OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1913 & 82-1951

TITLE JOE G. GARCIA, Appellant v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL; and RAYMOND J. DONOVAN, SECRETARY OF LABOR, Appellant v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

PLACE Washington, D. C.

DATE March 19, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

JOE G. GARCIA,
Appellant,
v. : No. 82-1913
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.; and
RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Appellant,
v. : No. 82-1951
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

Washington, D.C.
Monday, March 19, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 o'clock a.m.

APPEARANCES:

THEODORE B. OLSON, ESQ., Assistant Attorney General, Office of Legal Counsel, Department of Justice, Washington, D.C.; on behalf of the Appellants.

WILLIAM T. COLEMAN, JR., ESQ., Washington, D.C.; on behalf of the Appellee.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Garcia against the San Antonio Metropolitan Transit Authority and the consolidated case.

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

ORAL ARGUMENT OF THEODORE B. OLSON, ESQ.,
ON BEHALF OF THE APPELLANTS

MR. OLSON: Mr. Chief Justice, thank you, and may it please the Court. The issue in this case is whether the national uniform wage and hour protections afforded by the Fair Labor Stanards Act are available to employees of publicly owned transportation systems. These protections are an otherwise indisputably legitimate exercise by Congress of authority expressly delegated to it to regulate commerce by Article I of the Constitution.

Beginning in 1966, the Fair Labor Standards Act was extended by Congress in stages to employees of publicly owned mass transit systems. The San Antonio Metropolitan Transit Authority and the American Public Transit Association challenged the applicability of the wage and hour protections in the Western District of Texas based upon this Court's decision in National

League of Cities versus Usery.

The Secretary of Labor and Mr. Garcia, a SAMTA employee, are defendants. The District Court initially upheld the challenge without an opinion. On appeal, this Court vacated the District Court judgment and remanded the case for further consideration in light of the Court's decision in United Transportation Union versus Long Island Railroad.

The District Court, notwithstanding that decision and three contrary Circuit Court opinions, the District Court again decided in favor of appellees. Mr. Garcia and the United States have appealed directly to this Court.

To the extent that a federal regulation of states as states presents a danger to our federal system, National League of Cities articulated a limited immunity from otherwise valid Congressional regulation of commerce in order to prevent the utter destruction of the state as a political entity. A federal law will not be stricken, however, unless it would directly impair the state's ability to structure integral operations in areas of traditional governmental functions.

Two years ago, in United Transportation Union versus Long Island Railroad, this Court unanimously concluded that a commuter railroad is not an integral

part of traditional state activities generally immune from regulation.

QUESTION: Mr. Olson, we remanded on that case, of course, but isn't there a distinction in that the Long Island case was a railroad that was part of the interstate rail system from the time it was established up to the time of the decision of this Court?

MR. OLSON: I submit, Mr. Chief Justice, that the difference is not a distinction that ought to have constitutional significance. The transit systems that are at issue in this case are part of the interstate system also. The Congress specifically held that. The commuter railroad in Long Island's principal function was to move commuters from Long Island into the city of New York and back again. There isn't any constitutionally based significance between whether the rail -- whether the system operates on rails or rubber wheels. The function was the same.

History cannot be cited to support transit as a traditional local governmental function. In fact, appellee's notion of a tradition would seem to include anything developed during the last 20 years. But states have never historically considered it necessary to their survival as sovereign entities to operate transportation enterprises, much less to operate such systems

completely free of involvement by the national government on matters of national concern.

Municipalities, except in isolated circumstances, did not even enter the field for the first three-fourths of our nation's history. In 1934, in Helvering versus Powers, this Court unanimously agreed with the Solicitor General that it was no part of the essential governmental functions of a state to furnish transportation to its people. The Court characterized Boston's operation of a mass transit system, a street railway, as a departure from usual governmental functions, a business enterprise, and in the same category as the sale of liquor.

Thus, 50 years ago transit systems were not traditional governmental functions. They were not considered governmental functions at all.

QUESTION: You are not suggesting that a transit system is analogous to a liquor store, are you?

MR. OLSON: The transit system is analogous to a liquor store according to the Supreme Court's decision in Helvering versus Powers 50 years ago.

QUESTION: Exactly, but 50 years ago streets were maintained by cities to enable people to be transported from one place to another, and would you analogize that at all to the mass transit systems that

are now necessary to move people from one place to another?

MR. OLSON: We would submit, Justice Powell, that the analogy is still the same. The state has entered into a field previously occupied by the private sector to furnish services that it deemed appropriate, the state deems appropriate for the citizens of that particular state.

The reference to the liquor industry was a reference to the South Carolina decision of about 30 years prior to the Powers case in which South Carolina had regarded it as a part of the function of their activities to take over the liquor industry in the state. The fact that the states and the municipalities operate the roads is no different today than it was in 1934, so there is no constitutionally based significant difference between 1934 and today which ought to change the situation with respect to transit systems.

QUESTION: I don't quite place San Antonio, but it is somewhere near the -- at least the last time I was there, somewhere near the center of Texas, isn't it?

MR. OLSON: Yes, it is.

QUESTION: Now, how does that link up with the interstate rail system?

MR. OLSON: It does not link up with the

interstate rail system, but Congress has determined that transit systems in the cities have a significant impact on commerce in a variety of ways. Those findings were first articulated by Congress when the Fair Labor Standards Act was adopted in 1938 in general terms, in terms of the effect of various different enterprises on commerce itself.

And then as Congress determined to extend the application of the Fair Labor Standards Act in this area, Congress made various findings with respect to the effect of a transit system and the employment of the workers in the transit system on commerce.

So, unless this Court is prepared to enter into an inquiry concerning whether or not the Fair Labor Standards Act is a proper exercise by Congress of its authority under the commerce power, I submit that there should not be different constitutional distinctions between types of exercises of the commerce power.

The railroad system is not unlike the railroad system in the Long Island Railroad, which may have linked up with the national railroad system, nonetheless was principally engaged in the business of carrying commuters from the suburbs to the city and back, so the system functionally is not any different than what we are looking at in San Antonio.

Now, since 1934, there have been some changes as far as transit systems are concerned. The nation's larger municipalities have taken over the private sector activity in the transit field since that time. In 1940, only 2 percent of transit systems were publicly owned. This proportion had grown slightly to 8 percent in 1965. It was not until 1979 that this figure jumped to 51 percent. In short, as appellee's public literature declared in that year, 1979, public ownership of transit is a recent development.

QUESTION: I suppose that has occurred primarily because the private sector can't operate a lot of these systems at a profit. Is that right? The public has had -- the cities and local governments have had to step in because of the economic inefficiencies of the systems?

MR. OLSON: Well, that is the assertion, and it is very difficult to prove that one way or the other, Justice O'Connor.

QUESTION: In that regard, if that is true, would you say that it is traditional that local government steps in to meet needs of residents of the local community which can't be met by the private sector?

MR. OLSON: I don't think that the analogy

carries that far. The reason that the states went into transit may be debatable. The fact is that about the time that this transition became a very significant factor, the federal government, the Congress of the United States enacted the UMTA, the Act that I mentioned previously, which provided vast federal subsidies to support the acquisition and operation by the local governments of those transit systems.

So, to the extent that it might be said that transit systems couldn't be operated or couldn't be operated at a profit by the private sector, it was aparently true that it couldn't be operated by the local governmental sector either. So it is not an appropriate jump to take that facet of the fact of taking over the operation by the local government entities to assume that it has then become a traditional governmental function.

QUESTION: Well, I suppose you would, though, concede that it is traditional that government would step in to provide things for people that they can't provide for themselves within the community.

MR. OLSON: Government has done that sometimes. Government doesn't necessarily provide everything that people cannot provide for themselves.

QUESTION: Well, of course not, but it

traditionally has been a basis for providing government services, has it not?

MR. OLSON: It has been asserted as a basis for providing government services, and I can't quarrel with that as a generalization.

QUESTION: Would you agree, Mr. Olson, that over a period of 200 years, more or less, that something which at one time was a private function could become a governmental function just by the pressures of economics?

MR. OLSON: It is conceivable that it could. I hesitate to say that it could not. But I would suggest that the Court would be very reluctant to recognize that in the context of a Tenth Amendment constitutional analysis such as we are dealing with here. We are talking about the Tenth Amendment as an essential protection of the sovereignty of states as states, and a preservation of the federal system.

The benchmark that this Court has always turned to in deciding what is necessary for the preservation of the federal system is to undertake an analysis of the relative powers and authorities of the states to the federal governments when the states first entered into the union in 1787.

So it is necessary, it seems to me, very

firmly to be guided by historical reality and the relative allocation of powers, and when the state governments enter into something because they choose to operate it as an activity which they decide is something that they would like to provide for their citizens, that, in my judgment, and I believe -- we submit to the Court it should not be the Court's judgment -- could cause something to become -- something that can be handled by the private sector suddenly to become a traditional governmental activity, something that is necessary for the states to perform in order to be states.

QUESTION: Mr. Olson, I am sure you would agree that mass transit is a governmental function.

MR. OLSON: I would agree only in the sense that some -- and today a substantial number of the mass transit systems in this country are performed by governmental entities. In that sense, they are governmental functions. There are many that are still performed by private industry.

QUESTION: Not many relatively speaking.

MR. OLSON: Not many relatively speaking, but remember, the federal government has provided this assistance, so we are not just talking about governmental functions, but we are talking about

traditional local governmental functions, and I might add that the briefs reflect the fact that in certain cases the cities contract out this function to private enterprises to perform the service for them.

QUESTION: And subsidize those that are contracted out.

MR. OLSON: Yes.

QUESTION: But let me ask you this. Would the federal government consider it a federal function to operate mass transit in cities that said, we expect you to do it. You claim it is a federal function.

MR. OLSON: The federal government today is not claiming that it is a federal function.

QUESTION: Whose function is it?

MR. OLSON: It is not necessarily a municipal governmental function. It is not necessarily a federal function. It is not necessarily a private function, any more than an oil utility or an electric power utility might be necessarily vested in one place in the spectrum of who can perform functions or not. We are talking in terms of the Tenth Amendment, as I understand this Court's decisions, of what is governmental versus what is -- and governmental in the sense of what it takes to be a sovereign entity.

We submit that it doesn't require in order for

a state to retain sovereignty to operate the activity of transporting people from one place to the other, and I might say that the decision of this Court two years ago in the Long Island Railroad case substantially and overwhelmingly supports that proposition.

The Court again considered virtually the same question it considered 50 years before in Helvering versus Powers, and almost in the words of the Court itself, whether -- that question was whether a publicly owned transportation system was immune from federal regulation.

Once again, and once again without dissent, the Court determined that the commuter system there was not an integral part of traditional state activities generally immune from federal regulation under National League of Cities.

QUESTION: But was there not some considerable emphasis on the interstate aspects of that line, that it was linked up on both ends with the national railroad system?

MR. OLSON: Well, there was some emphasis in the Court's decision after the Court considered, most importantly, and I submit it appears from the Court's decision most importantly, the historical analysis to compare the respective functions of states versus

federal governments and what is truly governmental, and looking back into the history, the Court first of all considered that.

Then, we submit, the Court entered into a functional analysis, or the case appears to suggest that, to determine whether the movement of people -- and remember, this was primarily an activity designed to move people from one part of the city to the other. The transit systems link up in interstate commerce. The transit systems in Washington, D.C., for example, link up with National Airport. They move into Virginia. They move into Maryland. They link up with other -- They pick people up from the bus station or the train stations.

So, the transit systems are very much a part of the interstate commerce system, and not functionally or constitutionally distinguishable from the Long Island Railroad, we would submit.

QUESTION: Before the Long Island commuter system was acquired by the local government, what was its situation?

MR. OLSON: The Long Island Railroad had been a private enterprise for a substantial number of years, well over 100 years.

QUESTION: And regulated by what government?

MR. OLSON: Well, regulated by the federal government. That, the Court went on to that in the third part of the Court's opinion in the Long Island Railroad case. However, I think that that raises a very important -- in order to escape the force of the logic of that decision, the appellees have landed on the fact that, and emphasized the fact that railroads, particularly the Long Island Railroad, have a long history of very specific federal regulation of railroads.

And they seize upon the Court's opinion which contained the language that there is no justification for a rule which would allow the states by acquiring functions previously performed by the private sector to erode federal authority in areas traditionally subject to federal statutory regulation.

It is not true that the federal government has not regulated transit systems, but certainly we do not believe that the Court was adopting a proposition that would suggest because only if there is a long antecedent history of specific federal regulation of a subject will it not be preempted by the Tenth Amendment. That is sort of a use it or lose it theory whereby if the federal government doesn't regulate a particular activity, it might lose the power to do it under the

Tenth Amendment.

And I submit that would require rewriting the Tenth Amendment to read, "the powers not exercised by the United States are reserved to the states," as opposed to "the powers not delegaed to the United States." The power to regulate commerce is delegated to the United States. It may have been exercised more or less up to its limits. It may have been more close to the limits in the railroad situation than it ever has been in the transit system.

But the Tenth Amendment does not say that in order to preserve the power of the federal government over commerce it first must exercise that authority. In fact, the functional analysis that we believe is at the heart of the Court's decisions in this area accords with reality. Chief Justice Marshall may have said it the first time in the Planters Bank case in 1824, when he said that when the government becomes a partner in a trading company, it divests itself so far as concerns the transaction of that company of its sovereign character, and takes that of a private citizen.

Appellees urge a new approach on the Court. They say that transportation is a service which the private sector can no longer provide, and that a transportation system is vital to citizens, and

therefore it is an essential governmental function.

It is true that public authorities have unquestionably fostered a dependency in most large cities on government-subsidized transportation. It may not be surprising that the private sector cannot provide or may not be able to provide alternatives to urban mass transit as operated by the states and the cities now, because the states and the cities, using federal funds, and using state funds, are operating those systems at 25 to 40 percent of the operating revenues. They are operating them at a deficit, and in a sense they have precluded the development in that area of private sector alternatives.

We submit that if that logic is followed to its logical conclusion, the states would be able to take over utilities, the supplying of food, the supplying of gasoline. There are a lot of things that are necessary to citizens, most citizens in our society. The government could take over those functions, the state governments could, and they could begin providing those services to the citizens at a fraction of the cost, driving out the private sector, and then at the same time if that logic was followed by this Court, eroding the power of the federal government, shrinking it increasingly over the years, over commerce.

QUESTION: Well, Mr. Olson, I suppose that the local citizens would exert some influence over their elected officeholders over the extent to which they want local government taking over expensive new programs.

MR. OLSON: I am afraid that they --

QUESTION: And with the concern that citizens have about tax rates, wouldn't they exert enough control that the dangers you speak of are really not realistic?

MR. OLSON: There is a potential political check to that process. Whether that would be effective or not, it is very difficult to say. If you offer a citizen an opportunity of receiving electrical utilities in his home or heating it in the wintertime at one-fourth of its present cost to him, and then tell the vast majority of the citizens that that is going to be paid for taxes, it might well be that that pressure becomes inexorable to take over that function.

We submit that this Court would not support a theory that would allow the commerce power of the federal government, which is so vital to hold this country together, to eclipse federal authority in that way.

QUESTION: You didn't mention water in that list of services that you recited, water that is supplied in every home. What about that kind of a

service?

MR. OLSON: Water?

QUESTION: At one time that, of course, was done by private companies.

MR. OLSON: The history on water is not as clearly developed in the briefs of this case to lead necessarily to one conclusion or another. I think the facts would support the proposition, however, that the government took over the function in the area of water substantially because government itself needs water, and needs a -- it is a part of the government's process of perserving the health by preserving the quality of the water. It is a part of the government functions in the sense that you need water to put out fires, which is an essential governmental function.

So, I would submit that the water is in a distinguishable category.

One final point, and then I would like to reserve the balance of my time for rebuttal. The appellees have suggested that somehow the federal government should be displaced from this area because there was a history of substantial local regulation in the area of transit. This is another, a second area, I submit, where the appellees are attempting to rewrite the Tenth Amendment.

They suggest that if an activity has a long history or an expansive history of regulation by the states, that somehow the federal government is precluded under the Tenth Amendment. That is some sort of a change in the Tenth Amendment, almost like the prescriptive development of a prescriptive range of authority, and would require rewriting the Tenth Amendment to say the powers first exercised by the states would be reserved to the states.

QUESTION: Mr. Olson, you are not suggesting there is anything wrong with rewriting the Tenth Amendment, are you? The National League of Cities did that.

(General laughter.)

MR. OLSON: I haven't got a very good answer to that. I think that the Court interpreted the Tenth Amendment and the implicit structure of federalism in the Constitution, and the result that we are seeking today is consistent with the Tenth Amendment and the National League of Cities cases.

The logic of the two arguments that the appellees have made which require, as I say, rewriting the Tenth Amendment, would bring us a qualitative step back toward the Articles of Confederation. Providing transportation is a legitimate and laudable municipal

objective. The federal government supports it, and has contributed heavily to it.

Simply because the most populace cities have recently entered the field, however, does not mean that Congress's power to regulate commerce must be correspondingly reduced, and it would be an irony if federal funds which assisted in the evolution of this industry into municipal hands and caused a situation in which the federal protections for minimum wages for the laborers in that field would be pulled out from under those citizens.

QUESTION: What would you say, Mr. Olson, if 100 years elapsed, and the statistic was that all of the mass transit systems in the United States were municipal or state-owned, none with any federal government aid in their inception?

MR. OLSON: I would submit, Mr. Chief Justice, that that would still not change the constitutional analysis and the urgency as set out in the Constitution of Congress's ability to control commerce.

QUESTION: Then the federal aid in the inception is irrelevant?

MR. OLSON: It is not irrelevant, because we are looking at transit and municipal transit in the whole panoply of circumstances, and we are talking now

in terms of a test that this Court has articulated as traditional governmental functions. We are saying that it is not traditional. It has just begun, in terms of its transition to the private sector, and the reason that it is there in substantial part is because of federal money, and that should not be able to erode the federal government's power to protect workers in the commerce section.

CHIEF JUSTICE BURGER: Very well.

Mr. Coleman.

ORAL ARGUMENT OF WILLIAM T. COLEMAN, JR., ESQ.,
ON BEHALF OF THE APPELLEES

MR. COLEMAN: Good morning, Mr. Chief Justice, and may it please the Court.

The basic issue here is whether publicly owned local mass transit services, which almost all local governments provide today and upon which 94 percent of all persons who ride on local mass transit today are traditional government functions. The court below found that such services are as traditional as hospital, recreational facilities, libraries, and museums, to name a few of the activities that the federal government has admitted today are traditional local governmental functions.

First, I would like to put before you a few of

the facts. In 1959, San Antonio concluded that it had to serve the local mass transit needs of its entire community, and the only way to do so was to own and operate such a system. It acquired the local transit system without any federal funding, well before Congress attempted to regulate the minimum wages and overtime pay for any local mass transit worker, private or public, and well before Congress passed UMTA.

The same situation is true with many other American citizens. SAMTA, a political subdivision of Texas, which by statute is performing an "essential governmental function," bought the system from the city in 1978, again without any federal funding. In Texas today there are 18 urban mass transit systems. All are publicly owned. Nationwide, by 1979, publicly owned local mass transit systems provided, as I said, 94 percent of all mass transit rides in the United States, and took place on 90 percent of all mass transit vehicles.

A publicly owned local mass transit network is at least as vital to the health, welfare, order, and survival of the community as are the other functions listed in National League, and if you have any doubt about this, I would refer you to Page 33 and 34 of the SAMTA brief, in which the Congress indicated why it felt

it had to begin to make contributions to local communities.

Justice O'Connor, the fact is, in the case of San Antonio, it was the citizens that voted to acquire the local mass transit company. At the same time, the citizens voted and authorized the state to impose a sales tax on them to supplement the cost of operation.

Now, what does this vital public service cost the people of San Antonio? The average cost per passenger was 66 cents. The passengers on average paid only 18 cents. A third of ridership was school children, the elderly, and the handicapped, all of which paid 10 cents per ride. Downtown service was free. The remaining cost of the service was paid primarily from local sales taxes, and to a lesser extent from UMTA grants.

Nationwide, in 1965, once again, before UMTA funding and before Congress first attempted to extend the Fair Labor Standards Act to any publicly owned system, 56 percent of all transit employees worked for public systems, and over half of the nation's 21 largest cities were served by public systems. The great majority of people who ride public transit are the disadvantaged, the poor, low income workers, and school children. No publicly owned system makes a profit. All

are heavily supported by state and local taxpayers.

Every one of the 14 major systems cited as private on Page 17 of the government's brief are now privately owned. Thus the court below found that nationwide public transit benefits to the community as a whole is provided at a heavily subsidized price, and it cannot be provided at a profit. Thus government is particularly well suited and in fact is the only component of society that can provide the service. Government today is the primary provider of transit services.

Now, the government ignores these facts and says that you do not apply National League of Cities based upon four fallacious statements. I say this because contrary to the government's position, one, it is the determination of wages and overtime pay that under this Court's opinions is essential to the state's separate and independent existence, not the state activity involved.

Next, federal funding by matching grant does not affect whether an activity is a traditional local governmental function. Third, contrary to what the government says in its brief, transit was not singled out by Congress from other traditional activities for Fair Labor Standards Act coverage to prevent unfair

competition.

And fourth, this Court has already established the impact of the Fair Labor Standards Act on traditional state functions, and has determined as a matter of law it is impermissibly intrusive.

Now, the first point of the government. The government wrongly contends on Pages 24 through 38 of their brief and again on Page 14 and 15 of their reply brief that to be a protected traditional government function for purposes of the Fair Labor Standards Act, the particular service that the state provides to the public, not the state decision-making authority over wages and hours, is what must be essential to the separate and independent existence of the state.

EOC versus Wyoming is exactly to the contrary. There, this Court started its analysis with the conclusion that the management of state parks is clearly a traditional state function. Thereafter, the only dispute between the majority and the minority was whether the federal law affecting the state's ability to make employment decisions on the basis of age had the same intrusive effect on the states' ability to structure their integral operatrions as did the Fair Labor Standards Act.

The majority said no, and the majority said

yes. We believe the federal government slips into this fundamental error by wrongly reading EOC to require that the state activity involved, such as parks, hospitals, libraries, or museums, or as in EOC park game warden, must be a Code 4 function or core sovereign function in order to be traditional.

But the fact is that EOC used these words on Page 1066 of the opinion in Footnote 11 only for the purpose of comparing the intrusiveness of the Federal Age Discrimination Act on the state's right to establish a retirement age to the intrusiveness of the Fair Labor Standards Act on the state's function of determining wages and overtime pay, which it confirmed was a core state function essential to the state's independence.

The government's reading of EOC would lead to the absurd conclusion that a city's failure to provide a public hospital, a museum or park would destroy the state's independent existence. As decided in National League and reaffirmed in Mr. Justice Brennan's opinion for the Court in EOC, it is the interference with the state's right to make wage and overtime pay decisions which destroys such independence.

This issue therefore, if stare decisis has any meaning, should no longer be challenged in the Fsair Labor Standards Act case.

QUESTION: But, Mr. Coleman, if that is the test, what about the Long Island Railroad case?

MR. COLEMAN: Well, the Long Island Railroad, there the Court determined that basically the Long Island Railroad was not performing a traditional state activity. At the time of the decision, there were 17 railroad commuting systems, only two of which were owned by the government.

Secondly, the Court there determined that when you are dealing with a railroad which is part of the interstate system, that Congress would not and the Constitution does not permit the state to carve out part of it.

QUESTION: I am not sure I made my question clear. Would you say that the federal government could not enforce the Fair Labor Standards Act against the Long Island Railroad?

MR. COLEMAN: I would say that the Long Island Railroad -- well, first, Long Island Railroad doesn't decide that issue either way, but I would say --

QUESTION: Right, but if I understand your position, you are saying any Fair Labor Standards Act application to a public employee is impermissible.

MR. COLEMAN: No. This would say traditional governmental function. Long Island Railroad holds that

the providing of commuter railroad service is not a traditional governmental function because at that time there were only two such systems in the United States. There were 15 others which were all operated.

In addition, I think it is striking that when you read your cases or reread your cases, U.S. Parden, for example, Parden case, the one thing this Court has made clear is that when you are dealing with a railroad system, that there -- which is part of a national system, that there the power of the Congress is supreme, and you do not cut it off, and I would just urge you to compare the decision in the Parden case with the decision in the Missouri employment case, where there, because you were dealing with providing -- workers who provided health and welfare services, you there said the rule that you apply in railroad cases was not applicable, and it seems to me that under those circumstances, Long Island Railroad clearly does not cover this situation.

QUESTION: Mr. Coleman, was it in Long Island that the Court said that in determining what is a traditional function, we do not use a static concept or approach?

MR. COLEMAN: That's right. It says it is not dependent just upon history, that something at one time

could have been not pervasively in the public sector, as I assume the transit company in Boston in 1934, which had gone bankrupt, and to get it back on its feet, to put it back in the private sector again, they had the city being the trustee, but that was the only one that existed at that time.

QUESTION: But did the Court use the words "static concept?"

MR. COLEMAN: It said it could not -- Mr. Chief Justice Burger clearly said it was not a static historical concept. It was one that you looked at at the time you made the decision. And here it is clear that by 1965 and even before that, that transit, mass transit was an essential local governmental function.

Now, the other argument that the government makes is that somehow because in part federal funding helped the city to move from a system where you had local privately owned and operated systems but regulated locally and privately to one today where just about every city is owned and operated by the public, that if that is so, then it cannot become traditional within the meaning of National League.

This just has to be simply wrong. I just urge you to look at the situation with respect to public hospitals, which clearly are traditional. It is clear

today, for example, that only 36 percent of the hospitals are actually governmentally owned, even though you count all the federal hospitals.

It is also clear that through the Hill-Burton money and through Medicare and Medicaid, that the federal government has given much more support to the public hospitals than they have given to local mass transit, yet everyone here concedes, and I hope the government still does, that public hospitals would be a traditional governmental function.

I think when you turn to sanitation that the whole industry was revolutionized from private septic tanks to waste water treatment facilities beginning in the 1970's, and the federal government put up $33 billion in federal funding, more than twice the total federal funding of transit. Once again, everyone agrees that sanitation is performed by the government and is a local traditional function.

But I think the government is especially wrong in basing its argument on UMTA funding in a mass transit case, since this Court declared in Jackson Transit that UMTA was not intended by Congress to impose federal labor laws such as the Fair Labor Standards Act on local government that has additional federal funding.

QUESTION: Mr. Coleman, what if the government

simply provided as a condition of getting the federal funding that the transit authority pay wages consistent with the Fair Labor Standards Act?

MR. COLEMAN: That would be a completely different case, Your Honor. As you know, under the taxing power, the government can impose conditions. You first have, although there are not many cases, the Court today saying the whole doctrine of unconstitutional conditions, that the -- I don't think the federal government could say, well, if you take the money, you have to segregate on the basis of sex on the buses. I would say that that would be an unconstitutional condition. Whether this one would be, where you give up your rights under the Tenth Amendment, I don't think any court has decided.

But the one thing is clear in all the cases, that here the government did not do that. In fact, Mr. Justice Blackmun, in his opinion in Jackson Transit, goes through the legislative history and demonstrates that the federal government did not make that intention, in addition, and therefore that brings into play the Pennhurst case, where you said that you cannot claim that the government has imposed a condition unless it is specifically set forth in the statute.

Now, in this case, interestingly enough, it

has been set forth just the opposite. If you read Section 9(c) of the UMTA Act, you will -- it says that the fact that you take this money is not to impose any conditions on you as to how you operate your system with respect to your employees other than those things specifically set forth in the statute, and this is not one of the things specifically set forth.

I also would like to call your attention to Justice O'Connor's opinion in dissent where she had three others in the recent Dixon case where, Your Honor, you made it clear that where the federal government establishes a program where it makes grants to the local community, that the one thing that the local community is not required to do is to give up its autonomy unless that was the condition of the grant, and in this case there is no provision that that was a condition of the grant.

Now, the third fallacy of the government is that local transit can be distinguished from the activities expressly protected in National League because the government wrongly says Congress singled out, and this is at Page 20 of their brief, public transit for fair labor standards coverage to prevent unfair competition with the private sector.

Now, actually, the government fails to tell

you, Your Honors, that the same section of the 1966 amendment, which is Section 102(a) brought within the Fair Labor Standards Act schools, hospitals, and related institutions as well as transit. The federal government's partial quote from the 1960 House and Senate Report is misleading, for as shown by the full quotation, which is on Page 39 of SAMTA's brief, Congress specifically stated that by the 1966 amendment it wanted to eliminate unfair competition in schools, hospitals, and other institutions as well as transit systems, each of which Congress embraced in the phrase "enterprise engaged in commerce," and as such they were specifically identified in the cited Congressional Report.

The federal government then cited the same pages of the same House Report in its brief in Maryland versus Wirtz to sustain application of the Fair Labor Standards Act to schools and hospitals, and then argued the same point, incidentally on the same Page 20 in the brief, in the National League case with respect to trash collection, agencies, recreational facilities, libraries, and the like.

Now, clearly today, since only 6 percent of the people in the United States that use mass transit ride on other than the publicly owned system, clearly

today it is absurd to say that somehow the publicly owned system are competing with the private systems. The fact is that there are no private systems, and for the simple reason that it is impossible today to serve the people of the community at a profit.

It is a necessity that you have this type of service. It is as important today as keeping the streets repaired, and certainly at that point the people have voted either by the legislature or by referendum that this will come into the public sector, and that they will put up their tax money to support it.

Now, there is some hint in the government's brief that what they are really trying to do is protect people from being taken advantage of. That isn't the case. The minimum fair wage today is $3.35. In the United States, the average transit worker today is making $9.01, and on SAMTA, the average worker makes $8.61 per hour.

The problem is that to serve the people properly, you have to have schedules. It is like the police force. It is one of those things where you have to have the work when you need the service. People come to work in the morning. They go home in the evening. So you have the problem that people have to -- you have to work people four hours in the morning, and then they

take time off, and then they come back to take the crowds home at night.

Also, obviously, you plan the work for every person, and in San Antonio, for example, the schedules are planned so that if everything happens on time, you would get there -- you work eight hours. On certain schedules you select, however, you would have to work eight hours and 45 minutes. In those instances, the -- and if you did that for five days a week, if you took that other schedule, you could be working more than 40 hours, but you do not get the overtime pay.

In addition, there are all types of premiums. You come in to work ten minutes earlier. You have to fill out an accident report. Or you ofttimes have to report to other than the depot, and so there are all these premiums, and this has been built up over a series of collective bargaining agreements through all of these locally owned mass transportation systems.

But if you then have to apply the federal law, the federal law talks in terms of a statutory rate, and they require you to roll in all those premiums as part of the basic hourly rate rather than the fact that you can, because you have agreed that for that you don't have to calculate that when you are paying overtime. So if this Court now would say that somehow the Fair Labor

Standards Act would apply to local mass transit workers, it would mean that the disruption in the industry would be as great as it was when the Court looked at it and determined that it would not be applied to policemen or firemen.

As I said, there is nothing in Long Island Railroad which changes the position that we have advanced here today.

Finally, I would like to say that Long Island -- I mean National League invalidated the 1974 amendments as applied to traditional functions. I think the government will concede that over 80 percent of the workers that Congress intended to cover, this Court said that under the Constitution they can't be covered. Under those circumstances, the only way you could save the Act even if you would carve out an exception for transit would be that you would have to read into the Act what it says, but if a government employee is not involved in a traditional function. I don't think that you cases say that you an add on. They say that once you strip it down, you have to see whether what is left is constitutional.

Also, the Sloan case makes it clear that when you are convinced that Congress wanted a particular program, which was, and they got bold after the decision

in Maryland versus Wirtz, and there the Court at that time held that there was no Tenth Amendment argument. There Congress felt that they could apply it to every public employee, but this Court in National League reversed Maryland versus Wirtz, and says that can't be done.

It seems to me that even though you would try to find some argument where you could carve out mass transits, but I don't think you could, I think the responsible thing to do would be to knock out the whole statute and let Congress take a chance to see whether today under the situation they would want to impose this onerous condition on the state.

If National League, which this Court has distinguished but reaffirmed on numerous occasions since 1976, continues to have meaning, it must embrace local public transit systems as traditional governmental functions. Few functions of government are as vital to the life of the community and the health and safety of all of its residents. Providing public transit is not only an integral part of the city's historic responsibility --

QUESTION: Mr. Coleman, may I ask you if your position applies to municipally owned utilities, power companies?

MR. COLEMAN: No, sir, because a municipally owned utility -- we will take electric cases, if you are talking about an electric one.

QUESTION: Right.

MR. COLEMAN: The fact is that very few of the cities own such facilities. Most of them are in the private sector. In addition, they can be operated for profit. In addition, they have not been services which have been traditionally performed by local government. They are not traditionally services heavily supported by state and local taxpayers. They are not --

QUESTION: Does your position turn on the fact that throughout the country this particular function is generally owned locally, and if that is the case, and if you had an increase in municipal ownership of public utilities, would the constitutional rule change?

MR. COLEMAN: Well, I would think at some point it would, if you would have the eight factors which you have in the case of mass transit. I have them listed here. It provides -- All of it is provided by the public sector, just about. It is heavily supported by state and local taxpayers. Cannot be provided at a profit, but cannot be abandoned. Benefits the entire community. Reduces congestion, pollution, and forces rational land use. Knits together the community. Users

charges are no greater than for exempt activities such as sewage and hospitals. Not subject to long-standing or comprehensive federal regulation. There is a long tradition of state regulation. Federal funding here is no greater than activities exempted in National League.

The states consider transit to be an essential governmental function. If you have all those, and that was true through all the United States, unless we are going to start living in a society that can't change, at some point you would have to change. Today, I would not stand here and say the operation of a utility in electricity or gas is a traditional local state function.

But as the Chief Justice pointed out, water is a different situation. I mean, water at one time was owned privately. When it was owned privately, it was regulated under the state utility law, but then water became so important and so essential that it then passed into the public sector, and if you read the Brush case, in that case the Court there says by the time of its decision in 1934 that it had become so pervasively owned by the cities and the states that it had passed into the public sector.

CHIEF JUSTICE BURGER: Thank you.

Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON, ESQ.,

ON BEHALF OF APPELLANTS - REBUTTAL

MR. OLSON: Mr. Chief Justice, and may it please the Court, the last case mentioned by Mr. Coleman was the Brush case, which was decided in 1937. In 1938, the Court in Helvering versus Gerhardt declared that Brush should not be interpreted as a decision bearing on the doctrine of constitutional immunity. It had to do with the tax regulation, and the Court sharply distinguished it the following year.

Mr. Coleman makes the point that the San Antonio -- particular San Antonio system was purchased without federal funds and certain other limitations, lack of federal fund involvement in the San Antonio system particularly. That is not relevant. We have to look, as this Court instructed us, at the nation as a whole, and not one particular transit system.

Secondly, the San Antonio Transit System has conceded in its briefs and the briefs of all of the parties here have established that all the transit systems or virtually all of them receive federal funds, use federal funds to subsidize their operating, and use federal funds to purchase capital equipment.

Mr. Coleman has primarily based his argument on the notion that transit is vital. Transit is very

important. That does not make a governmental function, we submit. There are many things in this life that are supplied by private industry that are important to people, but it has never been the function of government to move you from your home to your work and back again.

It is fine for the government to do that, and the federal government has assisted that. We believe that the federal standards of commerce -- this is a regulation of commerce -- should be applied.

Mr. Coleman suggests that none of these transit systems make a profit. That is probably true, and two years ago in the Long Island Railroad case this Court said in Footnote 11, "There is certainly no question that a state's operation of a common carrier, even without profit and as a public function, would be subject to federal regulation under the commerce clause."

Mr. Coleman suggests that the railroad situation is completely different because the power of Congress over railroads is supreme. He hasn't given us any reasons why transit should be any different. Transit is a part of commerce. It is vital to the commerce of this country, and unless this Court would establish a different level of priorities for different types of regulation of commerce, commerce, interstate

commerce and transit systems must be treated the same way as interstate commerce on the railroads.

Finally, Mr. Coleman suggests that we look at the percentage of these activities that are owned by local government entities to determine the constitutional question. That would result in a different constitutional decision under the Tenth Amendment this year than might have been the result in 1975 and a different result possibly in 1999.

If this Court, and I believe it did, means what it said when it stressed the fact, irrespective, although we were not necessarily talking about a static historical test, in every one of these intergovernmental immunity cases that I have read, the Court has talked about traditional governmental functions.

We are involved here and being concerned about the preservation of the federal system. Therefore history and the tradition and what government has historically done is of vital significance in this area, and it can't be determined on the number of enterprises acquired by local governmental entities.

Thank you.

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

(Whereupon, at 11:00 o'clock a.m., the case in

the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-1913-JOE G. GARCIA, Appellant v. SAN ANTONIO METROPOLITAN AUTHORITY, ET AL.; AND #82-1951-RAYMOND J. DONOVAN, SECRETARY OF LABOR, Appellant v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Pierce Hammond

(REPORTER)