No. 08-388

In The
Supreme Court of the United States

THE CITY OF PHILADELPHIA, PENNSYLVANIA,

Petitioner,

v.

RICHARD LAWRENCE, ET AL.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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I. A Newly Issued decision, *Gonzalez v. City of Deerfield Beach*, Emphasizes the Circuit Split.

Pursuant to Supreme Court Rule 15(8), petitioner, the City of Philadelphia (the "City"), respectfully submits this Supplemental Brief to apprise the Court of *Gonzalez v. City of Deerfield Beach*, No. 07-11280, issued by the Eleventh Circuit Court of Appeals on Monday, November 24, 2008 ("Slip opinion"), 2008 U.S. App. LEXIS 24037. As briefly described below, the *Gonzalez* case clarifies the Eleventh Circuit's holding in *Huff v. DeKalb County*, 516 F.3d 1273 (11th Cir. 2008), that "responsibility" for fire suppression need involve no actual firefighting, thereby making the Circuit split between the Third Circuit's decision below and the Eleventh Circuit even more pronounced.

The fire trained paramedics in *Gonzalez*, like those in *Lawrence* below, argued that they were not "employees engaged in fire protection activities," as set forth at 29 U.S.C. § 207(k) and further defined at 29 U.S.C. § 203(y), because they did not have "responsibility to engage in fire suppression." The *Gonzalez* plaintiffs' duties consisted of providing emergency medical assistance; they did "not respond to fire calls, and when they do, they tend to the victims of the fire instead of fighting the fire itself." Slip opinion at 3, 2008 U.S. App. LEXIS 24037, at *3. Although assigned "turnout gear," they did not wear it when responding to fires. *Id*. They nevertheless conceded the "theoretical possibility" that a

commanding officer could direct them to engage in fire suppression, and that they would be subject to disciplinary action if they disobeyed such an order. Slip opinion at 4, 2008 U.S. App. LEXIS 24037, at *3-4.

The Eleventh Circuit held the case to be "on all fours with *Huff*," and the fact that the plaintiffs never actually engaged in fire suppression "simply irrelevant." Slip opinion at 7, 2008 U.S. App. LEXIS 24037, at *8. The Court also discounted the plaintiffs' argument that, because the plaintiffs typically did not wear their turnout gear when responding to fires, they could never *actually* be called upon to fight fires, stating that at most, that showed merely that under present operating procedures, they were unlikely to be called up to help suppress a fire, but that such procedures could always be changed. Slip opinion at 9, 2008 U.S. App. LEXIS 24037, at *10. What was determinative was that it was "undisputed that the plaintiffs could be required to help suppress a fire, and that they would be subject to discipline for refusing to do so." *Id*.

It is similarly undisputed that the City of Philadelphia's FSPs can be required by Incident Commanders or high ranking officers at firegrounds to engage in fire suppression activities, and that FSPs would be subject to disciplinary action if they

disobeyed such orders.[1] In fact, the City's FSPs, unlike the paramedics in *Gonzalez*, respond to all confirmed fires, carry their turnout gear, are required to wear it at fire scenes, and have been ordered, albeit rarely, to engage in fire suppression activities. Yet the Third Circuit holds that these employees have no "responsibility" for fire suppression pursuant to section 203(y), and the Eleventh Circuit holds that employees with even less prospect of actually fighting a fire *are* sufficiently "responsible" to be covered by the partial overtime exemption.

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[1] The Eleventh Circuit's perfunctory effort to distinguish *Lawrence* is erroneous. As Judge Hardiman noted in his Dissent in *Lawrence*, "§ 203(y) does not require employees to be fully certified." App. at 59a. Further, contrary to the Eleventh Circuit's supposition and as amply demonstrated in the City's Petition and Reply Brief, there clearly is evidence that FSPs would be disciplined for disobeying an order to engage in fire suppression. As Judge Hardiman concluded, "the municipality in *Huff* made precisely the same claim as the City of Philadelphia here, *viz*., that the plaintiffs could be ordered by an incident commander to engage in fire suppression and had the authority and responsibility to do so if ordered. . . . The majority makes no attempt to explain why the NPQ I plaintiffs in *Huff* are undoubtedly firefighters simply because they have a theoretical duty to comply with an incident commander's order to engage in fire suppression, while the Plaintiffs here, who recognize the same theoretical duty, are undoubtedly not firefighters." App. at 60a.

It is difficult to conjure a clearer circuit split.

Respectfully submitted,

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