

No. 05-851

In The
Supreme Court of the United States

—◆—
CITY OF LOS ANGELES,

Petitioner;

vs.

CEDRICK CLEVELAND, ET AL.,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Ninth Circuit**

—◆—
**AMICI CURIAE BRIEF OF LEAGUE OF CALIFORNIA
CITIES, INTERNATIONAL MUNICIPAL LAWYERS
ASSOCIATION, NATIONAL LEAGUE OF CITIES,
NATIONAL ASSOCIATION OF COUNTIES, UNITED
STATES CONFERENCE OF MAYORS, GOVERNMENT
FINANCE OFFICERS ASSOCIATION, NATIONAL
PUBLIC EMPLOYER LABOR RELATIONS
ASSOCIATION AND THE INTERNATIONAL PUBLIC
MANAGEMENT ASSOCIATION FOR HUMAN
RESOURCES IN SUPPORT OF PETITIONER**

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AMICI CURIAE BRIEF

The League of California Cities, International Municipal Lawyers Association, National League of Cities, National Association of Counties, United States Conference of Mayors, Government Finance Officers Association, National Public Employer Labor Relations Association, and the International Public Management Association for Human Resources respectfully submit this brief amici curiae, pursuant to Supreme Court Rule 37 and the written consents of the parties.¹



INTERESTS OF THE AMICI CURIAE

The amici consist of organizations representing local government officials throughout the United States.

The League of California Cities (“League”) is an association of 478 California cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys representing all 16 divisions of the League from all parts of the state. The Committee monitors appellate litigation affecting municipalities and identifies those that are of statewide significance. The issue currently before this Court is such an issue of statewide – and nationwide – significance.

¹ Counsel for amici curiae authored this brief in its entirety. No person or entity, other than the amici curiae, their members or their counsel, made a monetary contribution to the preparation or submission of this brief. Consents have been filed with the Clerk of the Court.

Since 1935, the International Municipal Lawyers Association (“IMLA”) has been the primary advocate for the chief legal officers of local governments throughout the United States and Canada. IMLA has appeared as amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The National League of Cities (“NLC”) represents more than 18,000 communities and is the oldest and largest national organization representing municipal governments. Founded in 1924, NLC strengthens local government through research, information sharing, and advocacy on behalf of hometown America.

Created in 1935, the National Association of Counties (“NACo”) ensures that the nation’s 3,066 counties are heard and understood at all levels of the federal government. NACo’s membership totals more than 2,000 counties, representing over 80 percent of the nation’s population.

The United States Conference of Mayors is the official nonpartisan organization of cities with populations of 30,000 or more. There are well over 1,150 such cities in the country today, each represented in the Conference of Mayors by its chief elected official, the Mayor. The United States Conference of Mayors is in its second half-century of service to mayors and citizens of America’s principal cities. Throughout its history, the Conference of Mayors has taken the lead in calling attention to the problems and the potential of urban America. Since its founding, it has carried the message of cities to every President and every Congress.

The Government Finance Officers Association (“GFOA”) is the professional association of state, provincial and local finance officers in the United States and Canada, and has served the public finance profession since 1906. Approximately 16,000 GFOA members are dedicated to the sound management of government financial resources.

The National Public Employer Labor Relations Association (“NPELRA”), established in 1970, is the professional association representing public sector and not-for-profit entities and practitioners of labor and employee relations employed therein. NPELRA and its members function as fiduciaries to the interests of the citizens, in part, by advocating the development of sound local, state and national policy relative to compensation, benefits and labor/management relations.

The International Public Management Association for Human Resources (“IPMA-HR”) is the professional association for human resource practitioners in federal, state and local government. IPMA-HR members are often the ones with ultimate responsibility for implementing employment laws such as the Fair Labor Standards Act.



INTRODUCTION

In *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005), the Ninth Circuit ruled that dual-function firefighter/paramedics do not fall within the partial overtime exemption in 29 U.S.C. § 207(k) when they are assigned to paramedic ambulances. As the City of Los Angeles has argued in its petition for writ of certiorari, this decision is not only wrong as a matter of basic statutory

interpretation, but it inflicts massive payroll expenses on local governments nationwide – a result Congress specifically sought to avoid when it enacted 29 U.S.C. § 203(y).

Contrary to what respondents assert in their opposition, the City's description of the adverse impact of the decision is not "hyperbole." Opposition 11. It is accurate, it is real, and it is immediate. State and local governments across the country must now pay dual-function personnel in accordance with the 40-hour rule in the Fair Labor Standards Act ("FLSA") or risk a liquidated damages penalty in a FLSA lawsuit. This could cost as much as \$500 million a year nationwide – a devastating impact on municipalities already struggling financially to provide emergency services and comply with "first responder" preparedness requirements imposed by Homeland Security concerns.

Moreover, that \$500 million annual expense does not account for the extra administrative personnel and time that must now be dedicated to the complex job of tracking every task performed by dual-function personnel to analyze whether it is exempt or non-exempt. This analysis alone will impose another multi-million dollar yearly expense.

To avoid these expenses, state and local governments could simply eliminate dual-function personnel, but that is hardly a satisfying alternative. Dual-function personnel play a key role in emergencies, as their breadth of training allows them to respond to a wider array of emergency situations and to provide comprehensive services at emergency scenes. Staffing with dual-function personnel also allows fire departments to contribute relief efforts to large-scale disasters in other areas without compromising

the ability to serve local citizens. Eliminating dual-function personnel may save money, but it may be at the greater cost in potential loss of life or property for the public.

The nation's emergency response providers have struggled in the face of conflicting case law for almost two decades to determine what the FLSA requires in terms of overtime for fire department personnel who perform paramedic work. When Congress enacted section 203(y) in 1999, the conflict was supposed to come to an end in favor of applying the partial overtime exemption to dual-function personnel. The Ninth Circuit, however, concluded otherwise. A ruling from this Court is therefore urgently needed to finally set the law straight.



ARGUMENT

A. Dual-function firefighters play a vital role in responding to disasters and emergencies.

As a result of two nationwide trends, the vast majority of calls that modern fire departments receive are for medical emergencies, not fire suppression. First, fire prevention measures such as stricter building codes, better building construction, sprinkler installation, fewer wood buildings, and smoke alarms have dramatically decreased the number of fires to which fire departments respond.²

² The National Fire Protection Association statistics show 3.1 million fires nationwide in 1977, compared to only 1.5 million fires nationwide in 2004. *See* National Fire Protection Association survey, Fire Incident Data Organization (updated 7/05), *available at* <http://www.nfpa.org>.

Second, reliance on the fire department for medical emergencies has increased as the nation's population ages and fewer people have the benefit of health insurance. Consequently, the number of fires and the percentage of fire related emergency calls for fire departments has steadily decreased while medical calls have steadily increased.

For example, in 1985, the year the FLSA finally became applicable to public agencies pursuant to *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), only 19 percent of the 11.9 million calls to fire departments nationwide were fire related, while 54 percent were for medical aid. In sharp contrast, in 2004, only seven percent of the 22.6 million calls received by fire departments were for fire suppression, whereas 62 percent of those calls were for medical aid.³ In fact, in 2004, fire departments received more calls for medical aid alone than they did in 1985 for all emergency calls combined.⁴

To make more efficient use of their personnel, many of the nation's largest fire departments, such as Los Angeles, San Francisco, and Houston, in addition to hundreds of smaller agencies, began to utilize the efforts of dual-function

³ National Fire Protection Association survey (updated 9/04), available at <http://www.nfpa.org>.

⁴ *Id.* Similarly, in the San Francisco Fire Department, 70 percent or more of the daily calls are not fire related. In fact, the San Francisco Fire Department receives approximately 200 emergency medical service related calls per day, compared to the one or two fire suppression calls received daily. See Report of the 2003-2004 Civil Grand Jury For the City and County of San Francisco, *The Merger of Emergency Medical Services and the San Francisco Fire Department: Match Made in Heaven or Shotgun Wedding?* (June 2004), available at http://www.ci.sf.ca.us/site/uploadedfiles/courts/Emergency_Medical_SFFD.pdf (as of Jan. 25, 2006).

firefighters – firefighters who are trained in both fire suppression and advanced life saving techniques – to improve disaster preparedness and to provide a cohesive and integrated response to emergency situations. Agencies dedicated to this dual-function system commonly spend thousands of dollars annually to cross-train each paramedic in fire suppression skills. These cross-trained personnel play a vital role in modern fire departments, serving as first responders to accidents, crime scenes, fires, natural disasters and medical emergencies.

An investigation of the emergency response in the nation's 50 biggest cities revealed that "most big-city EMS systems are fragmented and slow, and as a result they lose about 1,000 lives a year that could be saved." Robert Davis, *One City Saves Lives, Others Fail To Learn*, USA TODAY, July 30, 2003 at D01. In emergency situations where saving a life can depend on a matter of seconds, the benefit of having a cross-trained firefighter respond to an emergency is priceless since he or she is trained to provide a broad array of emergency services.

B. The *Cleveland* decision will impose massive liability on local governments and restrict their ability to deploy emergency resources.

In the wake of events such as those that occurred on September 11, 2001, and natural disasters such as Hurricane Katrina, local governments are constantly being pushed to provide more protection, faster service, more skilled workers, and more sophisticated equipment. The additional overtime, administrative and litigation costs that local governments will incur as a result of the *Cleveland* decision will drain the funding from their emergency services. As a result, allocation of the nation's emergency

resources will be restricted by the same statute that Congress believed would provide flexibility.

1. Overtime costs for fire departments that utilize dual-function firefighters will rise dramatically as a result of *Cleveland*.

The cost of the additional overtime that local governments will be required to pay under the *Cleveland* decision is staggering because the majority of agencies that utilize dual-function firefighters operate on a platoon schedule comprised of 24-hour shifts. Not only does platoon scheduling attract much-needed human capital, but platoon scheduling is the most viable solution to ensuring that first responders are available when emergencies occur – 24 hours a day, seven days a week. Unlike other types of employees, firefighters do not generally work four or five consecutive days, but rather work a series of 24-hour shifts with a one or two day break between shifts, followed by several consecutive days off. The irregular nature of these work schedules may result in a firefighter working 96 hours in one traditional seven-day workweek and only 24 hours in the following seven-day workweek.

When Congress created the fire protection exemption to the overtime requirement under the FLSA in 1974, it recognized that fire suppression personnel typically work significantly more hours than other public employees. As such, Congress and the Department of Labor established a higher overtime threshold that ranged from 53 hours in a seven-day work period to 212 hours in a 28-day work period. 29 U.S.C. § 207(k); 29 C.F.R. § 553.230(c) (2005). This exemption permits fire departments to schedule firefighters on platoon duty without incurring large amounts of overtime liability in a workweek.

Under a typical platoon scheduling scenario, the *Cleveland* decision would require state and local governments to pay at least 13 hours of additional overtime every week to every dual-function firefighter. In other words, local governments would be required to pay overtime for all hours worked in excess of 40 hours per week, as opposed to all hours worked in excess of 53 hours per week, to provide the same level of service to the public. Since the average hourly wage for firefighters in the nation's largest cities is about \$33 per hour,⁵ the average cost of keeping a dual-function firefighter on a platoon schedule is at least \$11,000 per firefighter per year in additional overtime. Considering the number of dual-function firefighters nationwide who may be affected by the *Cleveland* decision, the decision could cost local governments and taxpayers over \$500 million per year.

The significant increase in overtime will prohibit some local governments from employing dual-function personnel and from cross-training firefighters and paramedics. Consequently, local governments will be required to employ additional personnel, and response times to emergency calls will increase, since they will be unable to rely on dual-function firefighters to perform fire suppression duties when needed.

⁵ City & County of San Francisco Office of the Controller, *A Review of the San Francisco Fire-EMS System* (Apr. 28, 2004), available at http://www.sfgov.org/site/uploadedfiles/controller/reports/02_Report.pdf (as of Jan. 25, 2006).

2. The ambiguous standard created by the *Cleveland* decision will result in an administrative nightmare.

In addition to expending valuable resources on overtime, local governments will have to dedicate significant resources to track and decipher the activities of dual-function personnel. Under *Cleveland*, a firefighter's overtime threshold will fluctuate on a regular basis depending upon whether the firefighter is assigned to a fire suppression vehicle or a paramedic vehicle or rescue ambulance. The focus in *Cleveland* on a firefighter's assignment to a paramedic vehicle for a particular shift or work period creates an untenable administrative burden for fire departments.

For instance, would a firefighter assigned to a fire suppression vehicle or to a paramedic vehicle be exempt even if, during the assignment, he or she performed only paramedic work? If a firefighter is assigned to a fire suppression vehicle, but during a shift is not called out for any emergencies – fire or otherwise – would his or her time qualify as exempt? Likewise, if the firefighter is assigned to a paramedic vehicle or rescue ambulance, but during a shift is not called out for any emergencies – fire or otherwise – would his or her time qualify as exempt or non-exempt? These questions, all of which are distinct possibilities since the vast majority of emergency calls are not fire related, demonstrate the difficulty a local agency would have in simply categorizing the work of dual-function personnel.

In addition to hefty overtime, fire departments will be forced to hire additional personnel just to stay abreast of this burdensome recordkeeping and to analyze the daily

tasks of firefighters to determine if the section 207(k) exemption applies for all or part of a work period.

These financial and administrative burdens will substantially impair the ability of local governments to respond to emergencies. At a time in the nation's history when emergency response resources are needed more than ever, the public cannot afford this impairment.

3. The Ninth Circuit's interpretation of section 203(y) will result in dozens of lawsuits against fire departments over whether "fire protection activities" include medical activities.

Beginning in 1986, local governments nationwide were subjected to dozens of lawsuits regarding whether their fire department employees were covered by the section 207(k) exemption when they performed emergency medical services. This type of litigation against fire departments has been costly, as liquidated damages, unpaid overtime and attorneys' fees have resulted in numerous multi-million dollar judgments. In *West v. Anne Arundel County*, 137 F.3d 752 (4th Cir. 1998), Anne Arundel County was ordered to pay \$3.5 million to its dual-function personnel. In *Vela v. City of Houston*, 276 F.3d 659 (5th Cir. 2001), Houston was ordered to pay almost \$100 million to its dual-function personnel. In the present case, the City of Los Angeles was ordered to pay over \$5.1 million to its dual-function personnel.

Congress amended the FLSA in 1999 specifically to prevent further litigation over whether firefighters who perform emergency medical services are subject to the section 207(k) exemption. Section 203(y) specifically

recognizes that employees whose primary duties are usually not fire suppression, such as a paramedic or emergency medical technicians, may still be engaged in fire protection activities. The amendment was introduced by then-Congressman Ehrlich in response to the flood of FLSA lawsuits against fire departments and particularly in response to a decision by the Fourth Circuit that Anne Arundel County Fire Department emergency medical technicians did not qualify for the section 207(k) exemption. *See* Petition, p. 14; *West, supra*.

Cleveland will undermine Congress' action by spurring another wave of litigation that will have wide ranging repercussions for the national economy and, more importantly, for public safety. In these types of lawsuits, local governments will not only be exposed to liability for overtime, but will be open to an additional year of damages under the longer statute of limitations in addition to liquidated damages. *See* 29 U.S.C. §§ 216(b), 255.

Following the *Cleveland* rationale, if those same Anne Arundel County emergency medical technicians brought their lawsuit today, the outcome would be no different than it was prior to the 1999 amendment to section 203(y). At a time when Congress has mandated that local governments must shoulder the responsibility of providing first response in natural disasters and emergencies, local governments will be assembling their workforce not to improve the quality of their life-saving emergency responses, but, instead, to avert costly FLSA lawsuits.



CONCLUSION

In the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Congress declared that the responsibility of alleviating the suffering and damage caused by disasters rests on the shoulders of federal, State and local governments. 42 U.S.C. § 5121(b). In this regard, the Federal Emergency Management Agency has stated, “[i]n our country’s system of emergency management, local government must act first to attend to the public’s emergency needs.” FEDERAL EMERGENCY MANAGEMENT AGENCY, STATE AND LOCAL GUIDE 101: GUIDE FOR ALL-HAZARD EMERGENCY OPERATIONS PLANNING, 1-1. Dual-function firefighters allow local governments to provide efficient and effective first response to natural disasters, fires, accidents, crime scenes and other emergencies. To best protect the public, local governments desperately need this Court to intervene and provide the guidance and certainty that is lacking in this area of law.

For the foregoing reasons and those set forth in the briefs for the City of Los Angeles, amici urge the Court to grant the City’s petition for a writ of certiorari.

Respectfully submitted,

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