June 11, 1984

No. 82-1913) Garcia v. San Antonio Metropolitan Transit Authority
No. 82-1951) Donovan v. San Antonio Metropolitan Transit Authority

Dear Harry,

I agree and I see no necessity for reargument.

Sincerely,

Bill

Justice Blackmun

Copies to the Conference
MEMORANDUM TO THE CONFERENCE

Needless to say, Harry's circulation today supporting a reversal of the judgment below and offering a significant change in our approach to the Tenth Amendment question is unexpected. Because our summer recess is right around the corner, I, for one, would prefer that the case be reargued rather than reassigned.

Sincerely,

[Signature]

June 11, 1984

No. 82-1913 Garcia v. San Antonio MTA
No. 82-1951 Donovan v. San Antonio MTA
June 11, 1984

Re: Nos. 82-1913 & 82-1951 Garcia v. San Antonio Met. Transit Authority

Dear Harry:

I, too, favor reargument in this case.

Sincerely,

Justice Blackmun

cc: The Conference
June 11, 1984


Dear Harry:

I have your draft opinion in this case in which you suggest the possibility for (1) reassignment; (2) carry over for reargument.

At this stage — almost mid-June — a 30 page opinion coming out contrary to the Conference vote on a very important issue places those who may dissent in a difficult position.

I think we should set the case over for reargument and so move.

Regards,

Justice Blackmun

Copies to the Conference
MEMORANDUM TO THE CONFERENCE

Re: No. 82-1913, Garcia v. San Antonio Metro. Transit Auth.

You will recall that the conference vote in these cases was 5-4 to affirm, with my own vote shaky on the affirming side. I assume that it is because of this that the Chief Justice assigned the cases to me, on his frequently stated reference to the "least persuaded."

I have spent a lot of time on these cases. I have finally decided to come down on the side of reversal. I have been able to find no principled way in which to affirm. It seems to me that our customary reliance on the "historical" and the "traditional" is misplaced and that something more fundamental is required to eliminate the widespread confusion in the area. The enclosed draft of a proposed opinion reflects my views.

I realize that this means (1) that the cases should be reassigned and (2) that some of you may feel the cases should go over for reargument. Perhaps this can be discussed at conference.
June 12, 1984

Re: 82-1913 - Garcia v. San Antonio Metropolitan Transit Authority
82-1951 - Donovan v. San Antonio Metropolitan Transit Authority

Dear Chief:

Your motion to reargue this case prompts me to suggest that perhaps it would be useful to have a conference discussion of the standard that should be applied to such motions. I think our recent discussion of the standards to be applied to a dismissal of a writ as having been improvidently granted when there are four justices who want to decide the case on the merits was constructive and that we might profit by focusing our attention on the reargument situation in an orderly way.

It occurs to me that there are four alternative grounds for reargument:

(1) If five justices are unable to agree on the proper disposition of a case before the end of June, reargument is certainly appropriate. That was the justification for the reargument in Pennhurst and Sony last year. I suppose there is some possibility that that problem may justify a reargument in Segura and Palmer v. Hudson, although I gather that you remain optimistic about your ability to circulate in the near future a proposed Court opinion on which five people can agree.

(2) If the circulation of the majority opinion comes so late that there is not adequate time in which to prepare a
dissent, a reargument may be justified. I would suppose, however, that we could hold up adjournment for two or three days in order to avoid setting a case over. Two examples of this problem come to mind: Last Term I did not circulate my proposed majority opinion in Ruckelshaus v. Sierra Club, 82-242, until June 6; Bill Rehnquist circulated his dissent on June 20 and on the following day you changed your vote. Bill then circulated his draft opinion for the Court on June 27 and thereafter I converted my majority into a dissent.

There was a similar sequence of events in Buffalo Forge in the 1975 Term. I circulated my proposed majority on June 18, 1976, Byron circulated his dissent on June 21, and on June 25, you switched your vote making it necessary for Byron to prepare a majority which he was able to do on June 28, and I then circulated my dissent.

In the case under discussion now, I find it difficult to believe that the four Justices who have supported the motion to reargue do not have the capacity to prepare a dissent in the time which remains this month. The various status reports that have been circulated have led me to believe that all four offices were quite current in their work.

(3) The third possible basis for reargument might be that a Member of the Court is not certain as to his vote. It would not seem to me, however, that this would justify reargument unless the vote became critical to the disposition.

(4) Another possibility, of course, is the thought that the membership in the Court might change over the summer and thereby produce a different outcome. In my
view, this would not be a proper ground for rear argument.

Accordingly, unless someone advances a persuasive reason for rear argument that has not yet been identified, I plan to vote against your motion.

Respectfully,

The Chief Justice

Copies to the Conference
June 12, 1984

82-1913 Garcia v. San Antonio
82-1951 Donovan v. San Antonio

Dear Harry:

In view of the approaching end of the Term (one hopes), I prefer the reargument suggestion.

Sincerely,

Justice Blackmun
lfp/ss
cc: The Conference
June 12, 1984

Re: 82-1913 - Garcia v. San Antonio Metropolitan Transit Authority
82-1951 - Donovan v. San Antonio Metropolitan Transit Authority

Dear Harry:

Please join me.

Respectfully,

[Signature]

Justice Blackmun

Copies to the Conference
June 12, 1984

Re: Nos. 82-1913 & 1951-Garcia v. San Antonio Met. Transit Authority, etc.

Dear Harry:

I, too, do not favor reargument in this case.

Sincerely,

T.M.

Justice Blackmun

cc: The Conference
June 13, 1984

Re: 82-1913 - Garcia v. San Antonio Metropolitan Transit Authority

82-1951 - Donovan v. San Antonio Metropolitan Transit Authority

Dear Harry,

As would be indicated by my vote in previous cases such as Maryland v. Wirtz and National League of Cities, I am much taken with your opinion and could join it if the case is not to be reargued. If there is to be a reargument, however, I would prefer not voting on the merits at this time. As for the reargument, I shall await the discussion but would be inclined to follow your lead.

Sincerely,

Justice Blackmun

Copies to the Conference
July 3, 1984

Re: 82-1913) Garcia v. San Antonio Metro. Transit Authority
82-1951) Donovan v. San Antonio Metro. Transit Authority

Dear Lewis,

The following is a possible form of order on the reargument of this case:

"This case is restored to the calendar for reargument. In addition to the questions presented in the petition for writ of certiorari and previously briefed and argued, the parties are requested to address and brief the following question:

Whether [or not the framework of analysis of Tenth Amendment questions as set forth in] National League of Cities v. Usery, 426 U.S. 833 (1976), should be reconsidered?"

Sincerely,

[Signature]

Justice Powell

1) the approach to Tenth Amendment questions set forth in
2) the Tenth Amendment principles set forth in

One wants to err on the side of having too broad a question, rather than to narrow, in order to get briefing touching all the questions raised by HAB's opinion, and to alert State AGs.
MEMORANDUM TO JUSTICE POWELL

From: Joe
Re: 82-1913 & 82-1951 Garcia v. SAMTA

I suggest as a question for reargument the following:

Whether National League of Cities v. Usery, 426 U.S. 833 (1976), should be reconsidered.

This is the plain import of HAB's opinion. On page 18, it rejects "as unsound in principle and unworkable in practice" the rule that state immunity be based on whether a governmental function is integral or traditional. It would hold instead that the substantive limitations on congressional regulation of the States under the Commerce Clause "demand no more than that the statute at issue be a nondiscriminatory one." P. 26. The only part of the opinion that suggests otherwise is the conclusion, which states that the Court "reaffirm[s] the fundamental premise of National League of Cities that Congress' authority under the Commerce Clause must accommodate the special role of the States in the federal system." P. 30. But plainly the opinion "reconsiders" National League. Even if the parties read the above question to allow them to argue that the States had no special role in the federal system, that would not be bad.

Other possibilities:

2. Whether the doctrine of National League of Cities v. Usery, 426 U.S. 833 (1976), should be rejected.
Re: 82-1913 - Garcia v. San Antonio Metro. Transit Authority

82-1951 - Donovan v. San Antonio Metro. Transit Authority

Dear Lewis,

The proposed order on reargument is all right with me.

Sincerely yours,

Justice Powell

Copies to the Conference
July 3, 1984

Re: No. 82-1913, Garcia v. San Antonio Metro. Transit Authority  
No. 82-1951, Donovan v. San Antonio Metro. Transit Authority

Dear Lewis:

Because I voted against reargument of these cases, I have no standing to suggest changes in the proposed form of order. I venture to say, however, that if the question is to be presented, National League of Cities just might end up being overruled. In the opinion I prepared this Term, and as to which some took umbrage, it was not overruled.

Sincerely,

[Signature]

Justice Powell

cc: The Conference
July 3, 1984

82-1913 Garcia v. San Antonio Metro. Transit Authority
82-1951 Donovan v. San Antonio Metro. Transit Authority

MEMORANDUM TO THE CONFERENCE:

Sandra and I suggest the following form of order:

"This case is restored to the calendar for reargument. In addition to the questions presented in the petition for writ of certiorari and previously briefed and argued, the parties are requested to brief and argue the following question:

"Whether or not the principles of the Tenth Amendment as set forth in National League of Cities v. Usery, 426 U.S. 833 (1976), should be reconsidered?"

L.F. P., Jr.
July 3, 1984

82-1913 Garcia v. San Antonio Metro. Transit Authority
82-1951 Donovan v. San Antonio Metro. Transit Authority

Dear Harry:

Sandra and I thought, in view of your opinion critical of National League of Cities, that it was desirable to focus the attention of the parties broadly on the principles followed by the Court in that case.

I am sure I speak also for Sandra in saying that we would, of course, consider a different framing of the question.

Sincerely,

Justice Blackmun

lfp/ss

cc: The Conference
MEMORANDUM TO THE CONFERENCE:

Sandra and I suggest the following form of order:

"This case is restored to the calendar for reargument. In addition to the questions presented in the petition for writ of certiorari and previously briefed and argued, the parties are requested to brief and argue the following question:

"Whether or not the principles of the Tenth Amendment as set forth in National League of Cities v. Usery, 426 U.S. 833 (1976), should be reconsidered?"

L.F. P., Jr.

I concur

WEB

7/3/84