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

PETITION FOR WRIT OF CERTIORARI

ROMIN N. CURRIER
WILLIAM H. PINCUS
LAW OFFICES OF WILLIAM H. PINCUS
324 North Lakeside Court
West Palm Beach, FL 33407
(561) 868-1340

ERIC GRANT
Counsel of Record
JOHN B. THOMAS
HICKS THOMAS LLP
Suite 100
8001 Folsom Boulevard
Sacramento, CA 95826
(916) 388-0833

Counsel for Petitioners

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.

PARTIES TO THE PROCEEDINGS

Named petitioner Arnie Gonzalez instituted this action pursuant to 29 U.S.C. § 216(b), which provides in part that an action to recover unpaid overtime compensation may be maintained "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."

Subsection 216(b) also provides that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." The following individuals have filed consents in this case:

Keith C. Abbott
Lester A. Bauman
Walter Broadhead
Alessandro R. Cantalupo
William Conner
Len R. Elton
Joseph Langlois
Howard T. Noland
Randall D. Robertson
Michael B. Robinson
James C. VonMinden

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

Statutes and Rules

PETITION FOR WRIT OF CERTIORARI

Arnie Gonzalez, and all others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-11a) is reported at 549 F.3d 1331. The opinion of the District Court for the Southern District of Florida (App. 12a-24a) is reported at 510 F. Supp. 2d 1037.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 2008. *See* App. 1a. That court denied petitioners' timely petition for rehearing en banc on February 5, 2009. *See* App. 25a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 7 of the Fair Labor Standards Act ("FLSA") provides in pertinent part:

> (k) Employment by public agency engaged in fire protection or law enforcement activities. No public agency shall be deemed to have violated subsection (a) [regarding compensation for overtime] with respect to the employment of any *employee in fire protection activities* or any employee in law enforcement activities (including security personnel in correctional institutions) if . . . .

29 U.S.C. § 207(k) (emphasis added).

Section 3 of the FLSA provides in pertinent part:

> (y) "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who—
>
> (1) is trained in fire suppression, has the legal authority and *responsibility to engage in fire suppression*, and is employed by a fire department of a municipality, county, fire district, or State; and
>
> (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

29 U.S.C. § 203(y) (emphasis added).

STATEMENT OF THE CASE

1. As the court of appeals correctly observed, the "relevant facts are straightforward." App. 3a. Petitioners are twelve current and former employees of the City of Deerfield Beach, Florida ("City"), the sole respondent. Each petitioner works or worked for the City's Fire and Rescue Department either as a Firefighter/Emergency Medical Technician ("EMT") or as a Rescue Supervisor. *See id.* Regardless of their formal job titles, petitioners undoubtedly work on the "Rescue" side of that Department. As the court below described them, petitioners' duties "consist of providing emergency medical assistance"; specifically, petitioners "respond to car accidents, heart attacks, and other situations requiring medical care." *Id.* As a general rule, moreover, petitioners "do not respond to fire calls, and when they do, they tend to

the victims of the fire instead of fighting the fire itself." *Id.* Indeed, although petitioners "are assigned the protective 'turnout' gear worn by firefighters, they do not wear it when responding to fire calls"; to the contrary, they "wear the gear only when called to accident scenes involving a hazard of broken glass." *Id.*

Given these responsibilities, it is no surprise that although petitioners have "the training necessary to engage in fire suppression, they rarely, if ever, are called upon to do so. In fact, [Arnie] Gonzalez is the only class member *ever* to have engaged in fire suppression, and he has done so only on a handful of occasions." *Id.* (emphasis added). On the other hand, given their training and their positions in the Fire and Rescue Department's chain of command, petitioners "concede the 'theoretical possibility' that a commanding officer could direct them to engage in fire suppression." *Id.*

2. Petitioners filed this action against the City in the District Court for the Southern District of Florida in 1996. *See* App. 12a. In their single claim, petitioners alleged that the City failed to properly compensate them for overtime work; they sought to recover the unpaid compensation pursuant to the "collective action" provision of the FLSA, 29 U.S.C. § 216(b). *See* App. 2a & n.1; *supra* p. ii. The City moved for summary judgment, arguing that with respect to petitioners, the City is not subject to the FLSA's otherwise applicable overtime standard because petitioners "fall under an exemption in § 207(k) of the Act for individuals employed by a 'public agency engaged in fire protection . . . activities.'" App. 4a (quoting 29 U.S.C. § 207(k)). The district court granted the City's motion and entered a final judgment against petitioners. *See* App. 2a.

3. A three-judge panel of the Eleventh Circuit affirmed. The panel recognized that the "dispute in this case turns on whether [petitioners] can be considered employees 'engaged in fire protection activity' " within the meaning of § 207(k). App. 4a. And the answer to that question turns on the interpretation of § 203(y) of the Act, which provides that "Employee in fire protection activities" means an employee who, *inter alia*, "is trained in fire suppression, has the legal authority and *responsibility to engage in fire suppression*, and is employed by a fire department of a municipality, county, fire district, or State." 29 U.S.C. § 203(y)(1) (emphasis added), *reproduced at supra* p. 2. The panel rightly observed that the sole disputed aspect of this definition is the emphasized clause, in that petitioners "concede that they meet all of § 203(y)'s criteria except" the requirement that they "have the responsibility to engage in fire suppression." App. 5a.

As to that one disputed issue, the panel held that the issue was controlled—indeed, wholly resolved—by the Eleventh Circuit's recent decision in *Huff v. DeKalb County*, 516 F.3d 1273 (11th Cir. 2008). As described by the panel, the dispute in *Huff* (just like the dispute in the present case) "turned solely on whether the plaintiffs had the 'responsibility to engage in fire suppression' under § 203(y)." App. 5a. As further described by the panel, *Huff* "concluded that the plaintiffs were responsible, *regardless of whether they had ever actually engaged in fire suppression*." *Id.* (emphasis added). In particular, *Huff* "held that the ordinary meaning of the term 'responsibility' 'does not imply any actual engagement in fire suppression,' and that 'employees may have a "responsibility to engage in fire suppression" without ever actually engaging in fire suppression themselves.'" App. 6a (quoting *Huff*, 516 F.3d at 1281).

As elaborated below, the panel purported to distinguish decisions of two courts of appeals that sided with employees in similar circumstances, *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005), *cert. denied*, 546 U.S. 1176 (2006) and *Lawrence v. City of Philadelphia*, 527 F.3d 299 (3d Cir.), *cert. denied*, 129 S. Ct. 763 (2008). *See* App. 8a-10a. But in the end, the panel did not rely on those purported distinctions: "In any event, "*Huff* controls here, and under *Huff*, [petitioners] have the 'responsibility to engage in fire suppression' for purposes of § 203(y). We therefore hold that [petitioners] fall within § 207(k)'s exemption from the FLSA's general overtime requirements." App. 10a. Accordingly, the panel affirmed the district court's granting of summary judgment to the City.[1]

5. Petitioners timely petitioned for rehearing en banc. Their petition argued principally that "[t]ogether with the [Eleventh Circuit's] decision earlier this year in *Huff v. DeKalb County*, the panel's decision here has precipitated a conflict between [the Eleventh Circuit] and two other Circuits on an important and recurring question of federal labor law. En banc consideration of that question is warranted to address the conflict." Petition for Rehearing En Banc at 5 (filed Dec. 12, 2008); *see also id.* at 10 (contending 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

---

[1] In so ruling, the panel rejected petitioners' arguments regarding the so-called "80/20 Rule" found in a Department of Labor regulation codified at 29 C.F.R. § 553.212(a), as well as petitioners' argument that the district court erroneously denied them leave to amend their complaint. *See* App. 10a-11a. Petitioners do not seek review as to those two issues.

States Court of Appeals that has addressed the issue" (quoting Fed. R. App. P. 35(b)(1)(B))).

The full Eleventh Circuit denied the rehearing petition without comment. *See* App. 25a-26a.

REASONS FOR GRANTING THE PETITION

Confirming and extending an earlier Eleventh Circuit decision, and rejecting petitioners' express request to resolve the conflict en banc, the court below entered a decision in conflict with the decisions of two United States courts of appeals on an important and recurring question of federal labor law. *See* Rule 10(a). Review is warranted to resolve that conflict.

I. Both the Decision Below and an Earlier Eleventh Circuit Ruling Conflict with the Decisions of the Ninth and Third Circuits.

As noted above, the panel purported to distinguish the Ninth Circuit's decision in *Cleveland v. City of Los Angeles* and the Third Circuit's decision in *Lawrence v. City of Philadelphia*. But the distinctions drawn by the panel are illusory, and there is accordingly a real split between the court below and those two Circuits.

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

In *Cleveland*, the Ninth Circuit was called upon to "determine whether the fire protection exemption [set out in § 207(k) of the FLSA] should be applied to dual function paramedics, [i.e.,] individuals trained in both fire suppression and advanced life saving." 420 F.3d at 983. As here, *Cleveland* "turn[ed] on whether Plaintiffs have the *responsibility* to engage in fire prevention" as that term is used in § 203(y) of the FLSA. 420 F.3d at 989. As a matter of statutory construction, the Ninth Circuit held that the "ordinary, common meaning of the

word 'responsibility'" should control. *Id.* Applying this meaning, the court held that "for Plaintiffs to have the 'responsibility' to engage in fire suppression, they must have some real obligation or duty to do so. If a fire occurs, it must be their job to deal with it." *Id.* at 990.

Cleveland then laid out six items of evidence demonstrating that although the Los Angeles paramedics were "fully trained and certified in . . . fire suppression skills," *id.* at 983, the paramedics nonetheless did not, *in fact*, engage in any fire suppression. *See id.* at 990; *accord* App. 9a (recognizing that "the *Cleveland* plaintiffs had been fully trained in both firefighting and life support, but had never engaged in actual fire suppression"). On this evidentiary basis, the Ninth Circuit ruled that the Los Angeles paramedics lacked the requisite "responsibility" under the FLSA. *See* 420 F.3d at 990.

The Eleventh Circuit panel conceded that "there are many similarities between the *Cleveland* plaintiffs' jobs and the jobs of [petitioners] here." App. 9a. But the panel attempted to distinguish the two cases on the basis that "the most important factor present in *Huff*—and present here—was absent in *Cleveland*: there, unlike here, the plaintiffs could not be ordered to engage in fire suppression." *Id.* (citing *Cleveland*, 420 F.3d at 984; *Huff*, 516 F.3d at 1279-80). With all due respect, the panel misread *Cleveland* in this crucial regard.

The Ninth Circuit did not say in the passage cited by the panel that the Los Angeles paramedics "could not be" ordered to engage in fire suppression; instead, the Ninth Circuit said that there "is no evidence that any Plaintiff . . . *has ever been* ordered to perform fire suppression." 420 F.3d at 984 (emphasis added). The court repeated this phrasing in laying out the various reasons

why it was not the paramedics' job—not their "real" job anyway—to suppress fires: "there is no evidence that a dual function paramedic *has ever been* ordered to perform fire suppression." *Id.* at 990 (emphasis added).[2] Thus, it should be apparent that under *Cleveland*, the relevant question is not the theoretical one whether an employee *could* (or *could not*) be ordered to fight fires; rather, the relevant question in the Ninth Circuit is the empirical one whether the employee *actually has* fought fires.

Subsequent FLSA litigation in the Ninth Circuit confirms the foregoing interpretation. In *Weaver v. City & County of San Francisco*, 158 Fed. Appx. 921 (9th Cir. 2005), the court of appeals remanded the case for reconsideration in light of *Cleveland*. On remand, the district court found it to be "undisputed that an Incident Commander at the scene of a fire *can* and on occasion does order ambulance-assigned [firefighter/paramedics] to

---

[2] The panel also read *Cleveland* to say that the plaintiffs in that litigation "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." App. 9a (emphasis deleted and emphasis added). What *Cleveland* actually said was that "paramedics may volunteer to assist firefighters at a fire scene, but if they do not volunteer, they are not subject to discipline." 420 F.3d at 984. It is not clear from this passage precisely what paramedics were "required" to do if they were asked. Indeed, a district court in the Ninth Circuit concluded, based on its reading of the record in *Cleveland*, that the plaintiffs in that case in fact "*were* required to engage in fire suppression if requested to do so by their supervisors." *Weaver v. City & County of San Francisco*, No. C 03-1589 SI, 2006 U.S. Dist. LEXIS 62650, at *6 (N.D. Cal. Aug. 18, 2006) (emphasis added) (citing findings of fact in district court proceedings in *Cleveland*).

engage in fire suppression activities." *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) (emphasis added). But the undisputed fact that the public employees *could* be ordered to engage in fire suppression activities did not result in victory for the defendant municipality, as would have been the result under the decision of the panel below. To the contrary, following *Cleveland* and finding that the employees "perform fire suppression work only rarely, and when they do, their activities are only peripheral in nature," *id.* at *10, the district court in *Weaver* granted summary judgment to those employees. *See id.* at *16.

B. *Lawrence v. City of Philadelphia.*

In *Lawrence*, the Third Circuit considered "whether paramedics employed by the City of Philadelphia Fire Department have 'legal authority and responsibility' for fire suppression activities within the meaning of the Fair Labor Standards Act." 527 F.3d at 302. Decided shortly after *Huff*, *Lawrence* held that these paramedics "were not responsible for engaging in fire suppression, even though 'the incident commander theoretically has authority to tell [the paramedics] to do anything at the scene of a fire.'" App. 9a (quoting *Lawrence*, 527 F.3d at 318). For the Third Circuit, "[t]heoretical possibilities are not evidence." App. 10a (quoting same). What mattered to the Third Circuit were actualities: "There is no evidence that [Philadelphia paramedics] are ever dispatched to a fire scene for the purpose of fighting a fire," and "there is no evidence in the record to support the assertion that the [paramedics] are expected to engage in fire suppression as part of their job duties." 527 F.3d at 317.

Although the Eleventh Circuit panel asserted that *Lawrence* is "fundamentally different" from the present case, App. 10a, it should be apparent from the foregoing that any factual differences between the two cases are not truly fundamental. Thus, in *Lawrence*, there was no evidence that the paramedics were dispatched to fire scenes for the purpose of fighting fires; here, petitioners generally "do not respond to fire calls, and when they do, they tend to the victims of the fire instead of fighting the fire itself." App. 3a. In *Lawrence*, moreover, there was no evidence that the paramedics were expected to engage in fire suppression as a part of their job duties; here, petitioners "rarely, if ever, are called upon to" engage in fire suppression. *Id.*[3]

What *is* fundamentally different, however, are the interpretive approaches of the Third Circuit and of the Eleventh Circuit. As quoted above, *Lawrence* expressly eschewed the "theoretical possibilities" as to what an incident commander could direct a paramedic to do at a

---

[3] The panel also suggested that *Lawrence* was distinguishable because the plaintiff-employees in that case might not have satisfied § 203(y)(1)'s requirement that the employee be "trained in fire suppression," such that the Third Circuit could have resolved the case without any necessity to construe the term *responsibility*: "If the plaintiffs in *Lawrence* lacked the proper training, that fact alone would place them outside § 203(y)'s ambit, regardless of whether they were deemed responsible for fire suppression." App. 10a. There is no question, however, that the Third Circuit did not actually decide the case in the manner conceived by the panel: The plaintiffs "were not responsible for fire protection activities as a matter of law," and therefore it "is not necessary to reach the question whether [they] were 'trained' in fire suppression." *Lawrence*, 527 F.3d at 319.

fire scene, but the panel below positively embraced the " 'theoretical possibility' that a commanding officer could direct [petitioners] to engage in fire suppression." App. 3a. Indeed, that petitioners "can [i.e., theoretically] be required" to engage in fire suppression was essentially dispositive for the panel in light of *Huff*, because "the fact that [petitioners] never *actually* engage in fire suppression is simply irrelevant." App. 7a (emphasis added). Of course, this is precisely the approach advocated by the *dissent* in *Lawrence*: a court "must ask whether an [employee] has the 'responsibility' to engage in fire suppression and the answer to this question does not depend upon how much time [that employee] actually spends on such activities." 527 F.3d at 320 (Hardiman, J., dissenting).

In *Lawrence*, Circuit Judge Hardiman 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." *Id.* The decision of the panel—followed by the en banc court's refusal to take up the issue—confirms that split and leaves the Eleventh Circuit in direct conflict with both the Ninth Circuit and the Third Circuit.

II. Review Is Warranted to Resolve the Conflict.

The above-described conflict is not just academic. Rather, the question presented here is a recurring one, and the panel's decision contradicts a long-standing and important principle of federal labor law.

First, the question is a recurring one. In addition to the present case and *Huff* only last year, the district courts in the Eleventh Circuit have often confronted the FLSA's exemption for "fire protection." *See, e.g., Diaz v. City of Plantation, Florida*, 524 F. Supp. 2d 1352, 1365

(S.D. Fla. 2006) ("the Court must also address whether Plaintiffs have the legal authority and responsibility to engage in fire suppression"); *Prickett v. DeKalb County*, 276 F. Supp. 2d 1265, 1267 (N.D. Ga. 2003) ("Plaintiffs alleged that the [§ 207(k)] exemption did not apply because their primary duty was not providing fire protection services, but rather emergency medical services."), *rev'd*, 349 F.3d 1294 (11th Cir. 2003), *cert. denied*, 542 U.S. 919 (2004). As illustrated by the *Weaver* case discussed above (*supra* pp. 8-9), the district courts in the Ninth Circuit have also addressed the issue in recent years. Finally, there is the ongoing *Lawrence* litigation in the Third Circuit, whose decision was the subject of an unsuccessful petition for certiorari earlier this Term (as No. 08-388).

Second, and more importantly, the Eleventh Circuit panel's interpretation of the FLSA contravenes the principle, long recognized and applied by this Court in disputes over that statute's wage-and-hour provisions, 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." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *see also, e.g., Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 296 (1985) (observing that the Court "has consistently construed the [FLSA] 'liberally to apply to the furthest reaches consistent with congressional direction'" (quoting *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 211 (1959))).

One searches the panel's opinion in vain for any acknowledgment of this principle. Likewise, although the Eleventh Circuit in *Huff* professed to be "guided by canons of statutory construction" when it determined the

meaning of § 203(y)(1), 516 F.3d at 1280, *Huff* certainly was not in fact guided by the above-quoted canon established by this Court. Consequently, although the panel was correct to base its interpretation of the exemption on the statutory "text," App. 6a, there are (as the Third Circuit correctly recognized) "additional considerations in an FLSA case because the FLSA must be construed liberally in favor of employees." *Lawrence*, 527 F.3d at 310. Those considerations were noticeably absent from the panel opinion and, before that, from *Huff*.

The proper interpretation of the statutory phrase "responsibility to engage in fire suppression," 29 U.S.C. § 203(y)(1), is an important and recurring question of federal law. Because the panel's interpretation of the FLSA pays no heed to the applicable canon of construction of that statute laid down by this Court, and because the panel's interpretation confirms a conflict between the Eleventh Circuit and the Ninth and Third Circuits, review is warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

ERIC GRANT
Counsel of Record
JOHN B. THOMAS
HICKS THOMAS LLP
Suite 100
8001 Folsom Boulevard
Sacramento, CA 95826
(916) 388-0833

ROMIN N. CURRIER
WILLIAM H. PINCUS
LAW OFFICES OF WILLIAM H. PINCUS
324 North Lakeside Court
West Palm Beach, FL 33407
(561) 868-1340

Counsel for Petitioners

May 2009