No. 08-1379

In the Supreme Court of the United States

ARNIE GONZALEZ,
AND ALL OTHERS SIMILARLY SITUATED

Petitioners

v.

CITY OF DEERFIELD BEACH, FLORIDA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether an emergency medical technician or rescue supervisor who does not actually engage in any fire suppression activities can be said to have the "responsibility to engage in fire suppression" within the meaning of the Fair Labor Standards Act, 29 U.S.C. § 203(y)(1)—a question on which the courts of appeals are in active conflict.

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REPLY BRIEF FOR PETITIONERS

Arnie Gonzalez, and all others similarly situated, respectfully file this reply brief in support of their petition for a writ of certiorari.

ARGUMENT

I. The Circuit Split.

Even before the Eleventh Circuit issued the decision under review, Judge Hardiman of the Third Circuit thought that he recognized "an emergent circuit split regarding the interpretation of the phrase 'responsibility to engage in fire suppression' as used in § 203(y) of the Fair Labor Standards Act (FLSA)." *Lawrence v. City of Philadelphia, Pennsylvania*, 527 F.3d 299, 320 (3d Cir.) (Hardiman, J., dissenting), *cert. denied*, 129 S. Ct. 763 (2008). The essential division between petitioners and respondent City of Deerfield Beach, Florida ("City") is whether or not Judge Hardiman was correct. *Compare* Pet. 11 ("The decision of the panel—followed by the en banc court's refusal to take up the issue—confirms [the circuit] split and leaves the Eleventh Circuit in direct conflict with both the Ninth Circuit and the Third Circuit."), *with* Brief in Opposition ("BIO") 1 ("[T]here is no conflict between the [Eleventh Circuit] Opinion and any other Court of Appeals.").

The City readily concedes that on first glance, "it might appear that there is a conflict between *Lawrence* and [the Ninth Circuit's decision in] *Cleveland*, on the one hand, and [the Eleventh Circuit's decisions in] *Huff* and [the instant case], on the other hand." BIO 3. But the City's basic, and oft-repeated, point is that "distinct facts, not legal interpretation, are the reasons for [the] different results." BIO 2 (section heading). Therefore,

the City asserts that the facts in the various cases are not just "different" (BIO 3, 4, 8, 11) but "fundamentally different," "vastly different," and "drastically different" (BIO 6, 8). Indeed, *different* is far too humble a word to describe the yawning factual chasm stretching before the City's eyes: the respective facts are also "varying," "divergent," and "disparate" (BIO 2, 4), not to mention "completely dissimilar" and even "unique" (BIO 5, 7).

The foregoing demonstrates that the City's counsel has a serviceable thesaurus, but the reality regarding the facts of the relevant cases is more prosaic. Like any set of cases, *Lawrence* and *Cleveland* and the decision below are not identical in every last factual particular. But as explained in the petition (at 6-11) and as reiterated here, the outcomes in favor of the employees in the Third and Ninth Circuits (in contrast to the outcome in favor of the municipal employer below) can realistically be explained only by those courts' differing approaches to interpreting and applying the term "responsibility to engage in fire suppression" in 29 U.S.C. § 203(y)(1).

A. *Cleveland v. City of Los Angeles.*

The City would distinguish the Ninth Circuit's decision in *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005), *cert. denied*, 546 U.S. 1176 (2006), on the following ground: In *Cleveland*, "the Plaintiffs could not be ordered to engage in fire suppression. They could *volunteer* to assist fire fighters at a fire scene, but they were not required to do so and were not subject to discipline for failing to do so." BIO 5-6 (citing 420 F.3d at 984). This is not a new point; instead, the City simply plagiarized the opinion below: In *Cleveland*, "the plaintiffs could not be ordered to engage in fire suppression; they could *volunteer* to assist firefighters at a fire scene,

but they were not required to do so and were not subject to discipline for failing to do so." Pet. App. 9a (likewise citing 420 F.3d at 984).

Not surprisingly, the petition has already confronted this point at length. *See* Pet. 7-9 & n.2. In brief, the Ninth Circuit did not say that the *Cleveland* plaintiffs "could not be" ordered to engage in fire suppression; it said that there "is no evidence that any Plaintiff . . . *has ever been* ordered to perform fire suppression." 420 F.3d at 984 (emphasis added); *accord id.* at 990 ("there is no evidence that a dual function paramedic *has ever been* ordered to perform fire suppression" (emphasis added)). This evidentiary-based approach—examining (among other factors) whether an employee has actually been ordered to perform fire suppression—stands in marked contrast to the Eleventh Circuit's approach. Under the test developed in *Huff v. DeKalb County, Georgia*, 516 F.3d 1273 (11th Cir. 2008), and applied by the panel below, this kind of evidence categorically does not matter: "Given our holding in *Huff*, the fact that [petitioners] never actually engage in fire suppression is simply irrelevant." Pet. App. 7a; *accord* Pet. App. 11a ("As *Huff* indicates, and our discussion above reaffirms, it is irrelevant for purposes of § 203(y) whether an employee has ever engaged in actual fire suppression.").

In the Ninth Circuit's understanding of § 203(y)(1), for employees "to have the 'responsibility' to engage in fire suppression, they must have some real [i.e., actual] obligation or duty to do so"; that is, "[i]f a fire occurs, it must be their job to deal with it." *Cleveland*, 420 F.3d at 990; *see also id.* (reviewing "evidence" as to plaintiff-employees' actual jobs vis-à-vis fire suppression). Petitioners would easily prevail under this standard, given the panel's acknowledgment that although petitioners

have the requisite training to engage in fire suppression, "they rarely, if ever, are called upon to do so." Pet. App. 3a; *cf. Weaver v. City & County of San Francisco*, No. C 03-1589 SI, 2006 U.S. Dist. LEXIS 62650, at *3 (N.D. Cal. Aug. 18, 2006) (applying *Cleveland* to grant summary judgment to the *plaintiffs*, notwithstanding that "an Incident Commander at the scene of a fire can and on occasion does order [the plaintiffs] to engage in fire suppression activities").

By contrast, in the Eleventh Circuit's understanding of § 203(y)(1), whether the employees' job is to deal with fires, i.e., the extent to the employees "actually engage" in fire suppression, is "irrelevant." Pet. App. 7a. Thus, the panel below ruled that petitioners would not have prevailed even if they "had *never* engaged in fire suppression." Pet. App. 11a (emphasis added). In any reasonable universe, this ruling bespeaks a conflict between the Ninth and Eleventh Circuits.

B. *Lawrence v. City of Philadelphia.*

The City would distinguish the Third Circuit's decision in *Lawrence* on two factual grounds. First, and again plagiarizing the panel's opinion, the City observes that "[n]ot all of the Plaintiffs in *Lawrence* were certified fire fighters." BIO 6; *cf.* Pet. App. 10a (observing that "not all of the plaintiffs in *Lawrence* were certified firefighters"). As the petition explained, however, the question whether the *Lawrence* plaintiffs satisfied the separate requirement that they be "trained in fire suppression," 29 U.S.C. § 203(y)(1), ultimately did not get resolved by the Third Circuit. *See* 527 F.3d at 319 (The plaintiffs "were not responsible for fire protection activities as a matter of law," and so it "is not necessary to reach the question whether [they] were 'trained' in fire

suppression."), *quoted in* Pet. 10 n.3. Accordingly, any differences in certification or other training between petitioners and the *Lawrence* plaintiffs is irrelevant; the respective decisions of the Third and Eleventh Circuits simply did not turn on that factual point.

Second, the City asserts that in *Lawrence*, "there was no evidence that any of the plaintiffs could be penalized for refusing to fight a fire." BIO 6; *cf.* Pet. App. 10a (stating that in *Lawrence*, "there was no evidence indicating that [the plaintiffs] could be penalized for refusing" to fight a fire). But the *possibility* vel non of an employee's being ordered to fight a fire, and thereafter being penalized for refusing to do so, did not matter to the Third Circuit. For that court in the present context, "[t]heoretical possibilities are not evidence." 527 F.3d at 318. Thus, *Lawrence* (like *Cleveland*) turned on the evidence of what the plaintiff-employees *actually* did in their jobs:

> [W]e cannot sustain the District Court's holding that the City has shown that [the plaintiffs] have the legal responsibility to engage in fire suppression. *There is substantial evidence to the contrary*. [The plaintiffs] are not hired to fight fires, not even in small part; indeed, they are not expected to fight fires as part of their job duties.

Id. at 317 (emphasis added).

Contrast this non-theoretical, evidence-based interpretive approach with the Eleventh Circuit's approach in *Huff* and in the decision below. As the petition has already observed, the panel below positively embraced "the 'theoretical possibility' that a commanding officer could direct [petitioners] to engage in fire suppression,"

and so the fact that petitioners "can [i.e., theoretically] be required" to engage in fire suppression was dispositive for the panel. Pet App. 3a, 7a, *quoted in* Pet. 11; *accord* Pet. App. 7a, 11a (finding it "irrelevant" whether petitioners actually fought fires, even in small part).

In light of the above-described rulings, it is inconceivable to assert that "the lower courts are remarkably consistent with their interpretations and application of the exemption" in 29 U.S.C. § 203(y)(1). BIO 11. To the contrary, the lower courts are manifestly in conflict with one another in interpreting and applying that statute.

C. *McGavock v. City of Water Valley.*

The City charges that petitioners made "[a]nother error" by contending in their petition for rehearing en banc that "this proceeding presents a question of exceptional importance because 'it involves an issue on which the panel decision conflicts with the authoritative decisions of *every other* United States Court of Appeals that has addressed the issue.'" BIO 8-9 (emphasis by City) (quoting Pet. 5-6). According to the City, that contention "is simply not true" given the Fifth Circuit's decision in *McGavock v. City of Water Valley, Mississippi*, 452 F.3d 423 (5th Cir. 2006), a decision that petitioners "ignored," such that petitioners "have clearly misstated the situation." BIO 9.

These charges are scurrilous. It is apparent that *McGavock* simply did not address the issue presented by the decision below, by *Cleveland*, and by *Lawrence*—the proper interpretation of the phrase "responsibility to engage in fire suppression" in § 203(y)(1). In contrast to all those cases, the plaintiff-employees in *McGavock* were "five municipal firefighters" who had "graduated from the fire academy, where they were trained in fire

suppression"; they had "the legal authority to engage in fire suppression and [were] actually called upon to extinguish, control, and prevent fires." 452 F.3d at 424. Given these facts, it is not surprising that these employees "concede[d] that they meet the § 203(y) definition," including the fact that they had "responsibility" to engage in fire suppression. *Id.* at 427.

The employees argued that even though they met the statutory definition, they nonetheless should not be treated as firefighters for purposes of FLSA's overtime provisions in light of a Department of Labor regulation codified at 29 C.F.R. § 553.212(a):

> They argue that the regulation continues to limit employees considered engaged "in fire protection activities" to employees who spend 80% or more of their time engaged in fire protection activities. Because the plaintiffs spend more than 20% of their time working as dispatchers, they contend they are not "employees in firefighting activities" [for purposes of 29 U.S.C. § 207(k)].

McGavock, 452 F.3d at 427. The Fifth Circuit rejected this argument, ruling that the cited regulation was "obsolete and without effect" and therefore did not "remove [the plaintiffs] from the statutory definition of 'employees engaged in fire protection activities.'" *Id.* at 428.

Therefore, *McGavock* does not bear in the slightest on the question presented. Indeed, although petitioners did advance in the lower courts an argument similar to that advanced by the plaintiffs in *McGavock,* petitioners have expressly stated that they "do not seek review" as to that issue. Pet. 5 n.1. In short, *McGavock* in no way detracts from the circuit split on the question presented.

II. Why Review Is Warranted.

Part II of the petition argued that "review is warranted to resolve the [above-described] conflict" among the three courts of appeals. Pet. 11 (section heading). Specifically, "the question presented here is a recurring one, and the panel's decision contradicts a long-standing and important principle of federal labor law." *Id.* Even as it denies any conflict, the City does not dispute that this case presents a recurring question of federal labor law. *See* BIO 11-13.

More importantly, the City does not even address, let alone deny, the point that the "panel's interpretation of the FLSA contravenes the principle, long recognized and applied by this Court . . . , that 'exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit.'" Pet. 12 (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)). That salutary principle highlights the importance of the question presented. In short, the City has adduced no reason why review is not warranted if the Court agrees with petitioners that the lower courts are in conflict.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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