

CITY COUNCIL MEETING
AUGUST 7, 1985

REQUEST FROM
NIMLO FOR CITY'S
PARTICIPATION IN ACTION
CONCERNING THE
FAIR LABOR
STANDARDS ACT

Following introduction of the matter by Staff, Council, on motion of Council Member Olson, Reid second, authorized the expenditure of \$1,000 from the Contingency Fund for the City of Lodi to join in a litigation trust fund to be used for expenses, legal fees, experts etc to support litigation in attacking the provisions of the Fair Labor Standards Act (FLSA) as interpreted in Garcia v. San Antonio because of its burdensome, costly and unconstitutional impact on municipalities.



National Municipal Litigation Center of the National Municipal Legal Defense Fund
1000 Connecticut Avenue, N.W., Suite 800, Washington, E. C. 20036 (202) 466-5424

PRESIDENT
J. LAMAR SHELLEY
City Attorney
Mesa, Arizona

FIRST VICE PRESIDENT
JOHN W. WITT
City Attorney
San Diego, California

SECOND VICE PRESIDENT
ROGER F. CUTLER
City Attorney
Salt Lake City, Utah

THIRD VICE PRESIDENT
GEORGE AGNOST
City Attorney
San Francisco, California

TREASURER
ROY D. BATES
City Attorney
Columbia, South Carolina

TRUSTEES:

BENJAMIN L. BROWN
Immediate Past President
City Solicitor
Baltimore, Maryland

ROBERT J. ALFTON
City Attorney
Minneapolis, Minnesota

JAMES K. BAKER
City Attorney
Birmingham, Alabama

MARVA JONES BROOKS
City Attorney
Atlanta, Georgia

DOUGLAS N. JEWETT
City Attorney
Seattle, Washington

BARBARA MATHER
City Solicitor
Philadelphia, Pennsylvania

JAMES D. MONTGOMERY
Corporation Counsel
Chicago, Illinois

JOSEPH I. MULLIGAN
Corporation Counsel
Boston, Massachusetts

ANALESIE MUNCY
City Attorney
Dallas, Texas

CLIFFORD D. PIERCE, JR.
City Attorney
Memphis, Tennessee

WILLIAM H. TAUBE
Corporation Counsel
Kankakee, Illinois

WILLIAM I. THORNTON, JR.
City Attorney
Durham, North Carolina

July 19, 1985

Dear NIMLO Member:

The Executive Committee has voted to recommend the filing of a lawsuit seeking a declaratory judgment that required changes in policies and the enormous cost of the Fair Labor Standards Act (FLSA) cannot constitutionally apply to health, police, fire and other essential local government functions. With estimated increased costs of application to municipalities now exceeding 5 billion dollars per year this problem is major indeed as it will drastically curtail essential local safety protections.

On May 1, 1985 we forwarded to you a set of materials outlining our recommendations for an all-out legislative, executive and court battle to retain or regain for municipalities the exemption from FLSA won in National League but overruled in Garcia. The Supreme Court in fact limits its decision on pages 25 and 27 to the transit cases before it but refuses to "define" or "identify" local government impacts or policies of FLSA which are unconstitutional referring to its prior decisions as precedent for deciding only the transit "controversy before the Court." Slip. op., 25, 27.

We feel it important to have this lawsuit on the way to the U.S. Supreme Court in case the Congressional relief is not granted by the proposed legislation hereinafter referred to by me.

We are fortunate to have former U.S. Solicitor General Rex E. Lee agree to act as our lead counsel and fortunate also that the Attorney General, Edwin Meese, III, backs our position completely. Not only did he so tell this to NIMLO's recent Seminar on April 29 but in his address to the American Bar Association on July 9, 1985 he said:

"In Garcia v. San Antonio Metropolitan Transit Authority, the Court displayed what was in the view of this Administration an inaccurate reading of the text of the Constitution and a disregard for the Framers' intention that state and local governments be a buffer against the centralizing tendencies of the national Leviathan. Specifically, five Justices denied that the Tenth

GENERAL COUNSEL
CHARLES S. RHYNE
DEPUTY GENERAL COUNSEL
WILLIAM S. RHYNE
Washington, D.C.

Midyear Seminar, Washington, D.C., April 28-30, 1985
50th Annual Conference, Philadelphia, Pennsylvania, October 16-19, 1985

Exhibit A

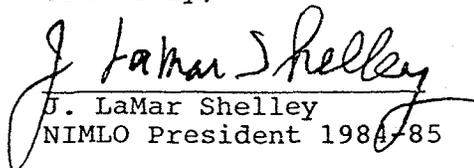
Amendment protects states from federal laws regulating the wages and hours of state and local employees. Thus the Court overruled -- but barely -- a contrary holding in National League of Cities v. Usery. We hope for a day when the Court returns to the basic principles of the Constitution as expressed in Usery; such instability in decisions concerning the fundamental principle of federalism does our Constitution no service."

NIMLO's fact survey has received reports from 281 municipalities reporting increased costs of over 400 million dollars per year. Translated by statistics into application to all municipalities this means a cost from FLSA application of over 5 billion dollars per year. This does not include the cost of changing and keeping city records to accord with FLSA and regulations under it of millions more in costs. The enormous increased costs of this preemption of local government policy and impact of limiting local government operations by the Federal Government could imperil local government's ability to furnish adequate safety, health, fire and police services thus creating a very serious local problem.

Reaction in the Congress against Garcia is similar to that of Attorney General Meese. Twenty-six members of Congress introduced a bill H.R. 2866 amending FLSA to restore compensatory time off for overtime for police, fire and other safety officers of local government. A similar bill is H.R. 2936. In the U.S. Senate, Senator Wallop of Wyoming has introduced a bill similar to the House bills, S. 798. Oversight hearings on Garcia have been scheduled by Senator Nickels of Oklahoma, Chairman of the Labor Subcommittee of the Senate Labor and Human Resources Committee for July 25, 1985. NIMLO's cost and preemption study will be presented by NIMLO Vice President Roger Cutler, City Attorney of Salt Lake City, to the Senate Hearing. The same report will be given to the White House staff for President Reagan and to the sponsors of the House bills.

Enclosed with this letter is an "FLSA Litigation Trust Fund Agreement" which all municipal, state and county agencies who want to maintain or regain exemptions from FLSA should sign and return as soon as possible. Non-members of NIMLO may join in this battle by executing the "agreement." We estimate the cost of the lawsuit to be filed by Mr. Lee and members of his Law Firm, Sidley and Austin, will be approximately \$400,000. Each contributor will have its contribution returned pro rata for any money contributed in excess of the costs of this effort.

Sincerely,


J. Lamar Shelley
NIMLO President 1984-85

Enclosure
JLS/kfq

Supreme Court Ruling Costly to Localities

Overtime Ruling Costly To Localities

Up to \$15 Million Expense for District

By Lee Hockstader
Washington Post Staff Writer

A recent Supreme Court ruling forcing state and local governments to adhere to federal wage and hour laws will add \$10 million to \$15 million a year to the costs of operating the D.C. government and hundreds of thousands of dollars to suburban governments, area officials say.

That is only a small portion of what is now estimated to be the overall \$2 billion to \$4 billion cost to state and local governments from the ruling that forces the governments to pay overtime wages to most of their workers instead of giving them compensatory time off.

"It's too much money," complained attorney Gilbert J. Ginsburg, a labor lawyer who is an adviser to many cities, including Alexandria and New York.

The ruling "hits very, very hard and is a burden," said Cornelius J. O'Kane, Fairfax County's personnel director. Officials there estimate the court's Feb. 19 ruling will cost Fairfax taxpayers \$500,000 to \$1 million a year.

Most of the added costs will come in overtime to police and firefighters, who in the past have earned substantial amounts of compensatory time off.

For example, one immediate impact of the ruling is in western states such as California, where thousands of firefighters will be collecting time-and-a-half overtime pay for battling the forest fires that were out of control in that region last week. Paying the California firefighters overtime wages, rather than compensating them with time off later, will cost \$10 million to \$20 million, according to James D. Mosman, the state's director of personnel administration.

Cities, which are expected to be hit the hardest when the Labor Department starts enforcing the court ruling Oct. 15, are raising the pos-

sibility of layoffs, reduced services or higher taxes. Officials in the Labor Department and the White House say they have been flooded with calls and letters from mayors worried about the impact of the ruling on their budgets.

Local governments attacked the ruling when it was announced, but say they are only now beginning to add up the likely costs as their budget and personnel officers supply them with more precise estimates.

"We are just now getting a handle on it, and it is very difficult," said Donald Weinberg, the District's director of labor relations. "It is causing a real problem."

District officials say the impact of the ruling here will not be as severe as in some other large cities because Washington already pays overtime to many of its employees. "If there are no other pressures then it is clearly manageable," said Betsy Reveal, the District's budget director. "But it cannot be seen in isolation. In combination with other pressures it could cause problems." The District's annual payroll is about \$850 million.

Under guidelines for the Fair Labor Standards Act, which state and local governments now must follow, police must receive overtime pay if they work more than 171 hours in a 28-day period. For firefighters, overtime must be paid after 212 hours.

Blue-collar employees in public works as well as clerical and technical employes, many of whom commonly work overtime hours, would also be covered. Teachers, as professional employes, are excluded from coverage under the law.

The Supreme Court ruling came in a case known as *Garcia v. San Antonio Metropolitan Transit Authority* on the question of whether overtime provisions in the act apply to municipal workers.

Joseph Garcia, a bus driver in San Antonio, had brought suit against the city, challenging its practice of paying time-and-a-half overtime only when bus drivers worked on their days off or on holidays. For all other overtime hours worked, bus drivers were paid at the normal hourly rate. The city said it should be exempt from the act; Garcia, backed by labor unions, said it should not.

The 5-to-4 high court ruling has diverse implications. For example: Municipalities will no longer be able to accept volunteer or submini-

imum wage services from their employes. Crossing guards—frequently senior citizens working for little or no pay—will have to be paid at least a minimum wage, for instance. This provision is expected to hurt small towns, which frequently depend on volunteer workers to a large degree.

Municipalities may have to pay substantial sums of overtime wages to police recruits in academies who devote long hours to their training. "We've heard of an instance where trainees are paid at a higher rate than police captains," said a White House official. The official, who asked not to be identified, said the likely effect in that instance would be a cutback in training time for police officers.

Public employes in some rural jurisdictions who saved compensatory time by working long hours in the winter so they could plant their crops in the spring will be unable to continue that practice.

In Puerto Rico, implementing the act is expected to cost millions of dollars because the government must start paying the minimum wage to public employes who have been earning less.

Officials also express fears of curtailed work by public safety employes, and cite the case of four D.C. homicide detectives whose investigation of a murder was cut short last week to avoid paying them overtime. The incident occurred shortly after police officials had circulated a memorandum outlining steps to comply with the ruling.

"There's an increasing degree of alarm about the costs and the disruption, both of which will be substantial," said the White House official.

Congressional hearings on the issue are scheduled for July 25, and three governors as well as a host of local officials are expected to raise the prospect of budget-busting expenses because of the ruling.

Groups such as the National Association of Counties and the National League of Cities also are increasing pressure on the Reagan administration to introduce legislation that would repeal overtime provisions of the Fair Labor Standards Act and effectively neutralize the fiscal impact of the Supreme Court's ruling.

The White House official acknowledged that the administration is considering backing such a bill.

Congressional aides say the measure would be opposed by organized labor, and would stand little chance of passage in the Democratic-controlled House of Representatives.

"What happens on the House side depends on how much pressure we can gin up," said one Senate aide who would like to see the *Garcia* decision undone by Congress. "But politically I just don't think we can do it."

Susan Meisinger, deputy undersecretary for employment standards in the Labor Department, said she believes legislation is possible. "There's a growing concern about the impact," she said. "What happens depends on how hard state and local governments push."

In a speech to the American Bar Association last week, Attorney General Edwin Meese III blasted the court for the *Garcia* ruling, declaring that it "undermines the stability" of state and local governments.

To comply with the ruling, Los Angeles will have to pay \$100 million a year; San Francisco, \$50 million, and New York, \$40 million, according to Cynthia M. Pols, counsel to the National League of Cities.

Many municipalities are in the process of determining how many of their workers are covered by the federal guidelines and how many are not. Some personnel officials acknowledge privately that in borderline cases where there is room for discretion, governments may tend to classify workers as exempt from the law, and therefore ineligible for premium pay.

State and local government officials also are afraid of the effects of a provision in the federal law that allows employes to bring private lawsuits to recover back overtime pay. Because the court's ruling was effective April 15, any municipal worker who wants to collect overtime since that date will be able to do so, along with a penalty doubling the overtime payment.

Ironically, although labor union officials initially were elated by the Supreme Court decision in February, some are now acknowledging that their members are unhappy about losing compensatory time off.

COUNCIL COMMUNICATION

TO: THE CITY COUNCIL	DATE	NO.
FROM: THE CITY MANAGER'S OFFICE	AUGUST 1, 1985	
SUBJECT: FAIR LABOR STANDARDS ACT (FLSA)		

Attached hereto as Exhibit "A" and incorporated herein by reference, is a July 19, 1985 letter which I received from the National Institute of Municipal Law Officers (NIMLO). They are requesting the City of Lodi to join in a litigation trust fund to be used for expenses, legal fees, experts and others, to support litigation in attacking the provisions of the Fair Labor Standards Act (FLSA) as interpreted in Garcia v. San Antonio because of its burdensome, costly and unconstitutional impact on municipalities.

Specifically, as you may remember, Garcia v. San Antonio Metropolitan Transit Authority applied the FLSA to local municipalities. The NIMLO Executive Committee has voted to recommend the filing of a lawsuit seeking a declaratory judgment that the required changes in policies and the enormous costs to the cities for the enforcement of the FLSA, cannot constitutionally apply to health, police, fire and other essential local government functions.

As you may be aware, there are at this time congressional solutions being looked at as it relates to the FLSA, however, NIMLO is concerned that these congressional solutions may not be forthcoming in the near future, and believes that a lawsuit to clarify the holding of Garcia might be apropos.

Attached hereto as Exhibit "B" is the NIMLO FLSA Litigation Trust Fund Agreement which we would enter into. Our participating share would be \$1,000.00 and that amount would be returned to the City if no litigation were pursued.

It is my recommendation that you do make this \$1,000.00 payment to the Trust Fund.


RONALD M. STEIN
CITY ATTORNEY

RMS:vc

attachments



National Municipal Litigation Center of the National Municipal Legal Defense Fund
1000 Connecticut Avenue, N.W., Suite 800, Washington, D.C. 20036 (202) 466-5424

PRESIDENT
J. LAMAR SHELLEY
City Attorney
Mesa, Arizona

FIRST VICE PRESIDENT
JOHN W. WITT
City Attorney
San Diego, California

SECOND VICE PRESIDENT
ROGER F. CUTLER
City Attorney
Salt Lake City, Utah

THIRD VICE PRESIDENT
GEORGE AGNOST
City Attorney
San Francisco, California

TREASURER
ROY D. BATES
City Attorney
Columbia, South Carolina

TRUSTEES:

BENJAMIN L. BROWN
Immediate Past President
City Solicitor
Baltimore, Maryland

ROBERT J. ALFTON
City Attorney
Minneapolis, Minnesota

JAMES K. BAKER
City Attorney
Birmingham, Alabama

MARVA JONES BROOKS
City Attorney
Atlanta, Georgia

DOUGLAS N. JEWETT
City Attorney
Seattle, Washington

BARBARA MATHER
City Solicitor
Philadelphia, Pennsylvania

JAMES D. MONTGOMERY
Corporation Counsel
Chicago, Illinois

JOSEPH I. MULLIGAN
Corporation Counsel
Boston, Massachusetts

ANALESIE MUNCY
City Attorney
Dallas, Texas

CLIFFORD D. PIERCE, JR.
City Attorney
Memphis, Tennessee

WILLIAM H. TAUBE
Corporation Counsel
Kankakee, Illinois

WILLIAM I. THORNTON, JR.
City Attorney
Durham, North Carolina

July 19, 1985

GENERAL COUNSEL
CHARLES S. RHYNE
DEPUTY GENERAL COUNSEL
WILLIAM S. RHYNE
Washington, D.C.

Dear NIMLO Member:

The Executive Committee has voted to recommend the filing of a lawsuit seeking a declaratory judgment that required changes in policies and the enormous cost of the Fair Labor Standards Act (FLSA) cannot constitutionally apply to health, police, fire and other essential local government functions. With estimated increased costs of application to municipalities now exceeding 5 billion dollars per year this problem is major indeed as it will drastically curtail essential local safety protections.

On May 1, 1985 we forwarded to you a set of materials outlining our recommendations for an all-out legislative, executive and court battle to retain or regain for municipalities the exemption from FLSA won in National League but overruled in Garcia. The Supreme Court in fact limits its decision on pages 25 and 27 to the transit cases before it but refuses to "define" or "identify" local government impacts or policies of FLSA which are unconstitutional referring to its prior decisions as precedent for deciding only the transit "controversy before the Court." Slip. op., 25, 27.

We feel it important to have this lawsuit on the way to the U.S. Supreme Court in case the Congressional relief is not granted by the proposed legislation hereinafter referred to by me.

We are fortunate to have former U.S. Solicitor General Rex E. Lee agree to act as our lead counsel and fortunate also that the Attorney General, Edwin Meese, III, backs our position completely. Not only did he so tell this to NIMLO's recent Seminar on April 29 but in his address to the American Bar Association on July 9, 1985 he said:

"In Garcia v. San Antonio Metropolitan Transit Authority, the Court displayed what was in the view of this Administration an inaccurate reading of the text of the Constitution and a disregard for the Framers' intention that state and local governments be a buffer against the centralizing tendencies of the national Leviathan. Specifically, five Justices denied that the Tenth

Midyear Seminar, Washington, D.C., April 28-30, 1985
50th Annual Conference, Philadelphia, Pennsylvania, October 16-19, 1985

Exhibit A

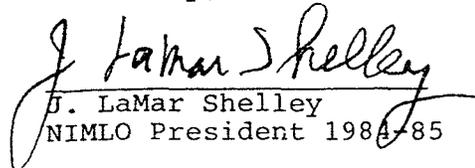
Amendment protects states from federal laws regulating the wages and hours of state and local employees. Thus the Court overruled -- but barely -- a contrary holding in National League of Cities v. Usery. We hope for a day when the Court returns to the basic principles of the Constitution as expressed in Usery; such instability in decisions concerning the fundamental principle of federalism does our Constitution no service."

NIMLO's fact survey has received reports from 281 municipalities reporting increased costs of over 400 million dollars per year. Translated by statistics into application to all municipalities this means a cost from FLSA application of over 5 billion dollars per year. This does not include the cost of changing and keeping city records to accord with FLSA and regulations under it of millions more in costs. The enormous increased costs of this preemption of local government policy and impact of limiting local government operations by the Federal Government could imperil local government's ability to furnish adequate safety, health, fire and police services thus creating a very serious local problem.

Reaction in the Congress against Garcia is similar to that of Attorney General Meese. Twenty-six members of Congress introduced a bill H.R. 2866 amending FLSA to restore compensatory time off for overtime for police, fire and other safety officers of local government. A similar bill is H.R. 2936. In the U.S. Senate, Senator Wallop of Wyoming has introduced a bill similar to the House bills, S. 798. Oversight hearings on Garcia have been scheduled by Senator Nickels of Oklahoma, Chairman of the Labor Subcommittee of the Senate Labor and Human Resources Committee for July 25, 1985. NIMLO's cost and preemption study will be presented by NIMLO Vice President Roger Cutler, City Attorney of Salt Lake City, to the Senate Hearing. The same report will be given to the White House staff for President Reagan and to the sponsors of the House bills.

Enclosed with this letter is an "FLSA Litigation Trust Fund Agreement" which all municipal, state and county agencies who want to maintain or regain exemptions from FLSA should sign and return as soon as possible. Non-members of NIMLO may join in this battle by executing the "agreement." We estimate the cost of the lawsuit to be filed by Mr. Lee and members of his Law Firm, Sidley and Austin, will be approximately \$400,000. Each contributor will have its contribution returned pro rata for any money contributed in excess of the costs of this effort.

Sincerely,


J. Lamar Shelley
NIMLO President 1984-85

Enclosure
JLS/kfq