No. 98-266

In the Supreme Court of the United States

OCTOBER TERM, 1998

ANNE ARUNDEL COUNTY, PETITIONER

v.

JOHN D. WEST, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held, on the facts of this case, that respondents did not perform "fire protection activities" within the meaning of Section 7(k) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 207(k), which provides a special maximum-hours and overtime standard for public-sector fire protection and law enforcement employees.

2. Whether the court of appeals correctly held that the FLSA, as applied to petitioner, does not contravene constitutional principles of federalism.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 75a-99a) is reported at 137 F.3d 752. The order of the district court granting the private respondents' motion for partial summary judgment on the application of 29 U.S.C. 207(k) to this case (Pet. App. 2a-17a) is unreported. The district court's later order granting and denying summary judgment to the parties on other statutory issues (Pet. App. 20a-57a) is reported at 3 Wage & Hour Cas. 2d (BNA) 234.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1998. A petition for rehearing was denied on May 13, 1998. Pet. App. 100a-105a. The petition for

a writ of certiorari was filed on August 11, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7(a) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 207(a), establishes general maximum hours and overtime pay requirements for employees covered by the Act. Section 7(k) of the FLSA, 29 U.S.C. 207(k), establishes a specific, more lenient overtime rule for employees of public agencies engaged in "fire protection activities" and "law enforcement activities." Section 7(k) itself does not define either "fire protection activities" or "law enforcement activities." The Department of Labor has promulgated regulations interpreting the scope of Section 7(k), two of which are relevant to this case. Those regulations first provide, in pertinent part, that an employee "in fire protection activities" is any employee

> (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards.

29 C.F.R. 553.210(a). This part of the regulation sets forth what is known as the "four-part test" for deter-

mining whether an employee is engaged in fire protection activities. In addition, the same regulation provides further (*ibid.*) that "[t]he term [fire protection activities] would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.215." That additional part of the regulation sets forth what is known as the "integral part test."[1]

In a second regulation, the Department of Labor has provided that an employee whose work meets one of the tests in Section 553.210, quoted above, may nonetheless fail to qualify for the special Section 7(k) overtime standard if he spends more than 20% of his time on "nonexempt work." 29 C.F.R. 553.212. Nonexempt work is defined as "work which is not performed as an incident to or in conjunction with [the employee's] fire protection * * * activities." 29 C.F.R. 553.212(a). That regulation is commonly known as the "80/20 rule."

2. Private respondents John D. West *et al.* (respondents) are emergency medical technicians currently or formerly employed by the Emergency Medical Services (EMS) division of the Anne Arundel County Fire Department. Pet. App. 81a. Respondents filed this action against petitioner Anne Arundel County, claiming overtime compensation alleged to be due under the FLSA. *Id.* at 82a. Petitioner contended in defense that

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[1] Section 553.215 of the Department's regulations, to which Section 553.210 refers, is not directly applicable in this case. Section 553.215 covers ambulance and rescue service employees who are employees of a public agency other than a fire protection or law enforcement agency. It covers the situation, for example, of rescue service employees who are employed by a special rescue service agency, but who accompany firefighters who are organized under a volunteer fire department rather than a public agency. Section 553.215 is discussed further at pp. 14-15, *infra*.

respondents' employment fell within the scope of the FLSA's more lenient maximum-hours standard for public-sector employees engaged in fire protection and law enforcement activities. *Id.* at 89a. The district court granted summary judgment for respondents with respect to their claims for overtime compensation and prejudgment interest, and denied their request for liquidated damages.[2] *Id.* at 18a.

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. After oral argument, the court of appeals ordered supplemental briefing on the following question: "In light of the Supreme Court's decision in *Printz v. United States*, 65 U.S.L.W. 4731 (June 27, 1997), whether the Fair Labor Standards Act may be constitutionally applied to the salary determinations at issue in this case." Pet. App. 80a. The United States intervened at that juncture, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the FLSA.

3. After renewed briefing and oral argument, the court of appeals affirmed the district court's decision on the application of Section 7(k) to this case. Pet. App. 88a-91a. It also held that the FLSA is constitutional as applied to petitioner. *Id.* at 82a-88a.

With respect to the constitutional issue, the court ruled that this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528

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[2] Petitioner also contended that some respondents fell within exemptions to the FLSA's maximum-hours requirements for executive and administrative personnel. See *Auer* v. *Robbins*, 519 U.S. 452, 455 (1997). The district court ruled against petitioner on that contention also, but the court of appeals reversed in significant part, and held that some of the respondents were executive and administrative personnel not entitled to overtime compensation. Pet. App. 91a-98a.

(1985), which upheld the constitutionality of the FLSA as applied to state and local government employers, was dispositive. Pet. App. 88a. The court explained (*ibid.*) that, because "*Garcia* is specifically on point," and because this Court did not overrule *Garcia* in *Printz* v. *United States*, 117 S. Ct. 2365 (1997), "the application of the FLSA to the Anne Arundel County Fire Department presents no constitutional defect." The court also noted that, in *Auer* v. *Robbins*, 519 U.S. 452 (1997), an FLSA case involving a local government agency decided the same Term as *Printz*, this Court "did not move to reconsider *Garcia* and enforced the FLSA against a local government agency without addressing the constitutional question." Pet. App. 88a.

On the merits of respondents' overtime claim, the court of appeals affirmed the district court's ruling that respondents did not perform "fire protection activities" within the meaning of Section 7(k). The court concluded (Pet. App. 89a) that petitioner had not shown that respondents' activities "integrally relate to the Fire Department's fire protection activities" within the meaning of 29 C.F.R. 553.210. It also ruled (Pet. App. 90a), based on the factual record in this case, that "[respondents] do not qualify as fire protection employees because they exceed th[e] twenty percent limit" on nonexempt activities in the Department of Labor's 80/20 rule (29 C.F.R. 553.212(a)).

In explaining the basis for those conclusions, the court emphasized that respondents "perform mostly medical services and work related to medical services" and "are medical personnel rather than firefighters." Pet. App. 90a. The court noted that the record demonstrated that, during the relevant time period, "at least eighty percent of the Fire Department's calls required only emergency medical services and did not involve

fire suppression at all." *Ibid*. In addition, the court noted that "when the Fire Department did respond to a fire call, [respondents] were prohibited by standard operating procedure from engaging in fire suppression activities." *Id*. at 91a. "In light of this evidence that [respondents] generally did not—and could not—fight fires, it cannot be said that 'fire protection activities' comprised more than eighty percent of their work." *Ibid*.

4. Petitioner filed a petition for rehearing and suggestion of rehearing en banc, in which it relied for the first time on the "plain statement" rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), in support of its argument that the basic overtime standard of Section 7(a) of the FLSA did not apply to respondents' employment. See Pet. for Reh'g 4-6. The court of appeals denied rehearing on May 13, 1998. Pet. App. 105a.

ARGUMENT

The court of appeals' decision on the merits of respondents' overtime claim is consistent with the Department of Labor's regulations implementing Section 7(k). Its ruling that the FLSA is constitutional as applied to this case is also correct. Neither aspect of the court of appeals' decision conflicts with any decision of this Court or any other court of appeals. Further review is therefore not warranted.[3]

1. a. Respondents brought this overtime action on the theory that their employment was subject to the

[3] The United States intervened in this case pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of the application of the basic maximum-hours and overtime provisions of the FLSA to petitioner, a local governmental entity. The United States did not take a position in the lower courts on the application of the FLSA to the facts of this case.

basic maximum-hours and overtime requirements of the FLSA, 29 U.S.C. 207(a), rather than the provisions of Section 7(k), 29 U.S.C. 207(k), which establish a special overtime standard for public sector employees engaged in "fire protection activities" and "law enforcement activities." Section 7(k) was enacted in the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(c)(1)(A), 88 Stat. 60, and was intended as a limited "[o]vertime [e]xemption for [p]olicemen and [f]iremen." H.R. Conf. Rep. No. 953, 93d Cong., 2d Sess. 26 (1974). Section 7(k) requires overtime pay only when a firefighter's tour of duty exceeds 212 hours over 28 consecutive days (or a proportionate number of hours if the employee's tour of duty is 7 to 27 consecutive days) rather than 40 hours in a workweek. See 29 U.S.C. 207(k); 29 C.F.R. 553.201(a), 553.230. These special rules "reflect[] the uniqueness of the firefighting service," which, Congress understood, was organized around extended tours of duty rather than workweeks. H.R. Conf. Rep. No. 953, *supra*, at 27.

Section 7(k) does not define "fire protection activities," and, in particular, it does not specifically address the situation of ambulance and rescue workers who (at least on occasion) accompany firefighters to the scene of a fire but do not themselves fight fires. The responsibilities and activities of workers who perform ambulance and rescue services vary considerably from jurisdiction to jurisdiction; in some jurisdictions, they actually fight fires, but in others (as in this case, see Pet. App. 91a), they are prohibited from doing so. Accordingly, exercising authority granted by Congress to implement the Fair Labor Standards Amendments of 1974, see Pub. L. No. 93-259, § 29(b), 88 Stat. 76, the Secretary of Labor has issued regulations implementing Section 7(k). Those regulations set forth a

fact-sensitive approach to resolve whether emergency service employees are subject to the provisions of Section 7(k). See 29 C.F.R. 553.210(a), 553.212(a), 553.215. Because Congress has not defined "fire protection activities," the Secretary's regulatory construction of that term is entitled to deference, and her interpretation of her own regulations construing the term is entitled to particular deference. See *Auer* v. *Robbins*, 519 U.S. 452, 457, 461 (1997).

Under the Secretary's regulations, an emergency medical service employee is engaged in "fire protection activities" if that employee meets either the "four-part test" set forth in 29 C.F.R. 553.210(a), or, alternatively, the "integral part test," which is also set forth in Section 553.210(a). Under the four-part test, application of Section 7(k) turns on whether the employee (1) "is employed by an organized fire department or fire protection district"; (2) "has been trained to the extent required by State statute or local ordinance"; (3) "has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type"; and (4) "performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards." 29 C.F.R. 553.210(a). The four-part test generally provides that employees who are engaged in core firefighting functions as well as closely related support functions are covered by Section 7(k).

The Secretary's alternative "integral part" test applies in many situations involving persons employed principally as rescue and ambulance service personnel rather than as actual firefighters. Under the integral

part test, such employees are engaged in "fire protection activities" if "such personnel form an integral part of the public agency's fire protection activities." 29 C.F.R. 553.210(a). A rescue service employee may satisfy the integral part test if (for example) he is regularly called out to perform emergency medical service during fires and if he receives certain training (see 29 C.F.R. 553.215(a)), even if he does not himself fight fires, because in such a situation his function may form an integral part of the public agency's fire protection activities.

In addition, however, employees who meet either the four-part test or the integral part test are also subject to the "80/20 rule" set forth in 29 C.F.R. 553.212. Under the 80/20 rule, a public agency may not apply the special overtime rules of Section 7(k) to those employees who spend more than 20% of their time in "nonexempt work"—*i.e.*, "work which is not performed as an incident to or in conjunction with their fire protection * * * activities." 29 C.F.R. 553.212(a). Thus, under the Department's regulations, the fact that a rescue service employee accompanies the fire department to fire scenes on a regular basis will not make that employee subject to the special rules of Section 7(k) for fire protection activities, if more than 20% of that employee's time is spent on functions that are not fire-related, such as responding to calls by persons who are experiencing non-fire-related medical emergencies. Rescue service employees who spend less than 80% of their time accompanying the fire department to fire scenes are not covered by Section 7(k), even though their participation at fire scenes might be regular when such scenes occur, and even though that function at the scene of a fire might be considered integral to the operations of the fire department.

Furthermore, for purposes of allocating an employee's time under the "80/20 rule," Department of Labor guidance suggests that employers should take into account the differences between employees who potentially fall within Section 7(k) because they meet the four-part test and are principally engaged in firefighting, and those employees who do not fight fires themselves but whose non-firefighting duties may form an "integral part" of the firefighting operation. Employees who satisfy the four-part test and are "principally engaged as firefighters," but are cross-trained as emergency medical technicians, may *also* perform ambulance and rescue activities without jeopardizing their status as firefighters, on the ground that such ambulance and rescue activities may properly be regarded as "incidental to the employee's fire protection duties." See App., *infra*, at 1a-2a (Department of Labor Opinion Letter (Feb. 2, 1995)). As a result, if the employees are *principally* engaged as firefighters, then they may also perform ambulance and rescue activities "related to medical emergencies, rather than fires, crime scenes, riots, natural disasters, and accidents," without having those activities count towards the 20% limitation on nonexempt work. *Ibid.*

In the case of employees who are *not* principally engaged in actual firefighting, but who potentially fall within the special standard of Section 7(k) only because their functions satisfy the "integral part" test, their ambulance and rescue activities related to purely medical emergencies are not considered "incident to or in conjunction with [their] fire protection" activities, and thus *do* count toward the 20% limitation. Such employees are not "principally engaged as firefighters." Their ambulance and rescue activities associated with non-fire medical emergencies are not "incident to or in

conjunction with" fire protection activities; rather, it is the essence of their work. Thus, a rescue service employee who is occasionally called out to provide emergency service during a fire—but who is also regularly called out for non-fire emergencies, and who never or rarely engages in actual firefighting—will likely not be considered to be engaged in "fire protection activities" within the meaning of Section 7(k).

b. The Secretary of Labor's regulations and guidance recognize that determining whether a particular employee is engaged in firefighting for purposes of the FLSA is a fact-sensitive inquiry. Decisions of the courts of appeals similarly reflect the fact-bound nature of the inquiry. For example, the court of appeals in this case stated, based on its review of the record before it, that respondents "were prohibited by standard operating procedure from engaging in fire suppression activities," and "perform[ed] mostly medical services and work related to medical services." Pet. App. 90a-91a. The court thus concluded that respondents were "medical personnel rather than firefighters." *Id.* at 90a. Those findings lead to the conclusion that respondents were not "principally engaged in firefighting," and that they *failed* the four-part test, particularly the fourth part of that test, concerning the performance of firefighting activities. See 29 C.F.R. 553.210(a); p. 8, *supra*. Thus, respondents were potentially covered by Section 7(k) only if they met the integral part test. Further, under the record as evaluated by the court of appeals, the ambulance and rescue services that respondents regularly performed in connection with medical emergencies—as opposed to those performed at the scene of a fire or car accident—should not be considered "incident to or in conjunction with" fire protection activities under the 80/20 rule, and should count toward the 20%

limit on nonexempt work. The result reached by the court of appeals—that respondents were not engaged in fire protection activities—is therefore fully consistent with the Secretary's regulations.[4]

Petitioner argues (Pet. 16-17) that the court of appeals' decision conflicts with decisions of the Fifth and Eighth Circuits. That contention is without merit. Although, in the cases cited by petitioner, the courts ruled that the employees were covered by Section 7(k), that divergence from the result reached in this case reflects only differences of fact, not conflicting interpretations of governing law.

In *Christian* v. *City of Gladstone*, 108 F.3d 929, cert. denied, 118 S. Ct. 557 (1997), the Eighth Circuit found that the employees in question satisfied the "four-part test." The court stressed that "[a] central consideration under [that] test is whether an employee actually fights fires." *Id.* at 932. It observed that the employees in that case were "sworn firefighters * * * [who] respond to every fire alarm where a fire has been confirmed, as well as some alarms where a fire has not been confirmed[.]" *Ibid.* It also noted that the employees "fight fires at those alarms, constitute over 40%

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[4] Petitioner argues that the district court found that respondents met the four-part test, and that the court of appeals erred by deciding that Section 7(k) does not apply to "public safety employees who meet the four-part test[.]" See Pet. 8, 17. But the district court merely stated that the fourth step of the four-part test "may appear to be satisfied," and then proceeded to find that Section 7(k) did not apply to respondents because they spent far less than 80% of their time in fire-related activities. Pet. App. 15a-16a. In any case, to the extent that petitioner is arguing that the court of appeals should have found that respondents met the four-part test, that argument is wholly factbound and does not warrant review in this Court.

of the public safety officers in the fire/ems bureau and on each shift, and perform fire protection support services such as equipment maintenance and training." *Ibid.* Indeed, the Eighth Circuit specifically distinguished emergency medical service personnel—comparable to the respondents in the present case (see Pet. App. 91a)—who do not actually fight fires and "who are only dispatched to fires to treat injured individuals," and concluded that such personnel would not qualify as employees "in fire protection activities under the four-part test." 108 F.3d at 932. The result in *Christian* is therefore entirely consistent with the result reached by the court of appeals in this case.

The Fifth Circuit's decision in *Bond* v. *City of Jackson*, 939 F.2d 285 (1991), also rests on a fact pattern that is significantly different from the one that the courts below found in this case. In *Bond*, the court held that the plaintiffs met the "integral part" test because they "received training in the rescue of fire and accident victims," "they spen[t] most of their time responding to accidents,"[5] and, "[i]n over ninety percent of the EMS calls, the EMS ambulances co-respond[ed] with one or more other units from the fire department." *Id.* at 288. Here, in contrast, the court of appeals found that respondents spent most of their time on emergency medical services that were not connected with fire protection (see Pet. App. 90a-91a) and thus concluded that petitioner failed to show that respondents

[5] Automobile and certain other accidents (such as explosions) may present a fire risk, such that fire department units responding to such accidents are considered to be engaged in fire protection activities. See 29 C.F.R. 553.215(a) (employees must be regularly dispatched to "fires, crime scenes, riots, natural disasters and accidents" to be considered engaged in fire protection activities).

met even the "integral part" test (*id.* at 89a). The difference between this case and *Bond* therefore turns on differences in the activities actually performed by the plaintiffs in the two cases.

c. Petitioner also argues (Pet. 14-15) that there is confusion in the lower courts regarding the interpretation of the "integral part" test set forth in 29 C.F.R. 553.210(a). Petitioner contends that the courts are divided as to whether the "integral part" test is the same as the "substantially related" test set forth in 29 C.F.R. 553.215, the section to which Section 553.210(a) makes a cross-reference. See p. 3, n.1, *supra*. The "substantially related" test provides that ambulance and rescue service employees "of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection * * * activities" if "their services are substantially related to firefighting[.]" 29 C.F.R. 553.215(a).

Petitioner's contention provides no basis for further review in this Court. The court of appeals did not address any purported connection between the "integral part" test and the "substantially related" test. Thus, even if there were confusion in the case law regarding that issue, this case would not be an appropriate vehicle to resolve it.

In any event, the state of the law in the circuits does not warrant this Court's review. The Sixth and Seventh Circuits have held that there is no material difference between the two tests; they have noted that the "integral part" test expressly refers to the "substantially related" test in Section 553.215, and have reasoned that it would not make sense for the standard applicable to emergency medical services employees to turn on the identity of the particular agency that happens to employ them. See *Alex* v. *City of Chicago*,

29 F.3d 1235, 1240-1242 (7th Cir.), cert. denied, 513 U.S. 1057 (1994); *Justice* v. *Metropolitan Gov't of Nashville*, 4 F.3d 1387, 1396 (6th Cir. 1993). In *Wouters* v. *Martin County*, 9 F.3d 924 (1993), cert. denied, 513 U.S. 812 (1994), the Eleventh Circuit stated in summary fashion that the "integral part" test "presents an inquiry distinct from the substantially related standard." *Id.* at 931. The court did not explain possible distinctions between the two tests, however, and it left application of those tests to the district court on remand. *Id.* at 932. Thus, there is no conflict between *Wouters* and *Alex* or *Justice*, and in any event the court of appeals did not express a view on the issue.

For the foregoing reasons, the court of appeals' conclusion that the special maximum-hours and overtime provisions of Section 7(k) did not apply to respondents' employment is consistent with the Secretary of Labor's regulations and does not conflict with any other appellate decision. Further review of that statutory issue is not warranted.

2. Petitioner further relies (Pet. 17-20) on *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), to argue that the basic maximum-hours provision of Section 7(a) of the FLSA does not apply to it. Petitioner contends that, under the "plain statement" rule of *Gregory*, Congress was required to make "unmistakably clear" that it was subject to the FLSA's general 40-hour maximum-hours standard of Section 7(a) rather than the special maximum-hours provision of Section 7(k), that Congress has failed to do so, and that the absence of a "plain statement" precludes application of the 40-hour per week standard in this case. That argument also fails.

As an initial matter, we note that the court of appeals did not address any argument concerning the "plain

statement" rule of *Gregory*. Petitioner did not raise that argument until its petition for rehearing, which the court of appeals denied without comment. See Pet. App. 105a. There is, accordingly, no reason for the Court to consider petitioner's *Gregory* argument at this late stage. See *Auer* v. *Robbins*, 519 U.S. at 464; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Even if the court of appeals had addressed the question, however, *Gregory* would not have advanced petitioner's position. The issue before the Court in *Gregory* was whether an ambiguous exception to coverage of state employees by the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, for elected officials and policymaking officials, covered state judges. 501 U.S. at 464-467. In considering whether Congress had intended to bring state judges within the coverage of the ADEA, the Court emphasized that that question touched on "the authority of the people of the States to determine the qualifications of their most important government officials[,] an authority that lies at the heart of representative government." *Id.* at 463 (internal quotation marks and footnote omitted). Since it was "at least ambiguous" whether state judges fell within the ADEA's exception for policymaking officials (*id.* at 467, 470), the Court concluded that the ADEA should not be construed to apply to state judges without a plain statement by Congress to that effect (*id.* at 470).

Petitioner's effort to analogize this case to *Gregory* is without merit. Congress has made it unmistakably clear in the FLSA that maximum-hours requirements cover state and local employers and employees, including fire protection employees. 29 U.S.C. 203(d), 203(e)(2)(C), 203(x), 207(k); cf. *Pennsylvania Dep't of*

Corrections v. *Yeskey*, 118 S. Ct. 1952, 1954 (1998) (Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327, "plainly covers state institutions without any exception that could cast the coverage of prisons into doubt") (emphasis omitted). The only question here, based on the facts of this case, is *which* provision of the FLSA covers respondents. If respondents are employees engaged in "fire protection activities," then they must be paid overtime for every hour worked in excess of 53 hours per workweek. Pet. App. 89a; 29 U.S.C. 207(k); 29 C.F.R. 553.230. If they are not engaged in fire protection activities, then they must be paid overtime for every hour worked in excess of 40 hours per workweek. Pet. App. 88a; 29 U.S.C. 207(a). Congress has clearly stated its intent that respondents be covered by some provision of the FLSA; the question of which provision is resolved by reference to the text of the FLSA, the Secretary's regulations implementing and interpreting the FLSA, and the factual record compiled in the case. Therefore, the *Gregory* rule, which was to make "absolutely certain that Congress intended [to] exercise" its constitutional powers (501 U.S. at 464), is irrelevant to this case.

Under petitioner's approach, Congress would be forced to draft legislation at a level of excessive detail, specifically identifying each and every aspect of state activity that might fall within the reach of its statutes; Congress could not rely on a general approach, reaching state employment broadly. That result certainly does not follow from the Court's decision in *Gregory*, which provides a rule of construction for ambiguous statutes, where it is unclear whether Congress intended to cover a particular state function at all. In the FLSA, Congress stated clearly that it intended to exercise its

constitutional powers; having done so, Congress could also rely on the Secretary of Labor to implement the FLSA.

In addition, this case, unlike *Gregory*, does not involve regulation of a state governmental function that "lies at the heart of representative government." *Gregory*, 501 U.S. at 463 (internal quotation marks omitted). While the provision of emergency medical services is undoubtedly an important public service, it does not implicate core sovereign functions in the same way as does the exercise of a State's judicial power. See also *Reich* v. *New York*, 3 F.3d 581, 589-590 (2d Cir. 1993) (also rejecting State's reliance on *Gregory* in FLSA context), cert. denied, 510 U.S. 1163 (1994); *Biggs* v. *Wilson*, 1 F.3d 1537, 1544 (9th Cir. 1993) (similar), cert. denied, 510 U.S. 1081 (1994).[6] The court of appeals therefore properly concluded that, under the Secretary's regulations, the special rule of Section 7(k) does not govern this case. The plain-statement rule of *Gregory* has no bearing on that conclusion.[7]

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[6] In *Yeskey*, the Court addressed whether the ADA covers state prisons to *any* extent, and in doing so, it assumed without deciding that the *Gregory* "plain statement" rule governed whether the ADA applied to the administration of state prisons. See 118 S. Ct. at 1954. The Court noted that "[o]ne of the primary functions of government * * * is the preservation of societal order through enforcement of the criminal law," and that "maintenance of penal institutions is an essential part of that task." *Ibid.* (internal quotation marks omitted). Whereas emergency medical and rescue services are important public services, they are not part of the essence of government, as is enforcement of the criminal law.

[7] Petitioner also contends (Pet. 19-20) that courts have erred in applying to public employers the statutory rule of construction that FLSA exemptions must be narrowly construed against the employer; it argues that the rule of narrow construction of FLSA

3. Finally, petitioner argues (Pet. 21-27) that the FLSA is unconstitutional as applied to this case, and that certiorari is warranted because (it contends) this Court's recent decisions cast doubt on *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which upheld the application of the FLSA to state and local governments. That contention is without merit. The court of appeals correctly held that this Court's ruling in *Garcia* remains good law and is dispositive of the FLSA's constitutionality. See also *Adams* v. *Department of Juvenile Justice*, 143 F.3d 61, 65 (2d Cir. 1998) (similarly rejecting contention that *Garcia* is no longer good law); *Bowman* v. *City of Indianapolis*, 133 F.3d 513, 518 (7th Cir. 1998). *Garcia* squarely upheld the application of the FLSA to state and local governments, and therefore directly controls this case.

Petitioner argues, however (Pet. 22-23), that the Court's decisions in *Printz* v. *United States*, 117 S. Ct. 2365 (1997); *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996); *United States* v. *Lopez*, 514 U.S. 549 (1995); *New York* v. *United States*, 505 U.S. 144 (1992); and *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), have undermined the continued vitality of *Garcia*. Those decisions, however, have little to do with the constitutional issue presented in this case.

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exemptions conflicts with *Gregory*. That contention is meritless. First, the court of appeals below did not rely on the rule of narrow construction of exemptions in reaching its decision; the court found that the record clearly showed that respondents are "medical personnel rather than firefighters" who "did not—and could not—fight fires," and it applied the Secretary's regulations to its factual findings. Pet. App. 90a-91a. In any event, as set forth in the text, the *Gregory* plain-statement rule is inapplicable to this case.

Printz involved interim provisions of the Brady Handgun Violence Prevention Act (Brady Act), 18 U.S.C. 922(s), which required local law enforcement officials to enforce federal law. Specifically, the Brady Act required local officials to make a reasonable effort to determine the legality of proposed handgun sales within five days of the proposed purchase. *Printz*, 117 S. Ct. at 2369. In holding the Brady Act unconstitutional, the Court relied on its previous decision in *New York* v. *United States*, 505 U.S. 144 (1992), which held that constitutional principles of federalism bar Congress from requiring state or local officials to "enact or administer a federal regulatory program." See *id.* at 188; *Printz*, 117 S. Ct. at 2384. In both *Printz* and *New York*, the Court distinguished statutes that regulate the activities of States affecting commerce from statutes that require the States to regulate. As the Court observed in *Printz*, "[t]he Commerce Clause * * * authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *Id.* at 2379 (quoting *New York*, 505 U.S. at 166). Likewise, *Printz* concluded that the Necessary and Proper Clause empowers Congress to "pass laws requiring or prohibiting certain acts," but does not grant Congress "the power directly to compel the States to require or prohibit those acts." *Ibid.*

At a minimum, therefore, when an Act of Congress applies to private entities as well as state and local governments, there can be no question that Congress has properly exercised its Commerce Clause power to regulate primary conduct and has not commandeered the States to enact or enforce a federal regulatory program. The FLSA's application to public employers is a straightforward instance of Congress's valid exer-

cise of its Commerce Clause powers. In no way does the FLSA commandeer the States to enact or enforce the federal wage and hours laws. The basic rules of primary conduct are set forth in the statute (subject to implementation by the Secretary of Labor), and all employers covered by the Act are subject to those rules. The Secretary of Labor, not the States or local governments, is responsible for administering the FLSA, and the Secretary and individual employees may bring suit against employers (including local governmental entities such as petitioner) alleged to be in violation of the FLSA. 29 U.S.C. 204, 216(b)-(c), 217. For that reason, the Court in *New York* expressly distinguished *Garcia* and declined "to apply or revisit [its] holding[.]" *New York*, 505 U.S. at 160; see also *Printz*, 117 S. Ct. at 2383; *Auer*, 519 U.S. at 457 (noting that, in *Garcia*, the Court "held that this exercise of power [*i.e.*, Congress's extension of FLSA coverage to public sector employers] was consistent with the Tenth Amendment").

Gregory likewise confirms the continued validity of *Garcia*. In *Gregory*, the Court, citing *Garcia*, stated that "[w]e are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause." 501 U.S. at 464. The Court then explained that resolution of the question at issue did not require it to "review limitations placed on Congress' Commerce Clause powers by our federal system." *Ibid.* The Court reiterated that "this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers[.]" *Ibid.* Thus, the Court resolved the issue in that case as

a matter of statutory interpretation, not constitutionality.[8]

The Court's decision in *Lopez* (a case involving conduct of a private person rather than of a state or local government) also does not cast doubt on its decision in *Garcia*. In *Lopez*, the Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q)(1)(A) (1994), exceeded Congress's authority under the Commerce Clause. The Court in *Lopez* overruled none of its precedents, however, and it confirmed that the Commerce Clause authorizes Congress to address "persons or things in interstate commerce" and activities that "substantially affect" interstate commerce. 514 U.S. at 558-559. Moreover, "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 558 (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)) (emphasis omitted). *Lopez* therefore supports the validity of the FLSA, for there can be no serious doubt that petitioner's employment of its employees bears a "substantial relation" to interstate commerce. Indeed, even in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), which invalidated the application of the FLSA to the States on Tenth Amendment grounds, the Court referred to the 1974 extension of the FLSA to state and local governments as "undoubtedly within the scope of

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[8] This Court's decision in *Seminole Tribe* also casts no doubt on *Garcia*. *Seminole Tribe* held that Congress lacked authority under the Indian Commerce Clause to abrogate a State's Eleventh Amendment immunity from suit. See 517 U.S. at 60-73. That case involved limitations on Congress's power to expand federal court jurisdiction under Article III and the Eleventh Amendment, however, and did not concern Congress's substantive power under the Commerce Clause to regulate state activities. See *id.* at 72-73.

the Commerce Clause." *Id.* at 841. And in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), the Court held that Congress had power under the Commerce Clause to extend the FLSA to state schools and hospitals.[9] See also *Garcia*, 469 U.S. at 537 (Commerce Clause power extends to regulation of "local transit system engaged in intrastate commercial activity" because "Congress' authority under the Commerce Clause extends to intrastate economic activities that affect interstate commerce"). There is therefore no basis for a reexamination of *Garcia*, and further review of the constitutional question in this case is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Although *Wirtz* was later overruled in *National League of Cities* v. *Usery*, see 426 U.S. at 855, *National League of Cities* was in turn overruled in *Garcia*, 469 U.S. at 557.