



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

June 11, 1996

MEMORANDUM

TO: Honorable Robert Reich, Secretary of Labor
Honorable Bruce Reed, Assistant to the President

FROM: *Jere*
Jere W. Glover, Chief Counsel for Advocacy

IN RE: Minimum Wage Increase - Amendment proposed by
Senator Bond

As the Chief Counsel for Advocacy of the Small Business Administration, I was recently asked to give the Senate Small Business Committee our views on the small business community's reaction to the proposed increase in the minimum wage.

In response, I pointed out that:

- small businesses, if asked, would oppose an increase in the minimum wage;
- however, the minimum wage has not been any area of intense interest for small businesses, it was not mentioned in the White House Conference, for example and is not on most small business groups legislative agendas; and
- relatively few small businesses currently pay their employees below even the proposed minimum wage, a more common complaint is the inability to find well-qualified workers.

NEW REQUEST FOR POSITION

Chairman Bond has now asked for our opinion of his amendment which would exempt from the increase in the federal minimum wage all businesses with gross revenues below \$500,000.

Historically, the Office has supported "tiering" statutory and regulatory requirements to lessen their impact on small businesses. We have therefore indicated our support for an exemption from the increase in the minimum wage and we hope that you would give consideration to this position. We do not believe that such an exemption will affect many employees and we would welcome an opportunity to discuss this with you.



Minimum Wage

**PRESIDENT CLINTON HAS ALWAYS SUPPORTED
THE MINIMUM WAGE AS A WAY TO MAKE WORK PAY**

April 2, 1996

**CLAIMS THAT PRESIDENT CLINTON OPPOSED A MINIMUM WAGE
INCREASE ARE JUST NOT TRUE.**

- President Clinton has always supported the Minimum Wage -- and he has NEVER opposed a minimum wage increase. President Clinton has always supported increasing the minimum wage -- from the campaign in 1992 to the present. He specifically proposed a 90-cent increase 14 months ago.
- Republican Members point to a 10-word *Time* magazine quote from 1995 that alludes to President Clinton's opposition to the minimum wage in 1993. But, President Clinton didn't say any such thing. The statement *Time* refers to does not appear in any transcript, tape, or speech text.
- For four years now President Bill Clinton has fought for several provisions that would raise the standard of living of hard-working families, including: increasing the minimum wage, expanding the Earned Income Tax Credit, and providing health care coverage for working families.
- President Clinton initially focused his legislative agenda on raising workers' incomes and increasing economic security through expansion of the Earned Income Tax Credit and health care reform, but he has always supported a Minimum Wage increase. Together with his EITC expansion, the President's minimum wage increase would ensure that no parents would have to raise their children in poverty.

**PRESIDENT CLINTON HAS ALWAYS SUPPORTED
A MINIMUM WAGE INCREASE AS A WAY TO MAKE WORK PAY**

SUPPORTED. MINIMUM WAGE HIKES AS GOVERNOR. As Governor of Arkansas, Bill Clinton supported two increases in the state minimum wage. And he changed state minimum wage law to cover more workers.

1992: CANDIDATE CLINTON CALLS FOR EXPANDING EITC AND RAISE MINIMUM WAGE TO MAKE WORK PAY. In 1992, President Clinton proposed expanding the Earned Income Tax Credit and raising the minimum wage to keep pace with inflation in order to ensure that no parent who was willing to work full-time would have to raise their children in poverty.

- ***In Putting People First***, Presidential Candidate Clinton and Vice-President Candidate Gore proposed to "increase the minimum wage to keep pace with inflation." (p. 127)
- ***In the Clinton/Gore Welfare Information packet***, Candidate Clinton and Vice-President Candidate Gore proposed to make the minimum wage a fair wage, and index it to inflation because "working people shouldn't have to lose purchasing power just because of inflation." [Clinton/Gore Welfare Information Packet, September 9, 1992]
- **On October 30, 1992**, the *Star Tribune* wrote that Candidate Clinton wants to "increase the minimum wage to keep pace with inflation and expand the earned income tax credit to guarantee no full-time workers lives in poverty." [Star Tribune, October 30, 1992]

AUGUST 1993: PRESIDENT CLINTON EXPANDS EITC AS FIRST STEP TO MAKE WORK PAY. In 1993, President Clinton took the first necessary step to achieving the goal of ensuring that anyone who worked full-time didn't have to bring up their children in poverty: he expanded the Earned Income Tax Credit to provide a tax break for 15 million of our most hard-pressed households.

- ***In April of 1993, The Washington Post*** wrote that: "Mr. Clinton's goal is ambitious: to make sure that in households with children where at least one person works full-time, the family won't fall below the poverty line. Under current law, the maximum EITC benefit for a family with two or more children was scheduled to rise to \$ 2,000 next year; Mr. Clinton would boost the maximum to \$3,370 by 1995. He would also raise the benefits for families with one child and establish a small new credit for workers without children....***On top of this, Mr. Clinton would try to boost the earnings of the working poor by hiking the minimum wage.***" [The Washington Post, April 20, 1993 -- emphasis added]

IN 1994 PRESIDENT CLINTON FOUGHT FOR UNIVERSAL HEALTH CARE -- WHICH WOULD HAVE BEEN THE EQUIVALENT OF A MINIMUM WAGE INCREASE FOR MILLIONS OF LOW-WAGE WORKERS. NONETHELESS, HE STILL MAINTAINED HIS SUPPORT FOR A MINIMUM WAGE INCREASE.

JUNE OF 1994, *THE WASHINGTON POST* WROTE THAT: "From health-care reform to a *higher minimum wage* to more training opportunities to increased earned-income tax credits to mandatory fringe benefits, the Clinton administration wants to increase dramatically the income security of the more than 6 million American adults whom it classifies as the 'working poor.'" [The Washington Post, June 26, 1994 -- emphasis added]

1995: PRESIDENT CLINTON PROPOSES MINIMUM WAGE INCREASE TO FULFILL COMMITMENT TO MAKE WORK PAY. On February 3, 1995, President Clinton put forward his proposal to increase the minimum wage from \$4.25 to \$5.15 over two years in two equal steps. This proposal would directly benefit 10 million American workers.

In his 1995 State of the Union, President Clinton called for Congress to raise the minimum wage: "The goal of building the middle class and shrinking the underclass is also why I believe that you should raise the minimum wage. It rewards work. Two and a half million Americans -- 2.5 million Americans, often women with children, are working out there today for \$4.25 an hour. In terms of real buying power, by next year that minimum wage will be at a 40-year low. That's not my idea of how the new economy ought to work.

Now, I've studied the arguments and the evidence for and against a minimum wage increase. I believe the weight of the evidence is that a modest increase does not cost jobs, and may even lure people back into the job market. But the most important thing is, you can't make a living on \$4.25 an hour. Especially if you have children, even with the working families tax cut we passed last year. In the past, the minimum wage has been a bipartisan issue, and I think it should be again. So I want to challenge you to have honest hearings on this; to get together; to find a way to make the minimum wage a living wage.

Members of Congress have been here less than a month, but by the end of the week, 28 days into the new year, every member of Congress will have earned as much in congressional salary as a minimum wage worker makes all year long." [State of the Union Address to the Nation, January 25, 1995]

On February 3, 1995, President Clinton proposed raising the minimum wage from \$4.25 to \$5.15: "Our job is to create enough opportunity for people to earn a living if they'll exercise the responsibility to work. That's why we fought so hard to expand the earned income tax credit - a working family tax cut for 15 million families - in 1993; precisely why we're calling on Congress today to raise the minimum wage 90 cents to \$5.15 per hour.

The only way to grow the middle class and shrink the underclass is to make work pay. And in terms of real buying power, the minimum wage will be at a 40-year low next year if we do not raise it above \$4.25 an hour. If we're serious- let me say this, too, emphatically- if we are serious about welfare reform, then we have a clear obligation to make work attractive and to reward people who are willing to work hard...

If in 1990, because the minimum wage had not been raised in such a long time, a Republican president and a Democratic Congress could raise the minimum wage, surely in 1995 - facing the prospect that work, full-time work, could be at a 40-year low in buying power unless we act - a Congress with a Republican majority and a Democratic president can do the same for the American people." [Announcement by President Bill Clinton of Minimum Wage Increase, February 3, 1995]

JUNE, 1995. At town hall meeting with Speaker Gingrich, the President reiterated his support for a minimum wage increase: "The reason that I am for it is that I believe that -- first of all, I know that a significant percentage of people on the minimum wage are women workers raising their kids on their own. And I just believe that we shouldn't allow -- if we don't raise the minimum wage this year, then next year, after you adjust for inflation, it will be at a 40-year low...

And I believe, if you go back to when they did it when -- the last time it was done was, when, '89 or something, I think, on balance, we did fine as a result of doing it. And I think we should do it again. [Remarks by President Clinton, Speaker Gingrich at Senior Center in Claremont, N.H., June 11, 1995]

In May 1995, President Clinton calls for minimum wage increase: "I believe it is especially important to women that we raise the minimum wage this year. Women represent three out of five minimum wage workers, but only half the work force. I have done everything I could to create a climate in which people are encouraged to be successful parents and successful workers. I believe that. That's what the Earned Income Tax Credit was all about in 1993... But it isn't enough. If we do not raise the minimum wage this year, next year it will be in real dollar terms, the lowest it has been in 40 years. Now that is not my idea of what the 21st century American economy is all about. [Remarks at Women's Bureau Reception, May 19, 1995]

- **On Labor Day 1995, President Clinton tells California that the minimum wage should be raised:** "I also think we ought to raise the minimum wage. Let me tell you, if we don't raise the minimum wage this year, on January the 1st of next year, our minimum wage in terms of what the money will buy will be at a 40-year low. I want a high-wage, high-growth, high-opportunity, not a hard-work, low-wage 21st century. And I think you do, too. And that's what we ought to do." [Remarks at the Dedication of California State University at Monterey Bay in Monterey, California, September 4, 1995]

1996 PRESIDENT REITERATES HIS CALL FOR AN INCREASE IN THE MINIMUM WAGE

- **Speech to Keene State College, New Hampshire.** "[A]mong the greatest heroes in this country are the people who work 40 hours a week and do their best to raise their kids and only make the minimum wage. If we do not raise the minimum wage, this year it will drop to a 40-year low in terms of what it will buy. There is always a lot talk in Washington about family values. It's hard to raise a family on \$4.25 an hour. Let's raise the minimum wage." [President Clinton, Keene, New Hampshire, February 17, 1996]

- **1996 State of the Union Address.** "More and more Americans are working hard without a raise. Congress sets the minimum wage. Within a year, the minimum wage will fall to a 40-year low in purchasing power. Four dollars and 25 cents an hour is no longer a minimum wage, but millions of Americans and their children are trying to live on it. I challenge you to raise their minimum wage." [President Clinton, State of the Union Address to Congress, January 23, 1996]

temptation of compensation. *Walling v Portland Terminal Co.*, 330 US 148, 91 L Ed 809, 67 S Ct 639, distinguished. The fact that the associates themselves protest coverage under the Act is not dispositive, since the test of employment under the Act is one of "economic reality." And the fact that the compensation is primarily in the form of benefits rather than cash is immaterial in this context, such benefits simply being wages in another form.

3. Application of the Act to the Foundation does not infringe on rights protected by the Religion Clauses of the First Amendment. The Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights. Here, since the Act does not require the payment of cash wages and the asso-

ciates received wages in the form of benefits in exchange for working in the Foundation's businesses, application of the Act works little or no change in the associates' situation; they may simply continue to be paid in the form of benefits. But even if they were paid in cash and their religious beliefs precluded them from accepting the statutory amount, there is nothing in the Act to prevent them from voluntarily returning the amounts to the Foundation. And since the Act's recordkeeping requirements apply only to commercial activities undertaken with a "business purpose," they would have no impact on petitioners' own evangelical activities or on individuals engaged in volunteer work for other religious organizations.

722 F2d 397, affirmed.

White, J., delivered the opinion for a unanimous Court.

APPEARANCES OF COUNSEL

Roy R. Gean, Jr., argued the cause for petitioners.
Charles Fried argued the cause for respondent.
Briefs of Counsel, p 914, infra.

OPINION OF THE COURT

Justice White delivered the opinion of the Court.

[1a, 2a] The threshold question in this case is whether the minimum wage, overtime, and recordkeeping requirements of the Fair Labor Standards Act, 52 Stat 1060, as amended, 29 USC § 201 et seq. [29 USCS §§ 201 et seq.], apply to workers engaged in the commercial

activities of a religious foundation, regardless of whether those workers consider themselves "employees." A secondary question is whether application of the Act in this context violates

the Religion Clauses of the First Amendment.

The Tony and Susan Alamo Foundation is a nonprofit religious organization incorporated under the laws of California. Among its primary purposes, as stated in its Articles of Incorporation, are to "establish, conduct and maintain an Evangelistic Church; to conduct religious services, to minister to the sick and needy, to care for the fatherless and to rescue the fallen, and generally to do those things needful for the promotion of Christian faith, virtue,

and charity." The Foundation does not solicit contributions from the public. It derives its income largely from the operation of a number of commercial businesses, which include service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a recordkeeping company, a motel, and companies engaged in the production and distribution of candy.² These activities have been supervised by petitioners Tony and Susan Alamo, president and secretary-treasurer of the Foundation, respectively.³ The businesses are staffed largely by the Foundation's "associates," most of whom were drug addicts, derelicts, or criminals before their conversion and rehabilitation by the Foundation. These workers receive no cash salaries, but the Foundation provides them with food, clothing, shelter, and other benefits.

[471 US 293]

In 1977, the Secretary of Labor filed an action against the Foundation, the Alamos, and Larry La Roche, who was then the Foundation's vice president, alleging violations of the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act, 29 USC §§ 206(b), 207(a), 211(c), 215(a)(2), (a)(5) [29 USCS §§ 206(b), 207(a), 211(c), 215(a)(2), (a)(5)], with respect to approximately 300 associates.⁴ The United States District Court for the Western District of

Arkansas held that the Foundation was an "enterprise" within the meaning of 29 USC § 203(r) [29 USCS § 203(r)], which defines that term as "the related activities performed . . . by any person or persons for a common business purpose." 567 F Supp 556 (1983). The District Court found that despite the Foundation's incorporation as a nonprofit religious organization, its businesses were "engaged in ordinary commercial activities in competition with other commercial businesses." *Id.*, at 573.

The District Court further ruled that the associates who worked in these businesses were "employees" of the Alamos and of the Foundation within the meaning of the Act. The associates who had testified at trial had vigorously protested the payment of wages, asserting that they considered themselves volunteers who were working only for religious and evangelical reasons. Nevertheless, the District Court found that the associates were "entirely dependent upon the Foundation for long periods." Although they did not expect compensation in the form of ordinary wages, the District Court found, they did expect the Foundation to provide them "food, shelter, clothing, transportation and medical benefits." *Id.* at 562. These benefits were simply wages in another form, and under the "economic reality" test of employment, see *Goldberg v*

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1. App to Brief for Petitioners 2.

2. The District Court found that the Foundation operates 4 businesses in California, 30 businesses in Arkansas, 3 businesses in Tennessee, and a motel in Tempe, Arizona. See 567 F Supp 556, 559-561 (WD Ark 1983). The Foundation also receives income from the donations of its associates. *Id.*, at 562.

3. Susan Alamo was named as a defendant

and as a petitioner in this Court, but died after the suit was filed.

4. The Secretary also charged petitioners with failing to pay overtime wages to certain "outside" employees. The District Court made findings regarding these claims, all but one of which was upheld by the Court of Appeals. The parties have not sought review of that portion of the judgment.

Whitaker House Cooperative, Inc.
366 US 28.

[471 US 294]
33, 6 L Ed 2d 100, 81 S Ct 933 (1961),⁴ the associates were employees. The District Court also rejected petitioners' arguments that application of the Act to the Foundation violated the Free Exercise and Establishment Clauses of the First Amendment, and the court found no evidence that the Secretary had engaged in unconstitutional discrimination against petitioners in bringing this suit.*

The Court of Appeals for the Eighth Circuit affirmed the District Court's holding as to liability, but vacated and remanded as to the appropriate remedy. 722 F2d 397 (1984).⁷ The Court of Appeals emphasized that the businesses operated by the Foundation serve the general public, in competition with other entrepreneurs. Under the "economic reality" test, the court held,

"it would be difficult to conclude that the extensive commercial enterprise operated and controlled by the foundation was nothing but a religious liturgy engaged in

5. See also *United States v Silk*, 331 US 704, 713, 91 L Ed 1757, 67 S Ct 1463 (1947); *Rutherford Food Corp. v McComb*, 331 US 722, 729, 91 L Ed 1772, 67 S Ct 1473 (1947).

6. The District Court enjoined petitioners from failing to comply with the Act and ordered that all former associates and others who had worked in the businesses covered by the Act be advised of their eligibility to submit a claim to the Secretary. The Secretary was to submit a proposed finding of back wages due each claimant, "less applicable benefits" that had been provided by the Foundation. 567 F Supp, at 577. The Secretary appealed the remedial portions of the District Court's order.

7. See n 6, supra. The Court of Appeals held that the District Court should have calculated back wages due instead of requiring associates to initiate backpay proceedings. 722 F2d, at 404-405. On remand, in an unpublished order,

bringing good news to a pagan world. By entering the economic arena and trafficking in the marketplace, the foundation has subjected itself to the standards Congress has prescribed for the benefit of employees. The

[471 US 295]
requirements of the Fair Labor Standards Act apply to its laborers." *Id.*, at 400.

Like the District Court, the Court of Appeals also rejected petitioners' constitutional claims. We granted certiorari, 469 US 915, 83 L Ed 2d 226, 105 S Ct 290 (1984), and now affirm.

II

[1b, 3] In order for the Foundation's commercial activities to be subject to the Fair Labor Standards Act, two conditions must be satisfied. First, the Foundation's businesses must constitute an "[e]nterprise engaged in commerce or in the production of goods for commerce." 29 USC § 203(s) [29 USCS § 203(s)].* Second, the associates must be "employees" within the meaning of the Act.

The District Court identified specific associates due back wages and ordered the Secretary to submit a proposed judgment. Following this Court's grant of a writ of certiorari, the District Court "administratively terminate[d]" the action pending this Court's decision. Brief for Respondent 12, n 8.

8. Employment may be covered under the Act pursuant to either "individual" or "enterprise" coverage. Prior to the introduction of enterprise coverage in 1961, the only individuals covered under the Act were those engaged directly in interstate commerce or in the production of goods for interstate commerce. Enterprise coverage substantially broadened the scope of the Act to include any employee of an enterprise engaged in interstate commerce, as defined by the Act. The Secretary did not proceed on the basis that the associates are within the scope of individual coverage.

While the statutory definition is exceedingly broad, see *United States v Rosenwasser*, 323 US 360, 362-363, 89 L Ed 301, 65 S Ct 295 (1945), it does have its limits. An individual who, "without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit," is outside the sweep of the Act. *Walling v Portland Terminal Co.* 330 US 148, 152, 91 L Ed 809, 67 S Ct 639 (1947).⁸

A

[1c] Petitioners contend that the Foundation is not an "enterprise" within the meaning of the Act because its activities are

[471 US 296]
not performed for "a common business purpose."¹⁰ In support of this assertion, petitioners point to the fact that the Internal Revenue Service has certified the Foundation as tax-exempt under 26 USC § 501(c)(3) [26 USCS § 501(c)(3)], which exempts "any . . . foundation . . . organized and oper-

9. The Court of Appeals omitted this second step of the inquiry, although it mentioned in passing that the associates expected to receive and were dependent on the in-kind benefits. 722 F2d, at 399. The District Court's findings on this question are sufficiently clear, however, that a remand is unnecessary.

10. Section 203(r) defines "enterprise" in pertinent part as "the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor." Petitioners do not dispute that the Foundation's various activities are performed

ated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes."¹¹

The Court has consistently construed the Act "liberally to apply to the furthest reaches consistent with congressional direction." *Mitchell v Lublin, McCaughey & Associates*, 358 US 207, 211, 3 L Ed 2d 243, 79 S Ct 260 (1959), recognizing that broad coverage is essential to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency. *Powell v United States Cartridge Co.* 339 US 497, 516, 94 L Ed 1017, 70 S Ct 755 (1950).¹² The statute contains no express or implied exception for commercial activities conducted by religious or other nonprofit organizations.¹³

[471 US 297]
and the agency charged with its enforcement has consistently interpreted the statute to reach such businesses. The Labor Department's regulation defining "business purpose," which is entitled to considera-

"through . . . common control." Nor do they quarrel with the District Court's finding that the Foundation's annual gross volume of sales exceeds \$250,000, as required by § 203(s)(1). See 567 F Supp, at 561.

11. The Internal Revenue Service has apparently not determined whether petitioners' commercial activities are "unrelated business" subject to taxation under 26 USC §§ 511-513 (26 USCS §§ 511-513). See App to Brief for Petitioners 14; Tr of Oral Arg 30.

12. See also *Goldberg v Whitaker House Cooperative, Inc.* 366 US 28, 6 L Ed 2d 100, 81 S Ct 933 (1961); *Rutherford Food Corp. v McComb*, 331 US 722, 91 L Ed 1772, 67 S Ct 1473 (1947); *United States v Rosenwasser*, 323 US 360, 89 L Ed 301, 65 S Ct 295 (1945).

13. Cf. *Powell v United States Cartridge Co.* 339 US, at 517, 94 L Ed 1017, 70 S Ct 755 (exemptions from the Act are "narrow and specific," implying that "employees not thus exempted . . . remain within the Act").

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ble weight in construing the Act, explicitly states:

"Activities of eleemosynary, religious, or educational organization [sic] may be performed for a business purpose. Thus, where such organizations engage in ordinary commercial activities, such as operating a printing and publishing plant, the business activities will be treated under the Act the same as when they are performed by the ordinary business enterprise." 29 CFR § 779.214 (1984).

See also *Marshall v Woods Hole Oceanographic Institution*, 458 F Supp 709 (Mass 1978); *Marshall v Elks Club of Huntington, Inc.* 444 F Supp 957, 967-968 (SD W Va 1977). Cf. *Mitchell v Pilgrim Holiness Church Corp.* 210 F2d 879 (CA7), cert denied, 347 US 1013, 98 L Ed 1136, 74 S Ct 867 (1954).

The legislative history of the Act supports this administrative and judicial gloss. When the Act was broadened in 1961 to cover "enterprises" as well as individuals, the Senate Committee Report indicated that the activities of nonprofit

14. The Senate Committee Report, in discussing the "common business purpose" requirement, states: "[T]he definition would not include eleemosynary, religious, or educational organizations not operated for profit. The key word in the definition which supports this conclusion is the word 'business.' Activities or organizations of the type referred to, if they are not operated for profit, are not activities performed for a 'business' purpose." S Rep No. 1744, 86th Cong, 2d Sess, 28 (1960).

15. 106 Cong Rec 16704 (1960).

16. *Ibid.* (remarks of Sen. Kennedy).

17. *Id.*, at 16703 (remarks of Sen. Goldwater). The following year, when the expansion of the Fair Labor Standards Act was again considered and this time enacted, Senator Curtis proposed the same amendment that Senator Goldwater had unsuccessfully introduced. The amendment was once more rejected. Senator McNamara, Chairman of the

groups were excluded from coverage only insofar as they were not performed for a "business purpose."¹⁴ Some illumination of congressional intent is provided by the debate on a proposed floor amendment that would have specifically excluded from the definition of "employer," see 29 USC § 203(d) [29 USCS § 293(d)], organizations qualifying for tax exemption under

(471 US 298)

26 USC § 501(c)(3) [26 USCS § 501(c)(3)].¹⁵ The floor manager of the bill opposed the amendment because it might have been interpreted to "g[o] beyond the language of the [Committee] report" by excluding a "profit-making corporation or company" owned by "an eleemosynary institution."¹⁶ The proponent of the failed amendment countered that it would not have excluded "a church which has a business operation on the side."¹⁷ There was thus broad congressional consensus that ordinary commercial businesses should not be exempted from the Act simply because they happened to be owned by religious or other nonprofit organizations.¹⁸

Senate Education and Labor Committee, opposed the amendment on the ground that it would remove from the protection of the Act employees of nonprofit organizations who were engaged in "activities which compete with private industry to such a degree that the competition would have a very adverse effect on private industry. . . . [W]hen such industry comes into competition in the marketplace with private industry, we say that their work is not charitable organization work." 107 Cong Rec 6255 (1961). See also HR Rep No. 75, 87th Cong, 1st Sess, 8 (1961); S Rep No. 145, 87th Cong, 1st Sess, 41 (1961).

18. Because we perceive no "significant risk" of an infringement on First Amendment rights, see *infra*, at 303-306, 85 L Ed 2d, at 289-291, we do not require any clearer expression of congressional intent to regulate these activities. See *NLRB v Catholic Bishop of Chicago*, 440 US 490, 500, 59 L Ed 2d 533, 99 S Ct 1313 (1979).

[4] Petitioners further contend that the various businesses they operate differ from "ordinary" commercial businesses because they are infused with a religious purpose. The businesses minister to the needs of the associates, they contend, both by providing rehabilitation and by providing them with food, clothing, and shelter. In addition, petitioners argue, the businesses function as "churches in disguise"—vehicles

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for preaching and spreading the gospel to the public. See Brief for Petitioners 27-28. The characterization of petitioners' businesses, however, is a factual question resolved against petitioners by both courts below, and therefore barred from review in this Court "absent the most exceptional circumstances."¹⁹ The lower courts clearly took account of the religious aspects of the Foundation's endeavors, and were correct in scrutinizing the activities at issue by reference to objectively ascertainable facts concerning their nature and scope. Both courts found that the Foundation's businesses serve the general public in competition with ordinary commercial enterprises, see 722 F2d, at 400; 567 F Supp, at 573, and the payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of "unfair method of competition" that the Act was

19. *Branti v Finkel*, 445 US 507, 512, n. 6, 63 L Ed 2d 574, 100 S Ct 1287 (1980).

20. 330 US, at 150, 91 L Ed 809, 67 S Ct 639. Since *Walling* was decided before the advent of "enterprise coverage," see n. 8, *supra*, the Court's remark must have been premised on the fact that railroad brakemen work directly in interstate commerce.

21. The Act defines "employ" as including

intended to prevent, see 29 USC § 202(a)(3) [29 USCS § 202(a)(3)], and the admixture of religious motivations does not alter a business' effect on commerce.

B

[1d] That the Foundation's commercial activities are within the Act's definition of "enterprise" does not, as we have noted, end the inquiry. An individual may work for a covered enterprise and nevertheless not be an "employee." In *Walling v Portland Terminal Co.* 330 US 148, 91 L Ed 809, 67 S Ct 639 (1947), the Court held that individuals being trained as railroad yard brakemen—individuals who unquestionably worked in "the kind of activities covered by the Act"²⁰—were not "employees." The trainees enrolled in a course lasting approximately seven or eight days, during which time they did some actual work

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under close supervision. If, after completion of the training period, the trainees obtained permanent employment with the railroad, they received a retroactive allowance of four dollars for each day of the course. Otherwise, however, they neither received or expected any remuneration. *Id.*, at 150, 91 L Ed 809, 67 S Ct 639. The Court held that, despite the comprehensive nature of the Act's definitions,²¹ they were "obviously not intended to

"to suffer or permit to work" and "employee" as (with certain exceptions not relevant here) "any individual employed by an employer." 29 USC §§ 203(g), (e) [29 USCS §§ 203(g), (e)]. See *Rutherford Food Corp.* 331 US, at 728, 91 L Ed 1772, 67 S Ct 1473; *Rosenwasser*, 323 US, at 362-363, 69 L Ed 301, 65 S Ct 295, and n. 3 (quoting Sen. Black as stating that the term "employee" had been given "the broadest definition that has ever been included in any one act." 81 Cong Rec 7657 (1935)).

stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." The trainees were in much the same position as students in a school. Considering that the trainees' employment did not "contemplate compensation," and accepting the findings that the railroads received "no immediate advantage" from any work done by the trainees," the Court ruled that the trainees did not fall within the definition of "employee." *Id.*, at 153, 91 L Ed 809, 67 S Ct 639.

Relying on the affidavits and testimony of numerous associates, petitioners contend that the individuals who worked in the Foundation's businesses, like the trainees in Portland Terminal, expected no compensation for their labors. It is true that the District Court found that the Secretary had "failed to produce any past or present associate of the Foundation who viewed his work in the Foundation's various commercial businesses as anything other than 'volunteering' his services to the Foundation." 567 F Supp, at 562. An associate characterized by the District Court as typical "testified convincingly that she considered her work in the Foundation's businesses as part of her ministry," and that she did not work for material rewards. *Ibid.* This same

22. Former associates called by the Secretary as witnesses testified that they had been "fined" heavily for poor job performance, worked on a "commission" basis, and were prohibited from obtaining food from the cafeteria if they were absent from work—even if the absence was due to illness or inclement weather. App 148-149, 146, 153, 218-219. These former associates also testified that they sometimes worked as long as 10 to 15 hours per day, 6 or 7 days per week. This testimony was contradicted in part by petitioners' witnesses, who were current associates. See 567 F Supp, at 562. Even their testimony, however, was somewhat ambiguous. Ann Elmore, for example, testified that

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associate also testified that "no one ever expected any kind of compensation, and the thought is totally vexing to my soul." App 79.

Nevertheless, these protestations, however sincere, cannot be dispositive. The test of employment under the Act is one of "economic reality," see *Goldberg v Whitaker House Cooperative, Inc.* 366 US, at 38, 6 L Ed 2d 100, 91 S Ct 933, and the situation here is a far cry from that in *Portland Terminal*. Whereas in *Portland Terminal*, the training course lasted a little over a week, in this case the associates were "entirely dependent upon the Foundation for long periods, in some cases several years." 567 F Supp, at 562. Under the circumstances, the District Court's finding that the associates must have expected to receive in-kind benefits—and expected them in exchange for their services—is certainly not clearly erroneous.²² Under *Portland Terminal*, a compensation agreement may be "implied" as well as "express," 390 US, at 152, 91 L Ed 809, 67 S Ct 639, and the fact that the compensation was received primarily in the form of benefits rather than cash is in this context immaterial. These benefits are, as the District Court stated, wages in another form.²³

the thought of receiving compensation was "vexing to [her] soul." But in the same paragraph, in answer to a question as to whether she expected the benefits, she stated that "the benefits are just a matter of—of course, we went out and we worked for them." App 78-79.

23. The Act defines "wage" as including board, food, lodging, and similar benefits customarily furnished by the employer to the employee. As the District Court recognized, an employer is entitled to credit for the reasonable cost of these benefits. 567 F Supp, at 563, 577; see 29 USC § 203(m) [29 USCS § 203(m)].

[471 US 302]

That the associates themselves vehemently protest coverage under the Act makes this case unusual,²⁴ but the purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work "voluntarily," employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. Cf. *Barrentine v Arkansas-Best Freight System, Inc.* 450 US 728, 67 L Ed 2d 641, 101 S Ct 1437 (1981); *Brooklyn Savings Bank v O'Neil*, 324 US 697, 89 L Ed 1296, 65 S Ct 895 (1945). Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses. As was observed in *Gemsco, Inc. v Walling*, 324 US 244, 252-254, 89 L Ed 921, 65 S Ct 605 (1945), it was there essential to uphold the Wage and Hour Administrator's authority to ban industrial homework in the embroideries industry, because "if the prohibition cannot be made, the floor for the entire industry falls and the right of the homeworkers and

the employers to be free from the prohibition destroys the right of the much larger number of factory workers to receive the minimum wage."

Nor is there any reason to fear that, as petitioners assert, coverage of the Foundation's business activities will lead to coverage of volunteers who drive the elderly to church, serve church suppers, or help remodel a church home for the needy. See Brief for Petitioners 24-25. The Act reaches only the "ordinary commercial activities" of religious organizations, 29 CFR § 779.214 (1984), and only those who engage in those activities in expectation of compensation.

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Ordinary volunteerism is not threatened by this interpretation of the statute.²⁵

III

[2b, 5a] Petitioners further contend that application of the Act infringes on rights protected by the Religion Clauses of the First Amendment. Specifically, they argue that imposition of the minimum wage and recordkeeping requirements will violate the rights of the associates to freely exercise their religion²⁶ and

24. Cf. *Van Schaick v Church of Scientology*, 535 F Supp 1125 (Mass 1982); *Turner v Unification Church*, 473 F Supp 367 (RI 1978), aff'd, 502 F2d 458 (CA1 1975) (FLSA claims brought by former church members).

25. The Solicitor General states that in determining whether individuals have truly volunteered their services, the Department of Labor considers a variety of factors, including the receipt of any benefits from those for whom the services are performed, whether the activity is a less than full-time occupation, and whether the services are of the kind typically associated with volunteer work. The Department has recognized as volunteer services those of individuals who help to main-

ter to the comfort of the sick, elderly, indigent, infirm, or handicapped, and those who work with retarded or disadvantaged youth. See Brief for Respondent 4-5, and n 3.

26. [5b] Petitioner Larry La Roche is an associate and a former vice-president of the Foundation. The Foundation also has standing to raise the free exercise claims of the associates, who are members of the religious organization as well as employees under the Act. See *NAACP v Alabama ex rel Patterson*, 357 US 449, 458-459, 2 L Ed 2d 1488, 78 S Ct 1163 (1958). But cf. *Donovan v Shenandoah Baptist Church*, 573 F Supp 320, 325-326 (WD Va 1983).

the right of the Foundation to be free of excessive government entanglement in its affairs. Neither of these contentions has merit.

[6, 2c] It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights. See, e.g., *United States v Lee*, 455 US 252, 256-257, 71 L Ed 2d 127, 102 S Ct 1051 (1982); *Thomas v Review Board, Indiana Employment Security Div.* 450 US 707, 717-718, 67 L Ed 2d 624, 101 S Ct 1425 (1981). Petitioners claim that the receipt of "wages" would violate the religious convictions of the associates.²⁷ The Act, however, does not require

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the payment of cash wages. Section 203(m) defines "wage" to include "the reasonable cost . . . of furnishing [an] employee with board, lodging, or other facilities." See n 23, supra. Since the associates currently receive such benefits in exchange for working in the Foundation's businesses, application of the Act will

27. Petitioners point to the following testimony by two associates deemed representative by the District Court:

"And no one ever expected any kind of compensation, and the thought is totally vexing to my soul. It would defeat my whole purpose." App 79 (testimony of Ann Elmore).

"I believe it would be offensive to me to even be considered to be forced to take a wage . . . I believe it offends my right to worship God as I choose." Id., at 62-63 (testimony of Bill Levy).

Petitioners also argue that the recordkeeping requirements of the Act, 29 USC § 211 [29 USCS § 211], will burden the exercise of the associates' religious beliefs. This claim rests on a misreading of the Act. Section 211 imposes recordkeeping requirements on the em-

ployer, not on the employees. work little or no change in their situation: the associates may simply continue to be paid in the form of benefits. The religious objection does not appear to be to receiving any specified amount of wages. Indeed, petitioners and the associates assert that the associates' standard of living far exceeds the minimum.²⁸ Even if the Foundation were to pay wages in cash, or if the associates' beliefs precluded them from accepting the statutory amount, there is nothing in the Act to prevent the associates from returning the amounts to the Foundation, provided that they do so voluntarily.²⁹ We therefore fail to perceive how application of the Act would interfere with the associates' right to

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freely exercise their religious beliefs. Cf. *United States v Lee*, supra, at 257, 71 L Ed 2d 127, 102 S Ct 1051.

[7a, 2d] Petitioners also argue that application of the Act's recordkeeping requirements would have the "primary effect" of inhibiting religious activity and would foster "an excessive government entanglement with religion," thereby violating

the Establishment Clause.

28. See App 62, 89 (testimony of Bill Levy and Edward Mick); Brief for Petitioners 33. The actual value of the benefits provided to associates—a matter of heated dispute below—was determined by the District Court to average somewhat over \$200 a month per associate. 567 F Supp. at 566-570.

29. Counsel for petitioners stated at oral argument that the associates would either fail to claim the backpay that was due them or simply return it to the Foundation. Tr of Oral Arg 25, 45. Counsel argued that this fact undermined the Secretary's argument that he had a "compelling interest" in applying the Act, but it is also indicative of how slight a change application of the Act would effect in the current state of affairs.

the Establishment Clause. See *Lemon v Kurtzman*, 403 US 602, 612-613, 29 L Ed 2d 745, 91 S Ct 2105 (1971) (quoting *Walz v Tax Comm'n*, 397 US 664, 674, 25 L Ed 2d 697, 90 S Ct 1409 (1970)).³⁰ The Act merely requires a covered employer to keep records "of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him." 29 USC § 211(c) [29 USCS § 211(c)]. Employers must also preserve these records and "make such reports therefrom from time to time to the Administrator as he shall prescribe." *Ibid.* These requirements apply only to commercial activities undertaken with a "business purpose," and would therefore have no impact on petitioners' own evangelical activities or on individuals engaged in volunteer work for other religious organizations. And the routine and factual inquiries required by § 211(c) bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of govern-

ment entanglement with religion.³¹ The Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations. See *Lemon*, supra, at 614, 29 L Ed 2d 745, 91 S Ct 2105 and the recordkeeping requirements of the Fair Labor Standards Act, while

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perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs.³²

IV

[1c, 2a] The Foundation's commercial activities, undertaken with a "common business purpose," are not beyond the reach of the Fair Labor Standards Act because of the Foundation's religious character, and its associates are "employees" within the meaning of the Act because they work in contemplation of compensation. Like other employees covered by the Act, the associates are entitled to its full protection. Further-

30. [7b] Under the *Lemon* test, the criteria to be used in determining whether a statute violates the Establishment Clause are whether the statute has a secular legislative purpose; whether its primary effect is one that neither advances nor inhibits religion; and whether it fosters excessive government entanglement with religion. 403 US, at 612-613, 29 L Ed 2d 745, 91 S Ct 2105. No one here contends that the Fair Labor Standards Act has anything other than secular purposes.

31. See *Meak v Pittenger*, 421 US 349, 44 L Ed 2d 217, 95 S Ct 1753 (1975); *Lemon v Kurtzman*, 403 US 602, 29 L Ed 2d 745, 91 S Ct 2105 (1971). Cf. *NLRB v Catholic Bishop of Chicago*, 440 US 490, 59 L Ed 2d 533, 99 S Ct 1313 (1979).

32. Petitioners also argue that application of the Act to them denies them equal protection of the laws because the Foundation's treatment of its associates is no different from the Government's treatment of its own volunteer workers, such as those enrolled in the

ACTION program. The respondent aptly characterizes this claim as "trivoltous." Brief for Respondent 46. The activities of federal volunteers are directly supervised by the Government, unlike the activities of those alleged to be volunteering their services to private entities. Furthermore, work in Government volunteer programs is "limited to activities which would not otherwise be performed by employed workers and which will not displace the hiring of or result in the displacement of employed workers." 42 USC § 5044(a) [42 USCS § 5044(a)]. Thus, Congress could rationally have concluded that minimum wage coverage of such volunteers is required neither for the protection of the volunteers themselves nor for the prevention of unfair competition with private employers. Petitioners have identified no reason to scrutinize the Government's classification under any stricter standard. The District Court found no evidence that the Department was acting on the basis of hostility to petitioners' religious beliefs. 567 F Supp. at 574.

on—and the more reason firms will have to petition for review of everything in sight”).

EPA's answering arguments against reading the § 509(b)(1)(D) jurisdictional grant this broadly are equally elaborate and do not require full explication here. Suffice it to say that we agree that in none of the respects suggested by Westvaco do the challenged EPA actions here constitute the kind of "determination" contemplated by subsection (D). We summarize our reasons but briefly.

As to the suggestion that preliminary disapproval by EPA of WQA "B" and "C" toxic hot-spot lists constitute an "implicit determination" of general failure to perform the obligation to protect water quality imposed by § 302(a), it is enough to note that § 302(a) does not directly impose any such obligation on the states. It merely authorizes the EPA Administrator—not the states—to establish more stringent effluent limitations than those required by technology-based limitations. See *NRDC v. EPA*, 859 F.2d 156, 171 (D.C.Cir.1988).

The suggestion that there has been a "determination" that the affected states' water quality standards are inadequate, which is in turn a "determination as to a state program submitted under § 402(b)" is equally unsound. All states have to develop and submit water quality standards for EPA approval; only states that apply for the opportunity are required to submit state NPDES programs. Review of water quality standards is committed, where appropriate at all, to the district courts; § 509(b)(1) confers no jurisdiction to review EPA approvals and disapprovals of water quality standards. Cf. *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513 (3d Cir.1976) (no jurisdiction in courts of appeals); *United States Steel Corp. v. Train*, 556 F.2d 822, 837 (7th Cir.1977) (jurisdiction over Administrator's approval of water quality standards in district courts).

Finally, the suggestion that preliminary disapproval of "B" and "C" lists and proposals to add to them constitutes a "determination" as to a state program submitted under § 402(b) is without merit. EPA may contest specific limitations in particular

permits without drawing an entire state permit program into question. Under § 402(d), states have to submit each permit for EPA approval, and if EPA objects, it may issue the permit where agreement with the state is not reached. In such cases, EPA's issuance of the permit is reviewable independently of any review of an EPA "determination as to a state permit program," which is what § 509(b)(1)(D) is about. See *Champion*, 850 F.2d at 187-88. EPA is simply given comparable authority under § 304(d) with respect to approval or disapproval of state ICSs, and the review paths are similar. EPA preliminary disapproval of a state ICS is not a "determination as to a state permit program under § 402(b)"; it relates to a quite different and discrete "program."

B

(4) CWA § 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E), confers jurisdiction to review agency actions in approving or promulgating any effluent limitations or other limitations under [the CWA].

Westvaco contends that the challenged agency action amounted to the promulgation of enforceable remedial measures for its two mills, hence constituted action subject to review under this jurisdictional grant. Specifically, Westvaco points to EPA's letter notification of its "understanding" that the states would issue revised permits by the legal deadlines, and that it might submit a later notification that "EPA intends to issue the ICS."

These statements require nothing of Westvaco: they impose no obligations enforceable by EPA. As EPA's letter clearly states, the only consequence of the states' failure to do anything in response will be for the EPA to promulgate ICSs, an event that may or may not occur. The jurisdictional grant in § 509(b)(1)(E) cannot be construed to cover such preliminary, contingent action by EPA.

Finally, alternatively, Westvaco suggests that EPA's proposed finding that Westvaco's mills are discharging into a body of water that is not attaining water quality

Tell the majority to begin to talk to his wife.

standards is a "promulgation of an effluent limitation" within contemplation of § 509(b)(1)(E). This is patently without merit.

As EPA points out, even if EPA had actually determined finally that Westvaco's permits needed more stringent limitations to meet WQA toxic pollution standards (which it has not) that decision would not be reviewable at this point. Such an action under § 304(f) procedures would be comparable to an EPA objection to a permit issued by a state under § 402(d). Such an objection is not immediately reviewable, but must await final action in the form of an EPA permit issuance. *Champion*, 850 F.2d at 182, 190. The same principle must apply to preliminary disapproval of states' "B" and "C" lists submitted under § 304(d).

III

For the reasons above given, we dismiss the petitions for review for lack of jurisdiction at this time to review the challenged actions.

Entered by direction of Circuit Judge PHILLIPS, with the concurrences of Circuit Judge DONALD RUSSELL and Circuit Judge K.K. HALL.



Elizabeth DOLE, Secretary, United States Department of Labor; Equal Employment Opportunity Commission, Plaintiffs-Appellees.

SHENANDOAH BAPTIST CHURCH: Carol C. Anderson; Lola D. Clifton; Loretta B. Dillon; Dorothy M. Dixon; Alma S. Greene; Delilah F. Gross; Margaret Harvey; Mary Ann Herndon; Jeffrey P. Kessler; John T. Kessler;

Shirley L. Kessler; Joyce T. Martin; Eva T. Murdock; Sherry R. Padgett; Antoinette L. Parsons; Barbara C. Shelor; Donna Shelor; Mary Beth Shelor; Ann T. Shelton; Ruth Wessellink; Donna M. Womack. Defendants-Appellants.

Elizabeth DOLE, Secretary, United States Department of Labor; Equal Employment Opportunity Commission, Plaintiffs-Appellants.

SHENANDOAH BAPTIST CHURCH: Carol C. Anderson; Lola D. Clifton; Loretta B. Dillon; Dorothy M. Dixon; Alma S. Greene; Delilah F. Gross; Margaret Harvey; Mary Ann Herndon; Jeffrey P. Kessler; John T. Kessler; Shirley L. Kessler; Joyce T. Martin; Eva T. Murdock; Sherry R. Padgett; Antoinette L. Parsons; Barbara C. Shelor; Donna Shelor; Mary Beth Shelor; Ann T. Shelton; Ruth Wessellink; Donna M. Womack. Defendants-Appellees.

Nos. 89-2341, 89-2368.

United States Court of Appeals, Fourth Circuit.

Argued Jan. 9, 1990.

Decided March 30, 1990.

As Amended April 5, 1990.

Federal Department of Labor and Equal Employment Opportunity Commission sought judgment against church for violations of Fair Labor Standards Act in operation of school. The United States District Court for the Western District of Virginia, James C. Turk, Chief Judge, 707 F.Supp. 1450, found that the Act applied to the school and assessed damages. Appeal and cross appeal were taken. The Court of Appeals, Sprouse, Circuit Judge, held that: (1) Fair Labor Standards Act applied to church-operated schools and employees; (2) application of Act to church-operated school did not violate First or Fifth Amendment rights of church or its teachers and employees; and (3) school failed to show that salary differential was not based on

File: Minimum Wage

sex or that support staff provided distinguishable church and school related labor.

Affirmed.

1. Labor Relations ⇐1128

Church-operated school is "enterprise" within meaning of Fair Labor Standards Act. Fair Labor Standards Act of 1938, § 3(e), r), as amended, 29 U.S.C.A. § 203(e), r); U.S.C.A. Const.Amend. 1, 5.

See publication Words and Phrases for other judicial constructions and definitions.

2. Labor Relations ⇐1128, 1249

Church-operated school was covered by minimum wage provision of Fair Labor Standards Act despite school's contention that school was inextricably intertwined with church and that school employees were really church employees. Fair Labor Standards Act of 1938, § 3(e), r), as amended, 29 U.S.C.A. § 203(e), r); U.S.C.A. Const. Amend. 1, 5.

3. Labor Relations ⇐1249

Church-operated school failed to support assertion that its teachers were ministers and thus exempt from Fair Labor Standards Act; teachers performed no sacerdotal functions, did not serve as church governors, and did not belong to any clearly delineated religious order. Fair Labor Standards Act of 1938, § 3(e), r), as amended, 29 U.S.C.A. § 203(e), r).

4. Labor Relations ⇐1128

Fair Labor Standards Act applied to teachers employed as lay teachers in church-operated private school. Fair Labor Standards Act of 1938, § 3(e), r), as amended, 29 U.S.C.A. § 203(e), r).

5. Constitutional Law ⇐84.5(12)

Labor Relations ⇐1090

Applying minimum wage and equal pay provisions of Fair Labor Standards Act to employees of church-operated school furthered the state's interest in assuring equal employment opportunities for all and outweighed burden, if any, that application of provisions placed on free exercise of religious beliefs; fact that school would incur increased payroll expenses to conform to

Fair Labor Standards Act requirements was not sort of burden that was determinative in free exercise claim. Fair Labor Standards Act of 1938, §§ 3(e), r), 6(d), as amended, 29 U.S.C.A. §§ 203(e), r), 206(d); U.S.C.A. Const.Amend. 1, 5.

6. Labor Relations ⇐1090

Application of Fair Labor Standards Act to church-operated school did not violate establishment clause despite contention that inclusion of nuns and priests in ministerial exemption and exclusion of lay teachers and staff members at church-operated school created official preference. Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d); U.S.C.A. Const.Amend. 1.

7. Constitutional Law ⇐84.5(12)

Labor Relations ⇐1090

Ministerial exemption to Fair Labor Standards Act provisions concerning school employees is facially neutral, encompassing ministers, deacons, and members of religious orders in any faith, not exclusively Catholic nuns and priests, and, thus, exemption does not create official preference; lay teachers and support staff at Catholic schools are covered by Federal Labor Standards Act, as are lay teachers and staff at other church-operated schools. Fair Labor Standards Act of 1938, §§ 6(a), d), 13(a)(1), as amended, 29 U.S.C.A. §§ 206(a), d), 213(a)(1); U.S.C.A. Const.Amend. 1.

8. Constitutional Law ⇐84.5(12)

Labor Relations ⇐1090

Government inspection, monitoring and review of church-operated school required to implement Fair Labor Standards Act does not impermissibly intrude into church affairs and does not violate establishment clause. Fair Labor Standards Act of 1938, § 1 et seq., as amended, 29 U.S.C.A. § 201 et seq.; U.S.C.A. Const.Amend. 1.

9. Constitutional Law ⇐84.5(12)

Labor Relations ⇐1090

Application of Fair Labor Standards Act to church-operated school did not violate equal protection guarantees despite school contention that ministerial exemption to Act created suspect classification

which discriminated against adherents of religions that do not have formal religious orders. Fair Labor Standards Act of 1938, § 3(e), r), as amended, 29 U.S.C.A. § 203(e), r); U.S.C.A. Const.Amend. 1, 5.

10. Labor Relations ⇐1522

Church-operated school failed to show that salary differential between male and female teachers was based on factor other than sex, and, thus, school was responsible for back pay for female teachers despite school's contention that salary differential was based on marital status. Fair Labor Standards Act of 1938, § 6(d)(1)(iv), as amended, 29 U.S.C.A. § 206(d)(1)(iv).

11. Stipulations ⇐14(10)

Trial court did not have sufficient evidentiary basis on which to make distinction between work performed by support staff for church and work performed for church-operated school, and, thus, court did not err in awarding back pay for support staff based on stipulation to amount of difference in wages which support staff members received and what they would have received had they been paid minimum wage. Fair Labor Standards Act of 1938, § 3(e), r), as amended, 29 U.S.C.A. § 203(e), r); U.S.C.A. Const.Amend. 1, 5.

12. Interest ⇐39(2.40, 2.45)

Trial court did not abuse its discretion in refusing to award government prejudgment interest on award of equal pay and back pay awards in case involving employees of church-operated school. Fair Labor Standards Act of 1938, § 3(e), r), as amended, 29 U.S.C.A. § 203(e), r); U.S.C.A. Const. Amend. 1, 5.

Donald W. Lemons, Durrette, Irvin & Lemons, P.C., Richmond, Va., Donald Wise Huffman, Bird, Kinder & Huffman, Roanoke, Va. (John L. Cooley, Fox, Wooten & Hart, P.C., Roanoke, Va., on brief, for defendants-appellants.

Samuel Alan Marcossan, U.S. E.E.O.C., William J. Stone, U.S. Dept. of Labor.

1. Title 29 U.S.C. §§ 201 et seq. The Equal Pay Act of 1963 amended the FLSA and is codified

Washington, D.C. (Charles A. Shanor, General Counsel, Gwendolyn Young Reams, Associate General Counsel, U.S. E.E.O.C., Jerry G. Thorn, Acting Solicitor, Monica Gallagher, Associate Solicitor, Linda Jan S. Pack, Counsel for Appellate Litigation, U.S. Dept. of Labor, Washington, D.C., on brief, for defendants-appellees.

Before SPROUSE and CHAPMAN, Circuit Judges, and HOFFMAN, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

SPROUSE, Circuit Judge:

The dispute underlying this appeal arose when the federal government sought to apply certain provisions of the Fair Labor Standards Act (the Act or the FLSA)¹ to the Roanoke Valley Christian Schools (Roanoke Valley) operated by Shenandoah Baptist Church. The church and twenty-one intervening employees (Shenandoah) urge that the district court erred in awarding back pay for teachers (for equal pay violations) and for nonprofessional support staff (for minimum wage violations). Shenandoah asserts that Roanoke Valley is not covered by the FLSA; that application of the Act violates the free exercise and establishment clauses of the first amendment and the equal protection guarantee of the fifth amendment; and that, even if the Act does apply, the damages were improperly calculated. The government cross-appeals, contending that the trial court abused its discretion in declining to award prejudgment interest and in refusing to grant injunctive relief. We affirm the decision of the district court in all respects.

I. Facts

The Shenandoah Baptist Church was founded in 1971 as an independent Baptist church which trusts in the absolute authority of the Bible. Shenandoah asserts, and the government has not disputed, that the church views Christian education as a vital

¹ 29 U.S.C. § 206(d).

part of its mission. Shenandoah believes the "Great Commission" of *Matthew 28:19-20* requires the church to evangelize, baptize, and teach:

Go ye, therefore, and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost, teaching them to observe all things whatsoever I have commanded you and, lo, I am with you always even unto the end of the world.

Shenandoah opened Roanoke Valley in 1973, with a full-time curriculum that included instruction in Bible study and in traditional academic subjects into which biblical material had been integrated. The school gradually expanded until, by 1977, it offered classes from kindergarten through high school. The teaching staff expanded accordingly, from twenty to about thirty teachers between 1976 and 1986, the years at issue in this case.

Roanoke Valley teachers received base salaries of about \$8000 for the 1976 school year. Because this low salary level made it difficult to attract teachers, Shenandoah instituted a head-of-household salary supplement. Pastor Robert L. Alderman explained the basis for the supplement in this way:

When we turned to the Scriptures to determine head of household, by scriptural basis, we found that the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family.... We moved in that direction, thinking that our opportunity and responsibility of basing our practice on clear biblical teaching would not be a matter of question.

The supplement ranged from \$1600 in the 1976-77 school year to \$200 during the 1985-86 school year. By that time, base salaries had been increased to about \$12,500, and the supplement was discontinued.

2. Title 29 U.S.C. § 216 authorizes the government to sue on behalf of employees and to supervise the distribution of any funds recovered. This claim was filed by the Secretary of Labor, Elizabeth Dole, the current Secretary, is named in the caption of this opinion pursuant to Fed.R.App.P. 43(c)(1). When administration of equal pay claims was transferred to the Equal Employment Opportunity Commission (EEOC)

Between 1976 and 1986, all married male teachers received a salary supplement. Married women were not eligible to receive the supplement. It was not paid to a woman whose husband was a full-time graduate student, nor to a woman who raised two children on her teaching income after her husband, who had become disabled and mentally ill, left the family. Another mother of two who was separated from her husband was not paid the supplement for two years until her divorce became final. Between 1981 and 1986, three divorced female teachers who had dependents did receive the supplement. No woman received a supplement prior to 1981.

Also, between 1976 and 1982, ninety-one persons who worked at Roanoke Valley as support personnel were paid less than the hourly minimum wage. These workers included bus drivers, custodians, kitchen workers, bookkeepers, and secretaries.

II. Procedure

In 1978, the government brought this action,² alleging that Shenandoah had violated two aspects of the Fair Labor Standards Act. The government asserted that Shenandoah had paid Roanoke Valley support personnel less than the minimum wage and had paid female teachers less than male teachers performing the same job. 29 U.S.C. §§ 206(a) and (d).³ The complaint sought permanent injunctive relief and back pay with interest. The parties stipulated to many of the key facts. Shenandoah acknowledged that, between 1976 and 1982, support personnel were paid less than the statutory minimum wage. Shenandoah also conceded that, between 1976 and 1986, most full-time female teachers at Roanoke Valley were paid less than most full-time male teachers, although their "skill, effort, responsibility and work-

ing conditions" were "substantially equal." But Shenandoah asserted that the school was not covered by the FLSA and that applying the statute to a church-run school like Roanoke Valley would be unconstitutional.

3. Teachers and academic administrators are exempt from the Act's minimum wage provisions, but are covered by its equal pay requirements. 29 U.S.C. § 213(a)(1).

ing conditions" were "substantially equal." But Shenandoah asserted that the school was not covered by the FLSA and that applying the statute to a church-run school like Roanoke Valley would be unconstitutional.

In 1983, the district court entered partial summary judgment in favor of the government on the minimum wage claim.⁴ *Donovan v. Shenandoah Baptist Church*, 573 F.Supp. 320 (W.D.Va.1983) (*Shenandoah I*). The court concluded that Congress intended the Act to apply to church-run schools, that Shenandoah's nonprofessional support staff was not exempt from the statute's coverage, unlike members of recognized "religious orders," and that requiring Shenandoah to comply with the statute's minimum wage provisions would not violate the church's first amendment rights. Twenty-one of the nonprofessional staff members subsequently intervened to assert their own first amendment rights and to support Shenandoah's position.

The case was tried to the district court and a seven-member advisory jury in September 1988. Based on its holding in *Shenandoah I* and on the parties' stipulations, the court found that Shenandoah had violated the FLSA minimum wage requirement. The court ruled that the equal pay provisions of the Fair Labor Standards Act also apply to Roanoke Valley and then posed two questions to the advisory jury. The panel found "that the female school teachers ... were paid less than the male teachers who were performing equal work" and that the salary differential was "not based on a factor other than sex." The district court adopted these findings in its subsequent opinion and rejected arguments by Shenandoah and the intervenors that application of the FLSA infringed their first and fifth amendment rights. *Department of Labor v. Shenandoah Baptist Church*, 707 F.Supp. 1450 (W.D.Va.1989) (*Shenandoah II*).

4. A motion by the government for partial summary judgment on the equal pay claim was denied in 1987.

The trial court ordered Shenandoah to pay the government \$16,518.46 in back pay to be distributed to the support staff members who were the subject of the minimum wage claim and \$177,680 to be distributed to the teachers who were the subject of the equal pay claim. The court declined to award prejudgment interest. The court also refused to enjoin Shenandoah from violating the Act in the future or from soliciting employees for the return of back pay awards.

Both Shenandoah and the government appeal. Shenandoah urges that Roanoke Valley is not covered by the Fair Labor Standards Act. It insists that applying the Act here violates the free exercise and establishment clauses of the first amendment and the equal protection guarantee of the fifth amendment. Shenandoah also argues that the district court erred in its damage calculations by awarding back pay to single female teachers and by awarding back pay to support staff members without regard to whether their work was church-related or school-related. The government argues that the district court abused its discretion in refusing to award prejudgment interest on the back pay awards and in failing to grant injunctive relief.⁵ We address these contentions *seriatim*.

III. Applicability of the Fair Labor Standards Act

Shenandoah urges that the strictures of the Fair Labor Standards Act do not apply to Roanoke Valley. We disagree. Two conditions are necessary for the FLSA to apply. The first is that Roanoke Valley be an "enterprise" within the definition of the Act; the second is that the teachers and support staff be "employees." See 29 U.S.C. §§ 303(r) & (e); *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 295, 105 S.Ct. 1953, 1958, 85 L.Ed.2d 278 (1985). We begin with the question of enterprise.

5. On appeal, the government no longer asks that Shenandoah be prohibited from soliciting employees for the return of back wages. It appeals only the court's refusal to enjoin Shenandoah from violating the Act in the future.

When the FLSA was amended in 1961 to cover enterprises as well as individuals, nonprofit religious and educational organizations were exempt, provided they were not engaging in ordinary commercial activities. See *Alamo*, 471 U.S. at 297-98, 105 S.Ct. at 1959.⁶ However, Congress amended the statute again in 1966 to include public and private schools in the definition of enterprise. The amended statute explicitly states that nonprofit schools are within the scope of the Act:

"Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units.... For purposes of this subsection, the activities performed by any person or persons— (1) in connection with the operation of ... a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such ... school is public or private or operated for profit or not for profit)....

... shall be deemed to be activities performed for a business purpose.

29 U.S.C. § 203(r); see also 29 U.S.C. § 203(s)(5).

(1) Shenandoah urges that this amendment does not demonstrate a clear "affirmative intention" by Congress that the Act apply to church-operated schools. *NLRB v. Catholic Bishop*, 440 U.S. 490, 501, 99 S.Ct. 1313, 1319, 59 L.Ed.2d 533 (1979).⁷ However, an examination of the legislative

6. The ordinary commercial activities of religious organizations are covered by the Act. See, e.g., *id.*, 471 U.S. at 298-99, 105 S.Ct. at 1959-60; *Brock v. Wendell's Woodwork*, 367 F.2d 196, 198-99 (4th Cir.1969); *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879, 884 (7th Cir.), cert. denied, 347 U.S. 1013, 74 S.Ct. 867, 98 L.Ed. 1136 (1954).

7. In *Catholic Bishop*, the Court held that in a case raising serious First Amendment questions, "we must first identify the affirmative intention of the Congress clearly expressed" before concluding that the statute applies. *Id.* But the *Alamo* Court appeared to back away from this

history of the amendment belies that argument. The provision as originally presented to the House would have covered institutions of higher learning but not elementary and secondary schools. Congressman Collier proposed the language adding public and private elementary and secondary schools. During debate, the following exchange took place:

Mr. PUCINSKI. Let us consider a parochial elementary school, in which the nuns do the work in the cafeteria. Would they have to be paid a minimum wage?

Mr. COLLIER. No, they would not be covered.

Mr. BURTON of California. Mr. Chairman, will the gentleman yield?

Mr. COLLIER. I am delighted to yield to the gentleman from California.

Mr. BURTON of California. As I understand, it is not the gentleman's intention to include members of a religious order under the definition of an employee, and therefore a nun would not be considered an employee. Therefore, a minimum wage would not be required to be paid a nun. Am I correct in my understanding of the gentleman's intention?

Mr. COLLIER. That is correct. I did not intend to cover them.

112 Cong.Rec. 11371 (1966). The critical concern for the legislators was not whether a parochial elementary school was an enterprise. They assumed that such a school was an enterprise and moved directly to the separate question of whether the nun was an employee.

heightened level of statutory analysis, saying, "Because we perceive no 'significant risk' of an infringement on First Amendment rights, we do not require any clearer expression of congressional intent to regulate these activities." 471 U.S. at 298 n. 18, 105 S.Ct. at 1960 n. 18 (citations omitted). Justice White, who authored the *Alamo* opinion, was a dissenter in *Catholic Bishop*.

The tension between these two cases does not present a problem here because, under the more exacting *Catholic Bishop* standard, we find that Congress affirmatively intended to apply the FLSA to schools such as Roanoke Valley.

The conclusion that church-operated schools are encompassed within the Act's definition of enterprise is supported by subsequent legislative action. Cf. *Andrus v. Shell Oil Co.*, 448 U.S. 657, 666, 100 S.Ct. 1932, 1938, 64 L.Ed.2d 593 (1980); see also 2A *Sutherland Statutory Construction* § 49.11 (Sands 4th ed. 1984). In 1977, Congress again amended the FLSA to create an exemption for "religious or non-profit educational conference center[s]." 29 U.S.C. § 213(a)(3); see also 123 Cong.Rec. 32724-26 (1977). Such an exemption would not have been necessary if church-operated educational facilities had been excluded under the statutory definition of enterprise.

Inclusion of church-operated schools under the protective umbrella of the Act is also consistent with Supreme Court precedent construing the FLSA "liberally to apply to the furthest reaches consistent with congressional direction." *Alamo*, 471 U.S. at 296, 105 S.Ct. at 1959 (quoting *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211, 79 S.Ct. 260, 264, 3 L.Ed.2d 243 (1959)).

We therefore hold that the history of the statute demonstrates an affirmative intention by legislators to treat church-operated schools as enterprises. *Accord Marshall v. First Baptist Church*, 23 Wage & Hour Cas. (BNA) 386, 1977 WL 1753 (D.S.C. 1977); see also *Ritter v. Mount St. Mary's College*, 495 F.Supp. 724 (D.Md.1980) (holding to the contrary), rev'd in relevant part, 738 F.2d 431 (4th Cir.1984) (table). The Ninth Circuit implicitly acknowledged this principle in *EEOC v. Fremont Christian School*, 781 F.2d 1362, 1367 (9th Cir.

8. Justice Rehnquist, acting as circuit justice, subsequently refused to stay discovery in *Pacific Union Conference v. Marshall*, 434 U.S. 1205, 98 S.Ct. 2, 34 L.Ed.2d 17 (1977); see also *Donovan v. Central Baptist Church, Victoria*, 96 F.R.D. 4 (S.D.Tex.1982) (denying church's motion for protective order).

9. Cases declining to apply labor statutes to church-operated schools have involved other statutes with legislative histories devoid of any indication as to the applicability of the statute to religious schools. See, e.g., *Catholic Bishop*, 440 U.S. at 504-06, 99 S.Ct. at 1320-21 (NLR); *Cochran v. St. Louis Preparatory Seminary*, 717 F.Supp. 1413, 1416 (E.D.Mo.1989) (ADEA).

1986), applying the equal pay provisions of the FLSA to a church-operated school which provided health insurance only for heads of households. See also *Russell v. Belmont College*, 554 F.Supp. 667, 670-76 (M.D.Tenn.1982) (denying college's motion for summary judgment); *Marshall v. Pacific Union Conference*, 23 Wage & Hour Cas. (BNA) 316, 1977 WL 385 (C.D.Cal. 1977) (denying conference's motion for summary judgment); cf. *Archbishop of Roman Catholic Apostolic Archdiocese v. Guardiola*, 628 F.Supp. 1173, 1178-79 (D.P.R.1985) (holding lay Catholic Church employees are covered by the Puerto Rico Minimum Wage Act, which is modeled on the FLSA).⁸

[2] Shenandoah urges nevertheless that Roanoke Valley should not be covered by the statute because it is inextricably intertwined with the church. It argues that school employees are really church employees and therefore not covered by the FLSA. Shenandoah asserts that the church and school share a common physical plant and a common payroll account, that the associate pastor for school ministries reports to the pastor, that the pastor hires all teachers, and that school staff must subscribe to Shenandoah's statement of faith.⁹ Shenandoah insists, "The school is the church."

Shenandoah relies on *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 107 S.Ct. 2562, 97 L.Ed.2d 273 (1987), and *Forest Hills Early Learning Center v. Grace Baptist Church*, 846 F.2d 260, 263-64 (4th Cir.1988), cert. denied, — U.S.

Here, the legislative history favors application of the FLSA to Roanoke Valley.

10. Shenandoah points to *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 101 S.Ct. 2142, 68 L.Ed.2d 612 (1981), which held that teachers in a Christian school that did not have a separate legal identity from the church were employees of the church. However, *St. Martin* turned on the construction of an unemployment compensation statute which explicitly distinguished between employees of a church and employees of separately incorporated organizations. 451 U.S. at 782, 101 S.Ct. at 2148. Congress did not create the framework for such a distinction in the FLSA.

—, 109 S.Ct. 837, 102 L.Ed.2d 969 (1989), for the proposition that the government should be required to accept the church's characterization of Roanoke Valley as an inseverable part of the church. Shenandoah's reliance is misplaced. These cases only considered whether legislators could exempt religious organizations from certain statutory provisions without running afoul of the First Amendment. They concluded that such exemptions were constitutionally permissible; they did not hold that they were mandatory. See *County of Allegheny v. Pittsburgh ACLU*, 492 U.S. —, 109 S.Ct. 3086, 3105 n. 51, 106 L.Ed.2d 472 (1989). The case *sub judice* presents an entirely different question—whether Congress intended the FLSA to include (not exclude, as in *Amos* and *Forest Hills*) church-operated schools. We hold that Congress affirmatively intended the Act to apply to such schools.

[3] Shenandoah also asserts that the second criterion for application of the Fair Labor Standards Act is not present here because Roanoke Valley teachers are not "employees."¹¹ It urges that they are ministers and therefore covered by the "ministerial exemption" from the Act.¹² This exemption is derived from the congressional debate excerpted above and delineated in guidelines issued by the Labor Department's Wage and Hour Administrator:

Persons such as nuns, monks, priests, lay brothers, ministers, deacons and other members of religious orders who serve pursuant to their religious obligations in the schools . . . operated by their church

11. The statutory definition of employee is singularly unhelpful. It states: "[T]he term 'employee' means any individual employed by an employer." 29 U.S.C. § 203(e)(1).

12. Shenandoah had also argued below that non-professional support staff members were ministers and subject to the exemption. The district court rejected this argument. *Shenandoah I*, 573 F.Supp. at 323, and Shenandoah does not raise it in a statutory context on appeal.

13. Another Title VII case relied on by Shenandoah is also factually distinct. In *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir.1981), cert. denied, 456

or religious order shall not be considered to be "employees".

Field Operations Handbook, Wage and Hour Division, U.S. Dept of Labor, § 10603(b) (1967). Shenandoah states that Roanoke Valley teachers consider teaching to be their personal ministry. It urges that all classes are taught from a pervasively religious perspective, and that teachers lead students in prayer and are required to subscribe to the Shenandoah statement of faith as a condition of employment.

Shenandoah contends that the characterization of Roanoke Valley teachers as ministers is consistent with this court's holding in *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1154 (4th Cir.1985), cert. denied, 478 U.S. 1020, 106 S.Ct. 3333, 92 L.Ed.2d 739 (1986). In *Rayburn*, we explained that the ministerial exemption in Title VII depended upon the function of the position, not simply on ordination. *Id.* at 1168. But the facts of *Rayburn* are far removed from those of the case at bar. There the claimant, whom we ultimately characterized as clergy, was a woman who held the degree of Master of Divinity from the church's theological seminary and who sought appointment to the seven-person pastoral staff of one of the denomination's largest congregations.¹³

The teachers in the present case perform no sacerdotal functions; neither do they serve as church governors. They belong to no clearly delineated religious order. Shenandoah insists that there is no cognizable difference between its teachers and nuns who teach in church-affiliated schools, but it has failed to adequately support this assertion.¹⁴ Cf. *Fiedler v. Marumisco*

U.S. 905, 102 S.Ct. 1749, 72 L.Ed.2d 161 (1982); the Fifth Circuit held members of the faculty of a theological seminary to be ministers; however, most were ordained members of the clergy whose job it was to train "the future ministers of many local Baptist churches." The *Southwestern Baptist* court also expressly stated that, "While religious organizations may designate persons as ministers for their religious purposes free from any governmental interference, bestowal of such a designation does not control their extra-religious legal status." *Id.*

14. Shenandoah directs us to the testimony of one Roanoke Valley teacher who attended a Catholic school as a child and testified that her

Cite as 899 F.2d 1389 (4th Cir. 1990)

Christian School, 681 F.2d 1144, 1153 (4th Cir.1980); *Triple "AAA" Co. v. Wirtz*, 378 F.2d 884, 827 (10th Cir.), cert. denied, 389 U.S. 959, 88 S.Ct. 336, 19 L.Ed.2d 364 (1967).

[4] This is not to minimize the vocation of the Roanoke Valley teachers or the sincerity which they bring to it. But "[e]xemptions from the Fair Labor Standards Act are narrowly construed." *Hodgson v. Duke Univ.*, 460 F.2d 172, 174 (4th Cir.1972), and, as the district court has observed, the exemption of these teachers would "create an exception capable of swallowing up the rule." *Shenandoah I*, 573 F.Supp. at 323. We therefore decline to give the ministerial exemption the sweeping interpretation Shenandoah seeks.¹⁵ The Supreme Court has explained "[t]he test of employment under the Act is one of 'economic reality.'" *Alamo*, 471 U.S. at 301, 105 S.Ct. at 1961. The economic reality in this case is that the Roanoke Valley teachers are employed as lay teachers in a church-operated private school.

We therefore hold that Congress intended church-operated schools such as Roanoke Valley to be covered by the Fair Labor Standards Act, and that their teachers and support staff are employees under the Act. We next consider the constitutional challenges raised by Shenandoah Baptist to application of the statute.

IV. Free Exercise of Religion

[5] Shenandoah and its intervenors argue that application of the Fair Labor Standards Act impermissibly burdens their first amendment right to free exercise of their religious beliefs. Our review of this free exercise claim requires that we first examine the burden on the exercise of Shenandoah's sincerely-held religious beliefs, then

role as a teacher at Roanoke Valley was the same as that of a nun in a Catholic school. Another Shenandoah witness, the executive director of the Association of Christian Schools International, discussed the role of nuns in school, but the district court found "his description of his research . . . too ambiguous for the court to credit his expertise in the subject." Having reviewed the evidence, we agree with the district court's characterization.

determine whether the state presents a compelling justification for imposing this burden, and finally balance the burden on free exercise against the hindrance to the state's goal that would arise from exempting Shenandoah from the Act's coverage. *Rayburn*, 772 F.2d at 1168 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)).

Shenandoah urges that application of the FLSA impairs the church's ability to administer its relationship with employees and thereby its "power to decide . . . free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116, 73 S.Ct. 143, 154, 97 L.Ed. 120 (1952). Shenandoah further asserts that its head-of-household practice was based on a sincerely-held belief derived from the Bible. The intervenors claim that allowing their wages to be set by the government, rather than by church governors acting under divine guidance, deprives them of blessings they would otherwise receive by allowing their Lord to supply their needs. On these bases, the church and intervenors insist that application of the Act to Roanoke Valley would burden the free exercise of their religious beliefs.

However, our examination of the record reveals that any burden would be limited. The pay requirements at issue do not cut to the heart of Shenandoah beliefs. Although Shenandoah's head-of-household pay supplement was grounded on a biblical passage, church members testified that the Bible does not mandate a pay differential based on sex. They also testified that no Shenandoah doctrine prevents Roanoke Valley from paying women as much as men or from paying the minimum wage. Indeed, the school now complies with the

15. Ministerial exemptions have also been construed narrowly in other contexts. "Certainly all members of a religious organization or sect are not entitled to the exemption by reason of their membership, even though in their belief each is a minister." *Dickinson v. United States*, 346 U.S. 389, 394, 74 S.Ct. 152, 156, 98 L.Ed. 132 (1953) (selective service); see also *Olsen v. Commissioner*, 709 F.2d 278, 282 (4th Cir.1983) (tax).

FLSA: teachers were last paid a head-of-household supplement in 1966, and all support staff members have been paid at or above minimum wage levels since 1982. The fact that Roanoke Valley must incur increased payroll expenses to conform to FLSA requirements is not the sort of burden that is determinative in a free exercise claim. Cf. *Jimmy Swaggart Ministries v. Board of Equalization*, — U.S. —, 110 S.Ct. 688, 698, 107 L.Ed.2d 796 (1990); *Hernandez v. Commissioner*, 490 U.S. —, 109 S.Ct. 2136, 2149, 104 L.Ed.2d 766 (1989); *Bob Jones Univ. v. United States*, 461 U.S. 574, 608-04, 103 S.Ct. 2017, 2034-35, 76 L.Ed.2d 157, (1983); *Braunfeld v. Brown*, 366 U.S. 599, 605-06, 81 S.Ct. 1144, 1146-47, 6 L.Ed.2d 553 (1961). Furthermore, the pastor testified that Shenandoah had no objection to complying with state fire, health, and safety requirements, and had withheld income tax from employees' wages and paid social security tax.

Regarding the intervenors' assertion that receipt of a government-mandated minimum wage may interfere with their reliance on God, we observe, as did the court below and the Supreme Court in *Alamo*, that the intervenors retain the option of volunteering their services or returning to Shenandoah all or part of their back pay awards. See 471 U.S. at 304, 105 S.Ct. at 1963.

Against what is, at most, a limited burden to Shenandoah's free exercise rights, we must weigh the reasons for applying both the minimum wage and equal pay provisions of the FLSA to Roanoke Valley. These reasons must be compelling. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141-42, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987). We find that they are. The Seventh Circuit has described the Fair Labor Standards Act as "a remedial measure seeking to insure to the workers of the United States ... a minimum wage sufficient to maintain a minimum standard of living which Congress deemed to be

16. Shenandoah urges that the congressional exemption for religious orders demonstrates that its interest in application of the FLSA is less than compelling. We do not agree that the closely circumscribed ministerial exemption has

necessary to their well-being." *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879, 833 (7th Cir.), cert. denied, 347 U.S. 1013, 74 S.Ct. 367, 98 L.Ed. 1136 (1954); see also *Alamo*, 471 U.S. at 302, 105 S.Ct. at 1962. Concerning the equal pay provisions of the FLSA, the Supreme Court has explained:

Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of "many segments of American industry has been based on an ancient but out-moded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."

Corning Glass Works v. Brennan, 417 U.S. 188, 195, 94 S.Ct. 2223, 2228, 41 L.Ed.2d 1 (1974) (quoting S.Rep. No. 176, 88th Cong., 1st Sess. 1 (1963)); cf. *Rayburn*, 772 F.2d at 1168 ("It would ... be difficult to exaggerate the magnitude of the state's interest in assuring equal employment opportunities for all, regardless of race, sex, or national origin."). We therefore conclude that this case presents state "interests of the highest order." *Yoder*, 406 U.S. at 215, 92 S.Ct. at 1533; against which we must weigh the concerns of Shenandoah and its intervenors.

In this case, the balance tips toward the application of the FLSA to Roanoke Valley. There is no principled way of exempting the school without exempting all other sectarian schools and thereby the thousands of lay teachers and staff members on their payrolls. This would undermine the congressional goal of making minimum wage and equal pay requirements applicable to private as well as public schools.¹⁶ Cf. *United States v. Lee*, 455 U.S. 252, 259-60, 102 S.Ct. 1051, 1056, 71 L.Ed.2d 127 (1982). Congress has here created a comprehensive statute, and a less restrictive means of attaining its aims is not available. See

such an effect. See *Hernandez*, 109 S.Ct. at 2149. To conclude otherwise would "radically restrict the operating latitude of the legislature." *Braunfeld*, 366 U.S. at 606, 81 S.Ct. at 1147.

Braunfeld, 366 U.S. at 607, 81 S.Ct. at 1148; cf. *Sherbert v. Verner*, 374 U.S. 398, 408-09, 83 S.Ct. 1790, 1796, 10 L.Ed.2d 965 (1963). See generally *New Life Baptist Church Academy v. East Longmeadow*, 385 F.2d 940, 946-48 (1st Cir.1989). As the Supreme Court explained in *Alamo*, "the purposes of the Act require that it be applied even to those who would decline its protections." 471 U.S. at 302, 105 S.Ct. at 1962. We therefore conclude that application of the FLSA to Roanoke Valley does not violate the first amendment free exercise rights of Shenandoah or the intervenors.

V. Establishment of Religion

[6] Shenandoah next urges that application of the Fair Labor Standards Act to Roanoke Valley violates the establishment clause. Our analysis is, of course, guided by *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), which held that to pass constitutional muster a statute must (1) have a secular legislative purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster excessive government entanglement with religion. Shenandoah does not dispute that the FLSA has a secular purpose. However, the church protests that the effect of the FLSA is to violate "[t]he clearest command of the Establishment Clause ... that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 1683, 72 L.Ed.2d 53 (1982).

[7] Shenandoah claims that the Roman Catholic Church is officially preferred under the Act because nuns and priests are included in the ministerial exemption while lay teachers and staff members at Roanoke Valley are not. We do not agree that the ministerial exemption creates an official

17. See also *Alamo*, 471 U.S. at 305 & n. 31, 105 S.Ct. at 1963-64 & n. 31, distinguishing FLSA requirements from "the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion."

Shenandoah points to the 10-year history of this case and its requirements for producing records as proof of the entanglement problems arising from the FLSA. If Shenandoah's rea-

ference. The exemption is facially neutral, encompassing ministers, deacons, and members of religious orders in any faith, not exclusively Catholic nuns and priests. See *Hernandez*, 109 S.Ct. at 2146-47. It is based on a determination that members of the clergy should not be characterized as employees, not on a decision to prefer any specific religion. See 112 Cong.Rec. 11371 (1966) (excerpted *supra*). Lay teachers and support staff at Catholic schools are covered by the FLSA as are the lay teachers and staff at Roanoke Valley. The Supreme Court has held that such a facially neutral provision which accommodates free exercise values does not constitute an establishment clause violation. *Gillette v. United States*, 401 U.S. 437, 451-54, 91 S.Ct. 823, 837-38, 28 L.Ed.2d 168 (1971).

[8] Shenandoah also asserts that applying the Act to Roanoke Valley spawns impermissible government entanglement with religion. The church complains that the government inspection, monitoring, and review required to implement the Act intrude into church affairs. See *Lemon*, 403 U.S. at 612-13, 91 S.Ct. at 2111. But the Supreme Court rejected this argument in *Alamo*, holding that "the recordkeeping requirements of the Fair Labor Standards Act, while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs" than fire inspection and building and zoning regulations. 471 U.S. at 305-06, 105 S.Ct. at 1963-64; see also *Swaggart*, 110 S.Ct. at 698-99; *Hernandez*, 109 S.Ct. at 2147-48.¹⁷ We therefore hold that the application of the Fair Labor Standards Act to Roanoke Valley does not violate the establishment clause of the first amendment.

VI. Equal Protection

[9] Shenandoah's final constitutional argument is that the application of the Fair

soning were followed to its logical conclusion, the government could never bring any claim against a religious organization without running afoul of the establishment clause. But "[e]ven religious schools cannot claim to be wholly free from some state regulation." *Ohio Civil Rights Comm'n v. Dayton Schools*, 477 U.S. 619, 626, 106 S.Ct. 2718, 2723, 91 L.Ed.2d 512 (1986) (citing *Yoder*, 406 U.S. at 213, 92 S.Ct. at 1532).

Labor Standards Act to Roanoke Valley violates the equal protection guarantee implicit in the fifth amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954). Again Shenandoah points to the ministerial exemption, arguing that it creates a suspect classification which invidiously discriminates against adherents of religions that do not have formal religious orders. As the Supreme Court observed in *Prince v. Massachusetts*, 321 U.S. 158, 170, 64 S.Ct. 438, 444, 88 L.Ed. 645 (1944), this is but another phrasing of the first amendment arguments we have already considered. There is "no justification for applying strict scrutiny to a statute that passes the *Lemon* test. The proper inquiry is whether Congress has chosen a rational classification to further a legitimate end." *Amos*, 483 U.S. at 339, 107 S.Ct. at 2370.

Courts analyzing similar ministerial exemptions in an equal protection context have upheld the exemptions as a rational means of creating a buffer between church and state. See, e.g., *Bethel Baptist Church v. United States*, 822 F.2d 1334, 1341-42 (3d Cir.1987), cert. denied, 485 U.S. 959, 108 S.Ct. 1221, 99 L.Ed.2d 422 (1988); *Olsen v. Commissioner*, 709 F.2d 278, 282-83 (4th Cir.1983). The same reasoning applies here and we find no fifth amendment violation.

VII. Relief

[10] Shenandoah and the government each challenge aspects of the remedy craft-

18. The stipulation reveals the following:

School Year	Female Teachers Receiving Supplement/Total Female Teachers	Male Teachers Receiving Supplement/Total Male Teachers
1976-77	0/15	3/4
1977-78	0/16	4/5
1978-79	0/20	4/3
1979-80	0/25	4/2
1980-81	0/21	5/3
1981-82	1/19	7/7
1982-83	1/23	6/6
1983-84	3/23	6/6
1984-85	3/26	6/6
1985-86	1/24	5/3

This table includes only teachers who worked on a full-time basis.

ed by the district court in this case. Shenandoah argues that the court erred in calculating back pay on both the equal pay and minimum wage claims. The government contends that the trial court erred in refusing to award prejudgment interest and in denying injunctive relief. We find all of these contentions to be without merit.

The district court awarded \$177,680 to the government on behalf of female teachers on the equal pay claim. Shenandoah seeks to reduce this sum by arguing that the court should not have awarded damages for supplements not paid to single female teachers. The Supreme Court has explained that in equal pay claims

once the [government] has carried [its] burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified. . . .

Corning Glass, 417 U.S. at 196, 94 S.Ct. at 2229. Shenandoah stipulated that women were paid less than men at Roanoke Valley.¹⁸ It bore the burden of proving that gender was not the reason for this discrepancy.

As its affirmative defense, Shenandoah urges that single female teachers were discriminated against on the basis of marital status, not sex. See 29 U.S.C. § 206(d)(1)(iv). It relies on the fact that the sole unmarried male teacher employed by Roanoke Valley was not paid a head-of-household supplement. Shenandoah as-

serts that single people of either sex were ineligible for the supplement. But the trial court also had before it evidence that marital status was not the determinative factor. Three years after the commencement of this action, Roanoke Valley deviated from its asserted policy and began paying supplements to some single people—divorced mothers with dependents. This conflicts with Shenandoah's assertion that only married people qualified for the supplement. In the group that Shenandoah describes as eligible for the extra pay—married people—it admitted discriminating against women by not making the supplement available to them on the same basis as to men.

The district court rejected Shenandoah's argument that it used marital status as the threshold consideration in determining eligibility for the head-of-household supplement, stating "(t)he court need not decide if Shenandoah could legally have paid a supplement to all married teachers while denying it to all single teachers performing the same work, for that is not the policy the church followed." *Shenandoah II*, 707 F.Supp. at 1464. In light of all the evidence, we cannot hold clearly erroneous the trial court's finding that Shenandoah failed to carry its burden of proving that the salary differential was "not based on a factor other than sex." See *Brewster v. Barnes*, 788 F.2d 985, 992 (4th Cir.1986).

[11] Shenandoah also complains of the district court's back pay award on the minimum wage claims. The district court awarded \$16,818.46. The parties had stipulated that amount as the difference in the wages the ninety-one affected support staff members actually received between 1976 and 1982 and what they would have received, had they been paid the minimum wage. Shenandoah urges the court erred in not considering whether the work of these support staff members was performed for the church or for the school. But Shenandoah also asserts that "some of the work is so interrelated . . . that it would be virtually impossible to assign an amount to either category." Shenandoah directs us to no evidence produced at trial that would

provide a basis for distinguishing between church- and school-related labor. Given that the trial court was not provided with a sufficient evidentiary basis on which to make the distinction Shenandoah seeks, the court did not err in awarding back pay based on the stipulation.

[12] The government has cross-appealed, claiming that the district court erred in refusing to award prejudgment interest. Normally, "[p]rejudgment interest is necessary, in the absence of liquidated damages, to make the individual discriminatee whole." *Cline v. Roadway Express*, 689 F.2d 481, 489 (4th Cir.1982). However, the decision whether to award interest is within the trial court's discretion. *Id.* On the narrow facts of this case, we find the equitable considerations sufficient to avoid a finding of abuse of discretion. Neither do we find that the district court abused its discretion in refusing to grant injunctive relief, in light of the fact that Roanoke Valley has been in compliance with the Act since 1986.

To summarize, we conclude that Congress affirmatively intended the Fair Labor Standards Act to apply to church-operated schools and that application of the Act to Roanoke Valley does not violate the first or fifth amendment rights of the church or the intervenors in this action. We affirm the district court award of \$16,818.46 back pay for support staff members who were subject to minimum wage violations and of \$177,680 back pay for teachers who were subject to equal pay violations. We also affirm the denial of prejudgment interest and injunctive relief.

AFFIRMED.



WHITE HOUSE STAFFING MEMORANDUM

DATE: 02/02/95 ACTION/CONCURRENCE/COMMENT DUE BY: 8:00 A.M. FRIDAY

SUBJECT: PRESIDENTIAL REMARKS: MINIMUM WAGE EVENT (02/03)

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	<input type="checkbox"/>	<input type="checkbox"/>	QUINN	<input type="checkbox"/>	<input type="checkbox"/>
PANETTA	<input checked="" type="checkbox"/>	<input type="checkbox"/>	RASCO	<input checked="" type="checkbox"/>	<input type="checkbox"/>
McLARTY	<input type="checkbox"/>	<input type="checkbox"/>	RUBIN	<input type="checkbox"/>	<input type="checkbox"/>
ICKES	<input checked="" type="checkbox"/>	<input type="checkbox"/>	SEGAL	<input type="checkbox"/>	<input type="checkbox"/>
BOWLES	<input checked="" type="checkbox"/>	<input type="checkbox"/>	STEPHANOPOULOS	<input checked="" type="checkbox"/>	<input type="checkbox"/>
RIVLIN	<input checked="" type="checkbox"/>	<input type="checkbox"/>	TYSON	<input checked="" type="checkbox"/>	<input type="checkbox"/>
EMANUEL	<input type="checkbox"/>	<input type="checkbox"/>	WEBSTER	<input type="checkbox"/>	<input type="checkbox"/>
GEARAN	<input checked="" type="checkbox"/>	<input type="checkbox"/>	WILLIAMS	<input type="checkbox"/>	<input type="checkbox"/>
GIBBONS	<input type="checkbox"/>	<input type="checkbox"/>	<u>TOIN</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
GRIFFIN	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>SPERLING</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
HALE	<input type="checkbox"/>	<input type="checkbox"/>	<u>REED</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
HERMAN	<input type="checkbox"/>	<input type="checkbox"/>	<u>BAER</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
LAKE	<input type="checkbox"/>	<input type="checkbox"/>	<u>PRINCE</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
LINDSEY	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
MIKVA	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
McCURRY	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
McGINTY	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>

REMARKS: COMMENTS TO JONATHAN PRINCE (65692) OR DON BAER (62777) BY 8:00 AM FRIDAY. AT HOME OR THROUGH SIGNAL IF NECESSARY.
RESPONSE:

JOHN D. PODESTA
Assistant to the President
and Staff Secretary
Ext. 2702

DRAFT: Thursday, 6:45 pm. Jobs numbers and comparisons subject to change.

**President William J. Clinton
Announcement Concerning the Minimum Wage
February 3, 1994**

Today marks the completion of two full years of reports on the economy under our Administration. This morning, the Department of Labor reported that over 6 Million jobs have been created since I became President.

As I am sure all of you remember, during the Presidential campaign, I promised the creation of 8 Million jobs over four years -- and today's report shows we are well ahead of schedule.

1994 was the best year for job growth in a decade. Eight times as many jobs are being created per month than were created during the previous Administration.

The unemployment rate has dropped 20% since I took office. We are experiencing the lowest combined unemployment and inflation in 25 years. And 92% of the job growth has been in the private sector -- and a majority of the jobs created have been high-wage jobs.

I am very proud of our record so far. But I am also very aware that all the good statistics in the world don't necessarily mean more money in the pockets of ordinary Americans. And despite all the progress we have made, millions of hardworking people are working longer hours for less money. From the end of World War II until the late 70s, the income of all Americans rose steadily together. But from 1979 to 1993, the income of the top 20% grew significantly, and the income of the other 80% of America barely grew at all or dropped.

Much of the problem is due to the widening income gap between working Americans who have the skills they need to compete in the new global economy and those who don't. A male college graduate today earns 83% more than a man with only a high-school degree. That's why we've pursued a far-reaching education agenda. It's why we've made it easier and more affordable to get college loans. And it's why I proposed the Middle Class Bill of Rights to help people invest in their childrens' education and in their own training and skills.

But another, no less important part of the problem, is the declining value of full-time wages for many jobs. And I believe that if we really honor work, anyone who takes the responsibility to work full-time should be able to support a family and live in dignity.

This is the essence of what I mean when I talk about the New Covenant. Our job is to create enough opportunity to earn a living for people who take the responsibility to work hard to build up their lives.

That is why we fought so hard to expand the Earned Income Tax Credit last year, cutting taxes for 15 Million working families with low-incomes. And that is precisely why today I am calling on Congress to reward work by raising the minimum wage to \$5.15 over the next two years.

The only way to build the middle-class and to shrink the underclass is to make work pay. And in terms of real buying power, the minimum wage will be at

a 40-year low by next year. The simple truth is that you cannot make a living on \$4.25 an hour. And if we are serious about reforming the welfare system, we have to be serious about making work pay for people who take responsibility for their lives.

I want to close with one observation about recent history. In 1990, Congress raised the minimum wage according to the exact same schedule I have proposed -- 45 cents a year, for two years. That increase was passed by overwhelming margins in both houses, with majority support from both parties.

This has always been a bipartisan issue and should remain one. Let's work together to make the minimum wage a wage you can live on.

Thank you.

REWARDING WORK: THE CASE FOR INCREASING THE MINIMUM WAGE

The President's proposal would increase the minimum wage from \$4.25 to \$5.15 over two years, through two 45 cent increases. The last increase, passed by an overwhelming, bipartisan vote in 1989, and implemented in 1990 and 1991, was also a 90 cent increase in two 45 cent stages. For a full-time, year-round worker at the minimum wage, a 90 cent increase would raise yearly income by \$1,800 -- as much as the average family spends on groceries in over 7 months.

MAINTAINING THE HISTORIC VALUE OF WORK: If the minimum wage were to stay at its current level (\$4.25), it would fall to its lowest real level in forty years. Indeed, the value of the minimum wage is now 27% lower than it was in 1979, and has fallen 45 cents in real value since its last increase in April of 1991. The first half of the President's 90 cent proposal simply restores the minimum wage to its value from the last increase.

RAISING THE MINIMUM WAGE PRIMARILY HELPS ADULT WORKERS -- MOST OF WHOM RELY ON THEIR MINIMUM WAGE JOBS TO SUPPORT THEIR HOUSEHOLDS: Nearly two-thirds of minimum wage workers are adults (63%); over one third of all minimum wage workers (36%) are the sole breadwinners in their families; the average minimum wage worker brought home over half of his or her family's earnings. Thus, a rise in the minimum wage is a significant boost to the standard of living to millions of households.

REWARDS WORK OVER WELFARE: The minimum wage increase provides another crucial measure to reward work and ensure that there is a strong incentive to choose work over welfare.

BETWEEN 11 MILLION AND 14 MILLION WORKERS WOULD BENEFIT FROM THE PRESIDENT'S PROPOSAL TO INCREASE THE MINIMUM WAGE: An estimated 11 million workers, paid by the hour, earn between \$4.25 and \$5.14. Research indicates that an increase in the minimum wage to \$5.15 could have a "ripple" effect on another 3.5 million workers who earn within 50 cents of the new minimum wage.

EMPIRICAL EVIDENCE SHOWS THE PRESIDENT'S PROPOSAL CAN INCREASE WAGES WITHOUT COSTING JOBS: Over a dozen empirical studies have found that moderate increases in the minimum wage do not have a significant impact on employment. These studies include state-specific research that shows that higher state increases in the minimum wage did not result in significant job impacts. As Nobel Laureate Robert Solow stated: "[T]he evidence of job loss is weak. And the fact that the evidence is weak suggests that the impact on jobs is small."

A 90 CENT INCREASE IN THE MINIMUM WAGE WILL LIFT A FAMILY OF FOUR OUT OF POVERTY: The dramatic extension of the Earned Income Tax Credit helped lift hundreds of thousands of working families out of poverty. Yet, by 1996, even the EITC is not enough to lift above the poverty line a family of four making the minimum wage. With the 90 cent minimum wage increase, food stamps, and the EITC, a family of four with a year-round minimum wage worker would be lifted above the poverty line.

THE LAST MINIMUM WAGE -- ALSO 90 CENTS -- GARNERED STRONG BIPARTISAN SUPPORT. In 1989, the minimum wage was passed by votes of 382 to 37 (135 Republicans) in the House, and 89 to 8 in the Senate (36 Republicans) and was supported by Senator Dole and Rep. Gingrich.