No. 81-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND
THE CITY OF JACKSON, TENNESSEE,

Petitioners,

v.

LOCAL DIVISION 1285, AMALGAMATED
TRANSIT UNION, AFL-CIO-CLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF PUBLIC SERVICE RESEARCH COUNCIL AND BRIEF OF PUBLIC SERVICE RESEARCH COUNCIL AS AMICUS CURIAE

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The Public Service Research Council respectfully moves for leave to file the annexed brief *amicus curiae*.* In support of this motion, the Council states:

Public Service Research Council is an independent national citizens' organization engaged in nonpartisan research and

* Pursuant to Rule 36 of the Rules of this Court, Public Service Research Council requested consent of the parties to the filing of a brief *amicus curiae* in this case. Counsel for Petitioners has taken no position regarding the filing of this brief, while Counsel for Respondent has refused to consent to the filing of said brief, necessitating this motion. Counsel for Petitioner's letter will be sent directly to the Court. Counsel for Respondent's letter has been filed with the Clerk of the Court.

education concerning public service unionism and its effects upon the nation's governmental institutions and their services to all Americans. It is a voluntary association of private citizens, legislators, scholars, and commentators united by a common concern with the maintenance of limited, constitutional government. With over 900,000 members, the Council is the nation's largest citizens' organization concerned exclusively with curbing the abuses of public sector unions in the United States. Public Service Research Council's request for leave of the Court to file the annexed brief as *amicus curiae* is in furtherance of its continual effort to achieve its stated goals.

Because of the Council's above stated fundamental concerns, it has been active as a friend of the court at all levels of the legal process to affect evolving concepts of law in connection with various matters in the public interest and has filed briefs *amicus curiae* in *National League of Cities, et al.* v. *Hon. Peter J. Brennan* and *State of California* v. *Hon. Peter J. Brennan*, Supreme Court of the United States, Nos. 74-878 and 74-879; *City of Madison Joint School District No. 8, et al.* v. *Wisconsin Employment Relations Commission, et al.*, Supreme Court of the United States, No. 75-946; *Commonwealth of Virginia* v. *The Board of Supervisors of Arlington County, et al.*, and *Commonwealth of Virginia* v. *The County School Board of Arlington County, et al.*, Supreme Court of Appeals for the Commonwealth of Virginia, Nos. 18747 and 18748, 1976; and *Pacific Legal Foundation and Public Employees Service Association* v. *Edmund G. Brown, Jr., Public Employees Relations Board, and Kenneth Cory* and *People of the State of California* v. *Edmund G. Brown, Jr., State Personnel Board, and Kenneth Cory*, Court of Appeal of the State of California for the Third Appellate District, 3 Civil No. 18364 and 3 Civil No. 18412, 1979. Most recently, the Council filed briefs *amicus curiae* in *United States of America* v. *Professional Air Traffic Controllers Organization, et al.*, United States District Court for the District of Columbia, Civil Action No. 81-1805, *United States*

of America v. *Professional Air Traffic Controllers Organization, et al.*, United States District Court for the Eastern District of Virginia, Civil Action No. 81-0763A; *Air Transport Association of America, et al.* v. *Professional Air Traffic Controllers Organization, et al.*, United States District Court for the Eastern District of New York, No. 70-C-400. Further the Council has recently been permitted to file a brief *amicus curiae* in this Court in *Professional Air Traffic Controllers Organization, et al.* v. *United States of America*, No. 81-542.

Movant believes that the positions it is advancing, particularly the arguments relating to the principles of the separation of powers and federalism, will not be fully argued to the Court by the parties in the instant case. The underlying issues of the case being of vital public interest and Public Service Research Council being interested in providing additional assistance and views to this Court as *amicus curiae*, movant respectfully requests that its motion for leave to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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BRIEF OF PUBLIC SERVICE RESEARCH COUNCIL AS AMICUS CURIAE

This brief *amicus curiae* on behalf of the Public Research Council is filed contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

The interest of the Public Service Research Council is set forth in its foregoing motion for leave to file a brief as *amicus curiae*.

SUMMARY OF ARGUMENT

The central question before this Court is whether Congress, in enacting the Urban Mass Transportation Act of 1964 (UMTA

or the Act), 49 U.S.C. § 1601 *et seq.*, created a federal private right of action for employees of a municipally owned transit system for an alleged breach of a local collective bargaining agreement.

Before resolution of this issue, however, it is necessary to establish that a cause of action exists on the facts of this case. Although there is no precise definition, a cause of action generally requires that the party asserting the right be injured by another's violation of a legal obligation. In this case these requirements are not met. Section 13(c) of UMTA simply sets forth preconditions to the granting of federal assistance. Once a municipality has met these conditions and a grant has been made, its duty under Section 13(c) has come to an end. The City of Jackson met the preconditions of Section 13(c) and received a grant. The union has obviously not been injured by this grant. The city's duty under Section 13(c) having been met, and the union having suffered no injury, there can be no cause of action based on Section 13(c).

Moreover, creation of an implied federal private right of action would violate the separation of powers doctrine. There is no dispute in this case that UMTA does not provide an express federal private right of action. If such a right exists at all, it must be implied. *Cort* v. *Ash*, 422 U.S. 66 (1975), and its progeny permit federal courts to consider factors other than the intent of Congress in determining whether such a right of action exists. This rule invites federal courts to rewrite statutes according to their wishes. Indeed, it enables them to find implied rights of action where Congress has expressed no intent at all to do so. In this case the Circuit Court itself acknowledged that Congress had not expressed itself on the creation of a private right of action under UMTA, but found one nonetheless. Yet, if Congress, and not the federal courts, is to write the laws, the courts should consider only the intent of Congress in construing federal statutes, as it is expressed in the plain language of such

statutes. The decision of the Circuit Court thus clearly violates the separation of powers doctrine and should be overruled, along with the *Cort* test which made it possible.

Furthermore, UMTA is unquestionably a federal financial assistance program. The express Congressional purpose of the legislation is to assist and encourage state and local entities to develop mass transportation systems through federal funding. UMTA is not a regulatory statute. Nowhere in the Act does Congress express an intent to interject the federal courts into local labor contract disputes or to preempt state remedies enforceable in state courts.

As is clearly expressed in Section 13(c) of UMTA, Congress intended that certain existing labor protections should be afforded to local transit employees as a precondition to receiving federal financial assistance. Congress does not expressly provide for federal judicial enforcement of the statutory provisions.

Likewise, nowhere in the legislative history of UMTA is federal judicial enforcement discussed. The only enforcement mechanism mentioned for Section 13(c) is the traditional mode of enforcement under such federal assistance programs — the denial or elimination of federal funds should certain conditions not be met. Since the language of the statute and its legislative history do not suggest that the Act was intended to create federal private labor rights, and because there is no evidence that Congress anticipated that there would be a federal private judicial remedy, such a federal private right of action should not be implied.

In addition, creation of an implied right of action under Section 13(c) violates the Tenth Amendment. The Court has held in *National League of Cities* v. *Usery*, 426 U.S. 33 (1976), and its progeny that the Tenth Amendment prevents the Congress from impairing basic attributes of state sovereignty in the

exercise of its power, among them the authority of the states to set the terms of employment of state and local transit workers. Yet, this prohibition of the Tenth Amendment is not limited in its application solely to Congress' power to regulate commerce. It does not apply selectively to certain powers of Congress and not to others, but reaches all Congressional authority. Thus, just as the Tenth Amendment bars the Congress from regulating state and local transit labor relations under the commerce power, it bars Congress from achieving the same effect under the spending power through the provisions of UMTA. Similarly, it prevents Congress from authorizing the federal courts to exercise such regulatory authority in the guise of a federal private right of action under its power over federal court jurisdiction. Nor can the courts undertake such regulation under their own powers. The Tenth Amendment acts as a restraint on the federal government as a whole and applies to federal courts as well as Congress. Therefore, creation of a federal private right of action violates the Tenth Amendment, and the decision of the Circuit Court upholding such a right should be reversed.

ARGUMENT

I. The City Of Jackson Did Not Violate Section 13(c) Of The Urban Mass Transportation Act, The Union Did Not Suffer An Injury Under The 1966 Federal Grant To The City, And In The Absence Of Both A Violation And An Injury There Is No Cause Of Action.

The principal and controlling issue of this case is whether Section 13(c) of the Urban Mass Transportation Act of 1964 (UMTA or the Act), 49 U.S.C. § 1609(c), creates a federal private right of action for an alleged breach of a local collective bargaining agreement, thereby conferring federal question jurisdiction on the federal courts. Preliminary to a resolution of this question, however, it must first be established that a cause of action, whether express or implied, exists under the facts presented.

Section 13(c) of the Act provides that as a condition of federal funding the recipient must first make "fair and equitable arrangements . . . to protect the interests of employees affected by such assistance," including, but not limited to: (1) "the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements;" (2) "the continuation of collective bargaining rights;" (3) "the protection of individual employees against a worsening of their positions with respect to their employment;" (4) "assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off;" and (5) "paid training or retraining programs." 49 U.S.C. § 1609(c). This provision of the Act, added as an amendment, was included in anticipation of the likelihood that certain municipalities under the program would acquire existing privately owned transportation companies, whose employees would lose their protection under the National Labor Relations Act (NLRA) because, as employees of a municipal agency, they would be exempted from NLRA authority. The obvious purpose of Section 13(c) was not to confer new rights on employees, extend the NLRA to include public employees, or enlarge the jurisdiction of the federal courts, but simply to assist such employees during the transition from private employment to public in making "fair and equitable arrangements" for the "preservation" of their "existing" rights and privileges. Believing that it was not "feasible to enumerate or set forth in great detail the provisions that may be necessary to assure the fair and equitable treatment of employees in each case," and giving no indication that Section 13(c) was intended to place municipal transit employees under the aegis of the NLRA or any other regulatory scheme, the authors of this legislation declared that "specific conditions" of employment would be "the product of local bargaining and negotiation" — subject not to the standards of national labor policy, but "to the basic standards of fair and equitable treat-

ment;" subject not to a judicial determination of their rights and privileges, but to an administrative determination by the Secretary of Labor, who "will assume responsibility for developing criteria as to the types of provisions that may be considered as necessary to insure that worker interests are adequately protected. . . . " S. Rept. No. 82, 88th Cong., 1st Sess. 28.

In order to qualify for a federal grant, Jackson entered into a so-called Section 13(c) Agreement in 1966 with Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC, which had served as the collective bargaining unit for the transit employees since 1943. This agreement was submitted to the Secretary of Labor, who certified that it met the "fair and equitable" standard of Section 13(c), and Jackson received a grant of $279,000. At this time Jackson also entered into a management contract with T. O. Petty to manage Jackson's transit system. Between 1966 and 1975, Petty and the Union made three collective bargaining agreements, each of three years duration.

The present dispute concerns none of these agreements, which the Union concedes were never breached, but the fourth collective bargaining agreement, covering the period between April 1, 1975 and April 1, 1978. Shortly after this agreement was negotiated, Petty resigned as manager and the management contract was terminated. Jackson notified the Union in December, 1975 that this fourth agreement was neither valid nor binding. Unsuccessful in its effort to gain a determination from either the Secretaries of Labor or Transportation that Jackson had violated the Section 13(c) agreement, the Union filed this action in the United States District Court for the Western District of Tennessee, seeking, *inter alia,* monetary and injunctive relief against Jackson. At the time this complaint was filed, Jackson had received no other UMTA grants since 1966.

Significantly, the Union's Complaint did not allege that Jackson had violated Section 13(c) or any other provision of

UMTA. This is not surprising in view of the fact that a Section 13(c) Agreement was executed in 1966, and certified by the Secretary of Labor as "fair and equitable" before Jackson received its grant. Nor has the Union claimed that any Jackson employees have suffered any injury under the 1966 grant. In brief, every requirement of Section 13(c) has been met.

Although the precise meaning of a "private cause of action" is not entirely clear, the term is generally understood to refer "to the right of a private party to seek judicial relief from injuries caused by another's violation of a legal requirement. In the context of legislation enacted by Congress, the legal requirement involved is a statutory duty." *Cannon* v. *University of Chicago*, 441 U.S. 677, 730 n. 1 (1979) (Powell, J., dissenting). Thus, in order to sustain a private cause of action, there must be both an *injury* and a *violation* of the statute. Respondent has claimed neither an injury under the 1966 grant nor a violation of Section 13(c).

Indeed, Section 13(c) imposes no legal obligation on the recipient of a grant that would give rise to a violation of the statute. If a municipality fails to make "fair and equitable" arrangements for the protection of employee interests, to the satisfaction of the Secretary of Labor, it incurs no legal penalty. At best, the disappointed grant applicant under Section 13(c) which cannot meet the precondition requirements suffers an economic loss through a denial of federal funding. The City of Jackson would not have been in violation of Section 13(c) had it been unable to produce an agreement acceptable to the Secretary of Labor.

But having once produced an acceptable "arrangement," the City met the only obligation explicitly imposed and knowingly accepted under Section 13(c); and that obligation was essentially a political one negotiated between the Secretary of Labor and the City of Jackson as a precondition to federal funding. Likewise, Section 13(c) does not state or imply that a recipient,

having met the condition and accepted the grant, thereby incurs a new, continuing, legal obligation to the Union, subject to federal judicial enforcement. The singular obligation of the City of Jackson under Section 13(c) runs not to the Union, but to the Secretary of Labor.

It thus appears that the only statutory duty imposed by the provision in question is that placed upon the Secretary of Labor to determine whether the applicant for a grant has made satisfactory arrangements for the protection of employee interests. As the Court below has already acknowledged, the Secretary has no statutory duty to enforce Section 13(c) agreements after he has made an administrative determination that they are acceptable under the standards set forth in Section 13(c). 650 F.2d 1379 (6th Cir. 1981).

There being no injury under the 1966 grant and no violation of the statute (since none was prescribed), there can be no private cause of action, either express or implied, for which relief can be granted.

II. By Creating An Implied Right Of Action In The Absence Of An Expressed Intention By Congress To Confer Such Jurisdiction, A Federal Court Usurps The Authority Of Congress And Violates The Separation Of Powers

Section 13(c) does not define the meaning and substance of the rights and privileges enjoyed by public employees under a "fair and equitable" arrangement that the Secretary of Labor has approved. When it enacted UMTA, Congress "expected that *specific* conditions normally will be the product at *local bargaining and negotiation*, subject to the basic standard of fair and equitable treatment." S. Rept. No. 82, *supra* at 28. Whatever their content, then, the rights and privileges secured under Section 13(c) are bargained for by the employees and their representatives. No rights are conferred by the Secretary of Labor, whose function is simply to veto or accept a negotiated

settlement, subject only to the inchoate standard of fairness as determined by the Secretary.

As previously noted, Section 13(c) is equally silent regarding the form and substance of violations under its provisions. Understandably, therefore, Section 13(c) also makes no mention of a private right of action. In short, the provision in question confers no concrete rights on public employees, is mute on the question of what action constitutes a violation of such undefined rights, imposes no legal obligation on grant recipients to guarantee protection of such rights, and contains no express provision that a party claiming injury under Section 13(c) has a private right of action for federal judicial relief from injury caused by another's violation of a legal duty under the statute.

In the face of this reigning silence, which serves as the surest guide to legislative intent, the United States Court of Appeals for the Sixth Circuit has nevertheless held that Section 13(c) creates an implied private federal cause of action for employees of local transit authorities under the theory that, because "Section 13(c) reflects *national* labor policy" and preserves "federal rights," Congress implicitly intended that contracts embodying "fair and equitable" arrangements were to be enforceable in federal courts. 650 F.2d at 1383, 1385-86. Applying the analysis under *Cort* v. *Ash*, 422 U.S. 66 (1975), the Court concluded that all four factors characteristic of an implied right of action were present in Section 13(c).

The first factor under the *Cort* analysis requires that the plaintiff be "one of the class for whose *especial* benefit the statute was enacted." *Texas and Pacific R. Co.* v. *Rigsby*, 241 U.S. 33, 39 (1916) (emphasis added). The Court found that Section 13(c) "was enacted for the 'especial' benefit of transit employees," and without argument assumed that it "creates federal rights on their behalves *(sic)*." 650 F.2d at 1384. The second factor under *Cort* requires that there be some "indication

of legislative intent, explicit or implicit, either to create such a remedy or to deny one.'" *Id.* at 1384. Conceding that "legislative intent is the most significant" factor of the *Cort* analysis and acknowledging that the "legislative history of Section 13(c) is not explicit," the Court nevertheless concluded that Section 13(c) implied a private right of action "by default." *Id.* at 1385. The Court's reasoning on this point is not entirely clear, but the argument seems to be that Congress impliedly intended to provide federal judicial relief for a breach of a collective bargaining agreement because "[t]he Act offers no administrative solution to the problem of enforcing Section 13(c) agreements." *Id.* at 1385. Why Congress' silence cannot be interpreted as an intent to allow State tribunals to enforce such agreements the Court does not say, but the assumption seems to be that Section 13(c) confers "federal" rights that must be adjudicated by the federal judiciary. Such an assumption is, of course, based on the policy considerations of the Court rather than Congress; for state courts may and do litigate federal constitutional questions. "State judges in assuming office take an oath to support the federal as well as the state constitution."[1] This Court ought not indulge the presumption that Congress intended by its silence to enlarge the federal question jurisdiction of the federal courts in matters affecting the inchoate rights of public employees who are already under *state* coverage as a matter of *national* policy. *See, National League of Cities* v. *Usery,* 426 U.S. 833 (1976).

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[1] "State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions where a *full* and *fair* adjudication has been given in the state court." Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 Wm. & Mary L. Rev. 801, 814-15 (1981).

It is submitted, therefore, that the four-factor analysis of *Cort* "is an open invitation to federal courts to legislate courses of action not authorized by Congress," *Cannon*, 441 U.S. at 731 (Powell, J., dissenting), and, although not necessary to a resolution of the case, that *Cort* v. *Ash*, should be overruled as an unconstitutional rule of statutory construction in violation of the separation of powers, as well as the decision of the Sixth Circuit in the case at hand.

In recent cases, this Court has repeatedly emphasized that the question whether a statute creates a private right of action is ultimately "one of Congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross* v. *Redington*, 422 U.S. 560, 578 (1979). *See, Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15-16 (1979); *Universities Research Ass'n* v. *Coutu*, ____ U.S. ____ , 101 S. Ct. 1451, 1461 (1981). In seeking an understanding of such intent, the focal point of inquiry is the status under which the right of action is claimed. "The question of the existence of a statutory cause of action is, of course, one of statutory construction." *Cannon*, 441 U.S. at 688; *Touche Ross & Co.*, 442 U.S. at 568. Thus, "as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself." *Id.* at 568. The intent of the legislature, then, is the object of construction, but it is first to be sought in the words of the statute.

It is a cardinal and universal rule of statutory construction, dating back to the establishment of our government, however, "that if the statute is plain and unambiguous, there is no room for construction or interpretation. The legislature has spoken; their intention is free from doubt, and their will must be obeyed." Theodore Sedgwick, *Treatise on . . . the Interpretation and Construction of Statutory and Constitutional Law*, 194-95 (1874). Very early in the history of the American

Constitution, the Supreme Court embraced this rule of interpretation, insisting that "where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." *United States* v. *Fisher*, 2 Cranch 358, 399 (1805).

The fatal defect of the *Cort* analysis is that it improperly treats the silences of a statute as an ambiguity rather than its plain meaning, and seizes upon the absence of language as an excuse for excogitating the intent of Congress outside of the statute, or worse, for disregarding intent altogether in favor of extraneous considerations. As one member of this Court has astutely observed, "Of the four factors mentioned in *Cort*, only one refers expressly to legislative intent. The other three invite independent judicial lawmaking. Asking whether a statute creates a right in favor of a private party, for example, begs the question at issue. What is involved is not the mere existence of a legal right, but a particular person's right to invoke the power of the courts to enforce that right." *Cannon*, 441 U.S. at 740 (Powell, J., dissenting). The *Cort* analysis, in other words, is incompatible with the basic principle of statutory construction that "it is only when the language is ambiguous that the courts are called on to construe or interpret; and then . . . the object is to ascertain the intent of the Legislature." Sedgwick, *supra* at 195. "Nor is it lightly to be inferred," adds Cooley, "that any portion of a written law is so ambiguous as to require extrinsic aid in its construction." Thomas M. Cooley, *Treatise on Constitutional Limitations* 57 (1871).

Moreover, the *Cort* analysis, as applied under some circumstances, has been used to confer a right of action where none was expressed under the spurious theory that because Congress did not express an intent to *deny* a private cause of action, it must have intended by its silence to have created one. *See*, e.g., *Cort*, 442 U.S. at 82; *Cannon*, 441 U.S. at 694;

Transamerica Mortgage Advisors, 444 U.S. at 28 (White, J., dissenting). This rule of interpretation, it is clear, creates an arbitrary presumption and imposes an intolerable burden on Congress to affirm the non-existence of a private right of action whenever it enacts a law that is not intended to confer such a right. In opposition to such a principle of construction, this Court declared more than a century ago while construing the Embargo laws:

> it has been truly stated to be the duty of the court to effect the intention of the Legislature; but this intention is to be searched for in the words which the Legislature has employed to convey it . . . But should this Court conjecture that some other act, *not expressly forbidden* . . . might also be a preliminary step to a violation of the law, and ought therefore to be punished for the purpose of effecting the legislative intention, it would certainly transcend its own duties and powers, and would create a rule instead of applying one already made. [*Schooner Paulina's Cargo* v. *United States*, 7 Cranch 52, 60 (1813).]

In summary, the basic rules of statutory construction under the American doctrine of separation of powers demand, that where there is no ambiguity in the wording of a statute, and Congress has not expressly provided for a private cause of action, that none may be implied. *See, Cannon*, 441 U.S. at 731 (Powell, J., dissenting). "Where the meaning of the statute, as it stands, is clear, they [judges] have no power to insert qualifications, engraft exceptions, or make modifications under the idea of providing for cases to which the Legislature has omitted any specific provisions." Sedgwick, *supra* at 326. The conclusion is inescapable that "By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve. This runs contrary to the established principle that '[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . . and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction.'" *Cannon*, 441 U.S. at 746-47 (Powell, J., dissenting).

Accordingly, there is not only a "need to re-examine the *Cort* analysis," *Id.* at 742, but to recognize it as an unconstitutional exercise of judicial power requiring the reversal of *Cort* v. *Ash* and its progeny.

III. Congress Did Not Intend That The Urban Mass Transportation Act Of 1964 Provide A Federal Private Right Of Action.

A. *The Express Purpose Of The Urban Mass Transportation Act Of 1964 Is To Provide Financial Assistance, Not Exercise Regulatory Authority*

The Urban Mass Transportation Act of 1964, viewed in its entirety, is unquestionably a federal financial grant program, which was fashioned by Congress to assist in the remedy of certain stated urban problems. 49 U.S.C. § 1601(a). Congress determined "that Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems." 49 U.S.C. § 1601(a)(3). The specific purposes for which the legislation was enacted are set forth in 49 U.S.C. § 1601(b):

> (1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;
>
> (2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private; and
>
> (3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

Thus, the express Congressional objective underlying the legislation is to assist and encourage state and local entities to

develop mass transportation systems and programs through federal funding, as determined by local requisites. In passing UMTA the Congress exercised its federal spending power to deal with urban mass transit problems. It did not exercise any regulatory power to set out a federal labor policy over employees of the mass transit industry. [2] Nowhere in the Act does Congress express an intent: to legislate a body of new federal labor law for transit employees; to interject the federal courts into local labor contract disputes; or to preempt state remedies enforceable in state courts. Indeed, there is no dispute that UMTA does not expressly provide a federal private right of action.

The Respondent Transit Union, however, argued below that Section 13(c) of UMTA, 49 U.S.C. § 1609(c), provides the basis by which a federal private right of action should be implied by the federal courts in order to acquire jurisdiction over local labor contract controversies. [3]

As is clearly set forth in Section 13(c) of UMTA, Congress intended that certain existing labor protections should be afforded to employees who otherwise might be disadvantaged as a result of federal assistance under the Act. These protections are to be afforded before the grant is approved; they are preconditions or prerequisites to receiving federal funding assistance.

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[2] Indeed, this legislation was never referred to either the Senate Committee on Labor and Public Welfare or the House Committee on Education and Labor for consideration, but was the product of the Senate Committee on Banking and Currency, the Senate Committee on Commerce, and the House Committee on Banking and Currency.

[3] Respondent makes this contention even though, as Judge Merritt (dissenting) stated below: "There is no reason to think that state courts in the performance of their traditional, common law role cannot decide these private breach of contract cases just as fairly and just as efficiently as federal courts." 650 F.2d at 1389.

Moreover, UMTA contains several such provisions requiring certain preconditions for obtaining the federal funding,[4] as do numerous other federal financial assistance programs.[5] If Respondent is successful in its contention here, one could logically next conclude that Congress intended the enlargement of federal court jurisdiction from all of these many federal statutory provisions.

The Congress has provided for private federal rights of action on numerous occasions.[6] If Congress had intended to provide a private federal right of action under UMTA, it would have expressly done so, just as it has in these other instances. And absent such express provisions, courts should not indulge in legal fiction to imply such a right, particularly, as here, where (1) the issue in the case (alleged breach of a local collective bargaining agreement) only obliquely pertains to the federal statutory provision in question (Section 13(c) of UMTA) and, (2) there are adequate remedies available in state courts.

As Mr. Justice White recently stated in *California* v. *Sierra Club:*

> the focus of the inquiry is on whether Congress intended to create a remedy. (Citing *Universities Research Ass'n.* v.

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[4] For example, other preconditions include: (1) relocation assistance to displaced families (49 U.S.C. § 1606); (2) requirements regarding environmental protections (49 U.S.C. § 1610); and, (3) adequate assurance relating to required labor standards (49 U.S.C. § 1609(a)).

[5] Such provisions include: Section 103 of the National Mass Transportation Assistance Act of 1974, 49 U.S.C. §1602; Section 164 of the Federal Aid Highway Act of 1973, Pub. L. No. 93-87, 87 Stat. 250; Section 516 of the Railroad Revitalization and Regulatory Act of 1976, 45 U.S.C. § 836; and Section 801 of the Mental Health Systems Act, 42 U.S.C. § 9521.

[6] *See*, 42 U.S.C. § 1983 (civil action for deprivation of rights); 5 U.S.C. § 7123 (judicial review and enforcement of orders arising from federal labor-management relations administrative proceedings); and 42 U.S.C. § 2000c-8 (personal suits for relief against discrimination in public education).

Coutu, ____ U.S. ____ , ____ , 101 S.Ct. 1451, 1458, 67 L. Ed. 2d (1981); *Transamerica Mortgage Advisors* v. *Lewis*, 444 U.S. 11, 23-24 (1979); and *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575-576 (1979).) The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide. [____ U.S. ____ , 101 S. Ct. 1775, 1781 (1981).]

In *Cannon* Mr. Justice Powell expressed the same concern:

> *Under Art. III, Congress alone has the responsibility for determining the jurisdiction of the lower federal courts.* As the Legislative Branch, *Congress also should determine when private parties are to be given causes of action under legislation it adopts.* As countless statutes demonstrates, including titles of the Civil Rights Act of 1964, Congress recognizes that the creation of private actions is a legislative function and frequently exercises it. *When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction.* [441 U.S. at 730-31 (Powell, J., dissenting) (emphasis added).]

B. The Legislative History Of The Urban Mass Transportation Act Of 1964 Exhibits No Congressional Intent To Create A Federal Private Right Of Action

Nowhere in the legislative history of UMTA is federal judicial enforcement discussed. The only mention of judicial enforcement is a reference to state courts. This occurred during a Senate floor colloquy after Senator Morse, a strong supporter of labor protections, offered an amendment which subsequently passed the Senate, and which is substantially the same as the Section 13(c) provision. Senator Goldwater was especially concerned that the amendment would not preempt state law, particularly where strikes against public agencies are prohibited:

> Mr. GOLDWATER. *Then, as a final word the language proposed by the Senator from Oregon or the lan-*

guage of the bill as it now stands in no way would preempt State law.

Mr. MORSE. *The answer is yes;* and particularly as I have mentioned. If the collective bargaining should be taken over by a public agency in the exceptional case described, the right to strike against the public agency would be taken away from labor. But that is not a contractual right; it is not among the contractual rights the State agency must recognize in order to have an application for aid considered.

Mr. GOLDWATER. The right to strike against the public agency.

Mr. MORSE. Against the public agency where the State or local law forbids the right to strike.

Mr. GOLDWATER. If there is a local law, the language of the Senator from Oregon would not prevail.

Mr. MORSE. The Senator is correct.

Mr. GOLDWATER. If there is not a local law, would it be the interpretation of the Senator from Oregon that employees could strike in spite of the language in the "definitions" clause of the Taft-Hartley Act?

Mr. MORSE. *In the absence of any local law, it would be for the State court to decide whether they had that right.* [109 Cong. Rec. 5674 (1963) (emphasis added).]

The only enforcement mechanism for Section 13(c) is the traditional mode of enforcement under such federal assistance programs — denial or elimination of federal funds should certain conditions not be met. But it is not surprising that neither the language of the Act nor its legislative history suggest a federal private right of action for settling local transit union disputes, since the primary purpose of the legislation is to assist and encourage state and local entities, through federal funding, to develop mass transportation systems and programs. As District Judge Wellford stated below:

UMTA was intended to protect collective bargaining rights only secondarily. Congress addressed this issue to

> assure employees that existing rights and contracts would not be eliminated as part of the *initial grant process* to municipalities and that the grants under the Act would "not be used in a manner that is directly or indirectly detrimental to legitimate interests and rights of such workers." 2 *U.S. Code Congressional and Administrative News* p. 2584 (1964). *The federal officials charged with this responsibility have acted properly here by not involving themselves in continuous controversies between private (or public) parties to a contract approved by them.* [447 F. Supp. 88, 93 (W.D. Tenn. 1977) (emphasis added).]

Even the Circuit Court below, although finding federal jurisdiction in the case, could not provide any legislative history on which to imply a private federal right of action:

> The legislative history of Section 13(c) is simply not explicit. Our review of the Congressional debates establishes that the precise means of enforcing Section 13(c) agreements was not discussed. [650 F.2d at 1385.]

It seems reasonable to conclude that if Congress had intended a federal private right of action under UMTA, it would have expressly provided such a right, or at a minimum, provided a sound basis in the legislative history of the Act from which to infer such a right. There is no such manifestation of intent pertaining to this legislation.

Recently, in the *California* v. *Sierra Club* case, *supra*, this Court unanimously held that Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, does not create a private right of action. In the concurring opinion, Mr. Justice Rehnquist (joined by the Chief Justice, Mr. Justice Stewart and Mr. Justice Powell) clearly sets forth the dispositive standards which govern in such cases:

> . . . I am happy to agree with the Court that there is no implied right of action because "[*t*]*he language of the statute and its legislative history do not suggest that the Act was intended to create federal rights for the especial*

> *benefit of a class of persons," ante,* at 1781, *and because there is no evidence that Congress anticipated that there would be a private remedy." Id.*, at 1781. [*Id.* at 1784 (emphasis added).]

Should the Court determine, however, that there is an implied federal private right of action in this case, it will be interjecting the federal judiciary into every local transit union labor dispute for the foreseeable future, even though federal funding under UMTA has long since terminated. Further, the Court would be placing local public transit unions in a very favorable bargaining position *vis a vis* the state and local governments, since their Section 13(c) "precondition employee protections" could never be eroded, regardless of changes in policy at the state and local level made through the democratic processes by elected government officials. The Court, in effect, would be requiring a contract with certain protections in these cases in perpetuity. Moreover, lower federal courts, on the basis of such an UMTA precedent, would necessarily find that federal private rights of action exist, by mere implication, in all the numerous other federal grant programs with preconditions for obtaining funding assistance — a result certainly not intended by Congress.

IV. The Creation Of An Implied Right Of Action For An Alleged Breach Of A Collective Bargaining Agreement Between Public Transit Employees And Jackson Violates The Tenth Amendment To The Constitution

In *National League of Cities* v. *Usery, supra,* this Court held that the Tenth Amendment to the Constitution constituted a limitation on the power of Congress to regulate commerce among the states, and that the 1974 amendments to the Fair Labor Standards Act, prescribing minimum wage and maximum hour requirements for all public employees employed by the states and their political subdivisions, impaired the states' ability to function effectively in a federal system. "We have repeatedly recognized," said the Court,

> that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congrss may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. [*Id.* at 851.]

In its examination of those "attributes of sovereignty," the Court reasoned that "[o]ne undoubted attribute" was the reserved power of the states to determine the wages and hours of their public employees who carry out governmental functions. The application of the 1974 amendments to such employees, the Court concluded, would

> significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. [426 U.S. at 851.]

By parity of reasoning, the Tenth Amendment to the Constitution also limits the spending power of Congress under Article I, § 8, Cl. 1, the power upon which UMTA rests. Although the spending power is not limited by the specific grants of power contained in Article I, § 8, it is qualified by the Tenth Amendment to the extent that Congress may not use moneys raised by taxation to regulate the working conditions of state and municipal employees. What Congress may not regulate under the commerce power, it may not regulate under the spending power; indeed, it may even be doubted whether the spending power includes any element of regulatory or police power, since it is not an independent grant of power, but a qualification of the taxing power.

It necessarily follows that even if Congress intended under Section 13(c) to enlarge the federal question jurisdiction of the federal courts to entertain federal private rights of action for

breaches of collective bargaining agreements between municipalities and public transit unions, that the Tenth Amendment would be a barrier to such action. What Congress cannot constitutionally accomplish under its commerce or spending power, it may not accomplish under its Article III power to regulate the jurisdiction of the federal courts; for the Tenth Amendment is not selectively applied to the delegated and implied powers of Congress. Nor is the federal judiciary exempt from its provisions, since the purpose of the Amendment is to limit the powers of the national government and not simply those of Congress. Thus, what Congress may not regulate under the commerce power, it may not regulate under Article III. The restrictions established in *Usery* may not be sidestepped by invoking a different power to achieve the same result, or by granting new powers to the federal courts to achieve what it cannot. Direct federal grants to municipalities, which by pass the state governments, can be viewed as an encroachment upon the reserved powers of the states to be constitutionally suspect, but surely the intrusion of the federal judiciary into the local affairs of their political subdivisions and employee relationships under such grants is an unconstitutional interference with the "essential attributes" of state sovereignty.

But it is abundantly clear from an examination of the legislative history of UMTA and from the absence of any express language in Section 13(c) that Congress never intended to expand the federal question jurisdiction of the federal courts in order to nationalize local collective bargaining agreements or place them under federal judicial scrutiny. And an implied intent to accomplish this result is not enough. As we are reminded by Mr. Justice Brennan, speaking for the Court in *Florida Lime & Avocado Growers* v. *Paul,* 373 U.S. 132, 142 (1963), "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject

matter permits no other conclusion, or that Congress has unmistakably so ordained." And on this very issue, Congress declared its intentions when it enacted UMTA: "In regard to the question as to whether these provisions [Section 13(c)] would supersede State labor laws, the committee concurs in a statement made by the Secretary of Labor 'that there could be no superseding of State laws by a provision of this kind.' " S. Rept. No. 82, *supra* at 29.

CONCLUSION

For the reasons developed above, the Public Service Research Council respectfully urges the Court to reverse the decision of the Circuit Court.

Respectfully submitted,

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