that section 7(k) provides that no overtime pay is due unless the employee works an average of over 60 hours per week in any 28-day period. Now, only about 10 percent of the firefighting personnel in this nation work in excess of 60 hours per week, and even the appellants as to that 10 percent apparently calculates only about $30 million in additional cost across the nation for them.

Now, California argues in its brief that these firefighters, their firefighters, work an 84-hour week during

the fire season and that this Act would have drastic results with respect to them. I can see no impact of this statute upon the California system as it was described this morning. The 84-hour week they describe in the California brief works as follows: The firefighters work four 24-hour days on followed by three 24-hour days off, followed by three 24-hour days on, and four 24-hour days off. Now, California assumes, since there is an 84-hour week in there, that it will have to pay 24 hours of overtime every week. But that is not the case. Under this statute, since these firefighters are on duty for over 24 hours continuously, sleep and meal time can be deducted. So if you deduct sleep and meal times from this, they will not exceed 60 hours a week and overtime will not be due.

Now, in this connection California complained rather bitterly about the compensatory time. The firefighters work very hard during the season and take time off in the non-fire season. But compensatory time does not arise as a problem under these amendments unless you work the firemen more than 60 hours a week. If they don't work the firemen more than 60 hours a week, they can give them compensatory time or anything else they want in any way they choose without interference from this statute.

So the entire system described this morning seems to me to fit well within the statute and not to impose the

kinds of additional costs or problems that California is talking about.

Now, the next matter of records and reports which seems to be confused almost beyond recognition. The question of reports which are discussed in the brief is simple. The Act does not require the preparation or the filing of any report. The question of records is about as simple. And let me say this: When the appellants say that this Act reaches every employee of every local and State government, it does so only in the sense that even exempt employees must have a record kept. But if we look at the nature of the records, they are records which are not required by the Federal Government to be kept in any particular form, and the only information they require is information that any employer would obviously have about his workers. It's the most elementary kind of thing.

QUESTION: Are they subject to inspection the same way private employer records of wages and hours are paid and kept?

MR. BORK: Yes, they are. What one must keep is the employee's name, the date of his birth, his address, his social security number, and except for exempt employees, the daily hours he works and the total wages he earns. Now, that as a recordkeeping requirement seems to me well within what any employer must keep as a matter of course.

Now, the appellants have tried to confuse this issue by quoting at length from Robert Hampton who was the Chairman

of the Civil Service Commission who was complaining about the application of this statute to the Federal system, and the Federal system as at page 9, and my brother Rhyne read from page 9 this morning, I would point out that Robert Hampton had a special problem. Congress when it passed this statute said you must give the Federal worker whichever is better, title V or the Fair Labor Standards Act. So that they do have to keep records under title V which is different and under the Fair Labor Standards Act, and they double computations and figure out in each case which gives the employee the better result. No such requirement is imposed upon the States. So that Mr. Hampton's complaints are not relevant to the States.

Now, the Act does preserve the State may keep more beneficial statutes than this if it wishes, but they are not mandated as they are for the Federal Government, and therefore Mr. Hampton's remarks are quite beside the point.

Now, as to volunteers, the Act as it has been interpreted and as it is enforced does not prevent the use of volunteers in any part of State government. And, indeed, reimbursement for reasonable expenses is allowed as a guideline, for example, for volunteer fire departments, $2.50 per call will not even be questioned. Above $2.50 per call they may look at it to see whether the amount of reimbursement bears a reasonable relationship to the cost incurred by the volunteer

firefighter. But he may be a volunteer above that price. And, by the way, the Labor Department has made a study. The average volunteer fire department call is 20 minutes.

Now, there was reference to collective bargaining. This statute does nothing to collective bargaining. Employee unions are free to bargain collectively for anything above these standards they wish.

The civil service processes. State civil service protection remains in force. State civil service processes to protect the workers remain in force. They are not ousted.

Now, we have answered a variety of other charges in our brief which I shall not go through here, and the various amicus briefs answer charges. But I think what it boils down to is the appellants' case rests upon misunderstanding of the statute and alarmist rhetoric. There is not a constitutional crisis here. There is not even a stiff breeze in a teapot. It's astounding to hear it argued, I think, in this stage of our constitutional history that federalism and State sovereignty depend upon the ability to give employees substandard wages and hours, to give them less than the Federal Government gives them, to give them less than private industry gives them, indeed, often less than enough to keep them off the welfare rolls. That cannot be the test of State sovereignty.

QUESTION: Presumably, though, Congress if it were to enact the entire local code for the States, which you say

even you would draw back at, in each case would be saying surely State sovereignty doesn't depend on denying the beneficent purpose that Congress had in mind with this statute.

The real complaint is that the States have lost the power to determine this matter for themselves, isn't it, rather than that they have lost the power to pay substandard wages?

MR. BORK: The only power they have lost, Mr. Justice Rehnquist, is to determine to pay substandard wages. They have not lost the power to pay more than that, they have not lost the power to adjust in a variety of ways. And I think the power, as I suggested perhaps too many times, the power to pay substandard wages must be less important to State sovereignty than the power to enforce your own social policy within your borders. The commerce clause allows the Federal Government to override the latter. I cannot believe that the power to pay substandard wages is the place where we suddenly trench upon the value of federalism.

QUESTION: (inaudible) It's a nice rhetorical phrase, substandard wages, but it means more than that. It means technically every hour worked over 40 hours a week is time and a half and maybe an employer wants to say, well, I want you to have a regular week of 50 hours because of the particular needs of the municipality or this particular public service and not be bothered with computing overtime. And that may or may not be substandard in the ordinary economic sense

of the word. He may be getting higher wages. But he doesn't want all this nonsense with the federal bureaucratic red tape when he is running his municipal government.

MR. BORK: Well, there is not much bureaucratic red tape, and furthermore substandard obviously refers to a national standard set for private industry and for the Federal government.

QUESTION: It's a rhetorical phrase but it involves a good many rather technical rules and regulations.

MR. BORK: Well, it would necessarily involve some technical rules and regulations. I might say that when a locality has a good case that they have to do something some way as in the firefighters case, Congress has proved responsive and made an adjustment.

It would not be true to say that this statute will not require some public employers to change some ways of doing business or of governing, if you want to put it that way, but of affecting interstate commerce, but that's the purpose of the statute. It may spread jobs.

QUESTION: I think that was the point, as I understood it, of my brother Rehnquist's question, that's the question here, whether or not the Federal Government is impeded by the structure of the Constitution from exerting the power to change the way the municipalities and the States want to do their business with respect to their employees.

MR. BORK: I guess I do two things. I guess I say in the first place that the State and local government work force is expanding quite rapidly and is continuing to grow. It is now, I think, about 14 percent of our national work force and is going up. And to say that that is exempt from all of the protections we extend to Federal workers and to all private industry workers is to make a rather large statement that unless there were compelling constitutional reasons, I don't think we ought. I think there are not compelling constitutional reasons, because it escapes me why State sovereignty is threatened by being required to pay a dime or two more an hour or is threatened by being required to pay time and a half over 40 or over 60 hours, or to hire additional workers, is a massive intrusion upon a State's political and governmental autonomy.

We have done all kinds of substantive laws that tell the States, You may not have laws on the subject. This seems to be a much less intrusion.

QUESTION: What if this statute had required all States and local governments to bargain collectively with their employees in a matter of wages and hours. You would have exactly the same arguments available to you, wouldn't you, that this large segment of employees shouldn't be exempt from standards that were imposed upon private employers? Would that raise any more difficult constitutional

question?

MR. BORK: I would have exactly the same arguments available to me, I would think. And I don't think it's a difference of constitutional dimension that that would be a larger intrusion than this one. This, if you look at what is actually done, the degree of impact is really not that large. It's been vastly overstated here. Every extension of the Fair Labor Standards Act has been met with these cries of takeover and destruction. It simply hasn't happened.

Well, I have addressed myself to the concerns of the Maryland dissent which I think are the real concerns in this case, and I have shown, I submit, I hope I have shown, that this measure does not involve or imply the Federal intrusion upon State sovereignty that that dissent feared. And for that reason, and because we permit easily other kinds of Federal ousting of State policy which are far more intrusive, I suggest it would be illogical and arbitrary to draw the line at the commerce power here in this case. And I therefore ask that the judgment of the district court be affirmed.

MR. CHIEF JUSTICE BURGER: Mr. Rhyne.

REBUTTAL ARGUMENT OF CHARLES S. RHYNE ON BEHALF OF THE APPELLANTS IN NO. 74-878

MR. RHYNE: Mr. Chief Justice, and may it please the Court: I take it that my distinguished adversary admits that there is such a thing as constitutional federalism that exists.

But he says that unless an Act of Congress, if I heard him right, unless an Act of Congress really wipes out the ability of a State government to be a viable government, you don't call it into play as a bar against legislation.

Now, he says that the States are not hurt here, that this isn't enough of an intrusion. But I call again to the Court's attention the $3 license fee was too much for Mr. Justice Holmes in Johnson v. Maryland when you are talking about a matter of power. We are talking about a matter of governmental power. We are not talking so much about money,but on money, they say that our figures are exaggerated. Well, the record proves just to the contrary. This man who gave us the $200 million estimate of cost of fire services to comply with this Act is the greatest expert there is in the United States on this subject.

There is one other little thing the distinguished Solicitor General keeps talking about -- confusion. If there is any one thing that is confused in his whole argument, it's this: He talks about working 60 hours or 84 hours. Now, the plain truth is that of that 60 hours or that 56 hours in New Jersey, so much of it is what you call stand-by time. In the record at page 321 it's pointed out that when you are on duty for 24 hours and then 24 hours, that you have in that 24 hours, the first 24 hours you have 16 hours of stand-by time. So these people are there, but only the difference

federalism is destroyed." I do not believe that. I do not believe that federalism is an immunity personal to the state which the state may waive if it does not choose to raise it.

Q Then your assurances to the various members of the Court that when we get to a really tough case of impairment of state sovereignty in the sense of affecting the state as a state will have a remedy, are really illusory because you cannot tell me that the Perez line of reasoning governs this type of case where you are talking about the state, that there is any stopping place. There is not.

MR. BORK: I think if this Court becomes impressed with the idea that in fact the states are being ousted as law making and law enforcing bodies, that a stopping point will have to be called.

Q Even if it is done little by little, bit by bit?

MR. BORK: I would think so, Mr. Chief Justice.

Q What do you do, add it up cumulatively and say, "No one of these would have been a serious invasion but taken all together, they now amount to one"?

MR. BORK: There may be various kinds of tests that can be constructed.

Q If the Court did not stop short of Perez, where could it stop so far as commerce power goes? And it is your submission that that is all that is involved here, as I

starve them to death. And just as in New Jersey, if they are going to go to a new platoon system, if they are going to change the overall system, these people in the New England town meeting or across this country, they vote on it, up to now they have been able to vote on it. And I think the most important question was from Mr. Justice Brennan when he talked about the republican form of government, because the biggest part of that republican form of government is ballot box control. And, Mr. Justice Brennan, it's gone if this Act is upheld.

Now, my distinguished colleague, the Governor of Utah, Governor Rampton, leaned over to me and he made a statement that I think I should pass on to you. He said, If they uphold this, there is no other stopping place from the complete swallowing up of State government under the commerce clause. And there is no logical place, just on and on, you talk about the National Labor Relations Act, well, those Acts are all being held over here in committees in Congress until you act on this. If you uphold this, frankly, cities as cities are gone, they are commercial enterprises. And I just don't believe that anyone can read the history of our nation, when you come to a new claim of power you have to go back to the sources of power. A mention was made by the Solicitor General about this being so minimal, it didn't have any impact at all. But I will remind the Court, I will remind the Court, as I was reminded again by Governor Rampton, that the impact of the tea

tax in Boston was minimal, but the principle was more than the people could stand to have someone else taxing them, someone else running their local affairs. And this is what the States and cities are fighting for here. That's exactly what they are fighting for here.

Now, this idea that this Act has no payroll impact is not only a false statement, but that is not the point at all. The point is who is going to determine that payroll impact, and this is just the beginning, the camel's nose under the tent. That's certainly very, very true. And look at the enormous impact that just this one ruling that a fireman who works 24 hours on the job, you can't deduct his sleep and eat time, but for every other person in the entire nation you can.

So there is no misunderstanding on our part, we know what this Act says. And he tries to justify it by saying, oh, well, this might help welfare, it might help unemployment. And then he said, in any event, we give you $52 billion in revenue sharing. Well, again, quoting Governor Rampton's note to me, he said it is very presumptuous to imply that State sovereignty is for sale for $52 billion or any other term. After all, that money is the people's money that's being returned to them. The idea that you can pay for it and take over the State is totally repugnant to our whole system of government.

I believe that the concession, both by the Solicitor General, by the Congress in its report that this would have

virtually no impact on cities, the concession by Senators Javits and Williams in their brief that it would have no impact. Why do it? Why take over? Why take over? And the statement about California, that's completely wrong. Sleep and eat time is included in 84 hours or 72 hours or 60 hours. It has been up till now. And the only thing that they say, they say they are not forcing States or cities to do anything. They are. This 24-hour no-sleep, no-eat thing is going to force them to hire an awful lot of new firemen and maybe some new police, and as Mr. Jones pointed out that's a very, very costly thing to hire and train all of these people. After all, the States and cities have got along pretty good up until now, and again I would reiterate over and over again, over and over again, there are no substandard labor conditions, there is no justification for this Act, any way, any how, no matter how you approach it.

And the one thing also that I think is not particularly a happy thing to have represented to this Court, that the Governors and Mayors who presented these figures that were included here of $200 million and a billion in costs are liars. I don't think they are. I think they can make just as good an estimate as a lot of other people. And I think they made honest estimates. They are honest people, they are hard-working people, and they live there with their own people. So I think they gave their very best estimates.

And certainly this -- well, for example, in the House committee report they estimated the first-year impact of this Act on the entire Federal Government. Do you know what it was? $250,000. I saw the Postmaster General sitting back there a few minutes ago and I saw a statement by him the other day that $60 million of his deficit is caused by this Act. I tried awfully hard, and I found a publication to that effect. I tried awfully hard to get some other figures, but all they tell me was it's just awful, you can't get it. And the idea that the Civil Service of the United States and the Civil Service of States is that different is just plain dead wrong.

So Mr. Rampton is right. You've got all of these statutes of States that they have been building up for 200 years trying to be fair with these people, and, after all, if they are not fair they are there to tell them about it. They live with them day in and day out.

So I think that here where this Act really obliterates the division of governmental power upon which our whole nation is founded now is the time, in the Rampton view, and the view of the Governors he represents as chairman, and of all of the Mayors and other public officials, now is the time to put a stop to this. Let's call government government and commerce commerce and not try to turn just by a few words -- whoever heard of a statute, this is the only one I have ever seen where it calls commercial enterprises governments, and over and

over again defines them so right in the statute. They say a commercial enterprise is a city, public agency. Well, that's not true. This idea of competition that was mentioned in connection with Wirtz, well, the court below found there was no competition here. They don't like that. The idea that somehow or over because governments might compete with each other -- well, that's preposterous. The only competition I ever see is when they bid against each other for a city manager to improve their whole operations of government.

So I would just correct one other thing. I have a letter here from the Governor of Colorado instructing his Attorney General to withdraw his name from that brief that was just called to your attention. And the idea of, the Solicitor General said, all you have got to do is comply with 7(k) and then you have no problems. Well, you comply with 7(k), you have to comply with this rule 24 hours on you don't deduct sleep and eat.

So I started out by saying that we don't have substandard conditions here, and what do they come up with? This figure of 95,000 faceless wonders that they got from nowhere, and there is no evidence whatever, not one scintilla that those 95,000 exist, and without that, their substandard idea is gone forever. Cities are not here fighting to maintain substandard labor conditions. States are not here fighting to maintain substandard living conditions. These are their

people, they live with them, and we feel that they should continue as they have for 200 years,and to tear up this system of shared governmental power that has worked so well in this Bicentennial year would be a monstrosity indeed.

I end by saying government is not commerce, and I ask the Court to recognize that government is government and commerce is commerce and that this decision below should be reversed because even there the court doubts very much that this Court would want to stick with some of the broad language that was contained in Wirtz, but they felt district court judges shouldn't overrule this Court.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:11 p.m., the argument in the above-entitled matter was concluded.)