No. 129526

IN THE
SUPREME COURT OF ILLINOIS

CARMEN MERCADO and JORGE LOPEZ, on behalf of themselves and all others similarly situated,	)	On Appeal From the Illinois Appellate Court, First Judicial District, No. 1-22-0020
Plaintiffs-Appellants,	)	
v.	)	There on Appeal From the Circuit Court of the First Judicial Circuit, Cook County, Illinois, No. 2020CH7349
S&C ELECTRIC COMPANY,	)	The Honorable ALLEN P. WALKER,
Defendant-Appellee.	)	Judge Presiding.

BRIEF OF AMICI CURIAE ILLINOIS ATTORNEY GENERAL AND ILLINOIS DEPARTMENT OF LABOR IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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INTEREST OF AMICI CURIAE

This appeal raises two important issues of first impression regarding the Illinois Minimum Wage Law ("IMWL") and its implementing regulations. Plaintiffs allege that they worked for defendant S&C Electric Company as hourly-paid factory assembly workers, and that S&C compensated them in part by making regular, non-discretionary incentive payments — "bonuses" tied to the quality or quantity of their work, their success at meeting various metrics, or their tenure at the company. S&C, however, did not include these payments in calculating plaintiffs' regular pay rate, and so when it paid plaintiffs overtime wages, it calculated those wages using a baseline rate that plaintiffs allege was too low. When plaintiffs sought to remedy the alleged underpayment, S&C paid them the back wages they were owed, but not the statutory damages that the IMWL requires as a remedy for wage-and-hour violations. S&C argued that even *assuming* plaintiffs were owed additional overtime, an employer is entitled to pay that overtime at any point, including after an employee has brought suit, and moot any claim the employee might have for statutory damages. Both the trial and appellate court agreed, and this Court allowed plaintiffs' petition for leave to appeal.

The Illinois Attorney General and the Illinois Department of Labor ("Department") have a substantial interest in explaining why the appellate court's opinion is incorrect and should be reversed. The Department is a state agency charged by the General Assembly with the duty to "foster, promote,

and develop the welfare of wage earners" within the State and to "[a]ct in relation to the payment of wages due employees from their employers." 20 ILCS 1505/1505-15, 1505/1505-120. The General Assembly has likewise tasked the Attorney General with "protecting the State's workforce," and specifically directed him "to ensure workers are paid properly, guarantee safe workplaces, and allow law-abiding business owners to thrive through healthy and fair competition." 15 ILCS 205/6.3(a).

Pursuant to these directives, the Department and the Attorney General each have authority to enforce Illinois's wage laws, including the IMWL. *See* 15 ILCS 205/6.3(b); 20 ILCS 1505/1505-120. The IMWL also authorizes the Department to "make and revise administrative regulations, including definitions of terms, as [it] deems appropriate to carry out the purposes of this Act." 820 ILCS 105/10(a). Pursuant to this authority, the Department has promulgated regulations defining various provisions of the IMWL, including regulations defining the statutory term "regular rate" that help answer the question whether S&C appropriately withheld the incentive payments from plaintiffs' regular pay rate in the first instance. *See* 56 Ill. Admin. Code §§ 210.410, 210.420, 210.430.

Given all this, the Attorney General and the Department have a substantial interest in this case. Both issues raised by this appeal — (a) whether S&C was required to include the incentive payments when calculating plaintiffs' regular pay rate and (b) whether, assuming plaintiffs were entitled

to additional overtime, S&C could moot their claims for damages by paying back wages but not statutory damages at any point after accrual — concern the proper interpretation of the IMWL and its implementing regulations. Both questions are significant ones for workers and the State. As discussed below, if an employer can moot an IMWL claim by providing back pay, but not statutory damages, employers will be able to evade their statutory obligations and "pick off" IMWL claims by offering only a fraction of what employees are owed. And if the appellate court was correct that all payments "not measured by or dependent on hours worked" can be withheld from an employee's regular pay rate, employers will be able to shift substantial portions of their employees' compensation to a non-hourly format and, in doing so, reduce their obligations to make overtime payments. Both results would frustrate the Department and the Attorney General's ability to "protect[] the State's workforce." 15 ILCS 205/6.3(a); *see* 20 ILCS 1505/1505-15.

Finally, the Department also has an interest in interpreting and defending the regulations it has promulgated to implement the IMWL, and in ensuring that its views are heeded by the courts. As this Court has noted, "an agency's interpretation of its regulations and enabling statute are entitled to substantial weight and deference given that agencies make informed judgments on the issues based upon their experience and expertise." *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 16 (quotation marks omitted). Here, the Department has promulgated regulations that address whether the

incentive payments were properly excluded. *Infra* pp. 18-20. But the appellate court gave no weight to the Department's views, failing even to acknowledge that the Department has interpreted its regulations and enabling statute in a manner that differed from the court's interpretation.

For these reasons, the Attorney General and the Department have a substantial interest in this case and can assist this Court by presenting their shared perspective on the important issues that it raises.

ARGUMENT

The appellate court misread the IMWL in two ways. First, it erred in holding that an employer can moot an IMWL claim by providing an employee with back wages, but not statutory damages, at any time before judgment — a rule that would make it all but impossible to bring IMWL claims. Second, the appellate court incorrectly interpreted the IMWL to allow employers to exclude non-discretionary incentive payments from their employees' regular pay rates as long as those payments are not directly tied to hours worked. Neither aspect of the decision below can be squared with the text or structure of the IMWL and its implementing regulations. And even if the Court were to find the statute or regulations ambiguous, it should defer to the Department's interpretation as to both.

I. The appellate court erred in holding that an employer can moot an accrued IMWL claim by providing back pay but not statutory damages.

The appellate court erred by holding that an employer can moot an IMWL claim by providing an employee with the back wages he or she is owed, but not statutory damages, at any time before judgment. *See* A14-17 (¶¶ 30-35).[1] That reasoning cannot be squared with the text, structure, or purpose of the IMWL, and it would lead to disastrous consequences, permitting employers to "pick off" IMWL claims and effectively gutting the statute's enforcement by

[1] Citations to "A__" are to plaintiffs' appendix, and citations to "C__" are to the common-law record.

workers, the Department, and the Attorney General alike. The judgment below should be reversed.

A. An IMWL claim, once accrued, cannot be mooted by a payment only of back pay and not statutory damages.

Under Illinois law, an employer is required to pay an employee time-and-a-half for any hours worked over 40 in a workweek, and those wages must be included in the employee's regular paycheck. If the employee is not paid the wages that he or she is owed, he or she is entitled to bring suit under the IMWL to recover those wages and statutory damages — *i.e.*, the underpayment gives rise to an IMWL claim. Once that claim has accrued, it cannot be mooted by an employer's payment of some (but not all) of what the employee is owed. These straightforward principles resolve the primary question presented by this case.

The General Assembly has enacted a comprehensive statutory regime governing the payment of wages to Illinois workers. In the 1970s, the General Assembly enacted two statutes — the IMWL and the Illinois Wage Payment and Collection Act ("IWPCA") — that operate together to establish *how much* an employer is required to pay its workers and *when* an employer must make payment. *See* Pub. Act No. 77-1451 (1971) (IWML); Pub. Act No. 78-914 (1973) (IWPCA). Each statute remains in force today.

The IMWL establishes *how much* an employer is required to pay its employees. It sets a minimum wage for Illinois workers (currently, $13 per hour), 820 ILCS 105/4(a)(1), and also requires employers to pay overtime

wages to employees who work more than 40 hours each week, *id.* § 105/4a(1).[2] Specifically, the IMWL requires an employer to pay all its employees "at a rate not less than [one and one-half] times the regular rate" at which they are paid for every hour worked over 40 in the workweek. *Id.*

The IWPCA, for its part, determines *when* an employer must pay its employees (and establishes a right to timely payment of whatever wages are promised). It requires an employer to pay a covered employee "at least semi-monthly . . . *all wages* earned during the semi-monthly pay period." *Id.* § 115/3 (emphasis added). Specifically, the employer must pay wages "not later than 13 days after the end of the pay period in which such wages were earned," or, in the case of an employee paid weekly, "not later than 7 days after the end of the weekly period." *Id.* § 115/4. Taken together, these statutes require an employer to (a) pay an employee at least time-and-a-half his or her regular hourly rate for any hours worked over 40 in a workweek, and (b) include those overtime wages in an employee's regular paycheck. *See id.* § 115/3 (employer must pay "all wages earned" at least "semi-monthly").

Each statute can be enforced privately by workers as well as by the Department and the Attorney General. *See id.* § 105/12 (IMWL); *id.* § 115/14 (IWPCA). As relevant here, the IMWL provides that an employee who is not

[2] The IMWL establishes various exemptions to these rules, *see, e.g.*, 820 ILCS 105/6(a) ("learners" may be paid below minimum hourly wage); *id.* § 105/4a(2) (workers in various fields need not receive overtime wages), but none are at issue here.

paid "the wage to which he is entitled . . . may recover in a civil action treble the amount of any such underpayments," costs, attorney's fees, and additional statutory damages equivalent to 5% of the underpayment "for each month following the date of payment during which such underpayments remain unpaid." *Id.* § 105/12(a).[3] The IWPCA likewise authorizes an employee "not timely paid wages" to bring a civil action and recover both the underpayment and statutory damages — specifically, 5% of the relevant underpayment "for each month following the date of payment during which such underpayments remain unpaid." *Id.* § 115/14(a).

These statutory provisions entitle a worker who either is not paid the wages guaranteed by the IMWL or is not timely paid according to the terms of the IWPCA to bring a civil suit to recover any underpayment and damages — that is, they give rise to a cause of action under the relevant statute. And the natural reading is that each claim accrues on "the date of payment," *id.* §§ 105/12(a), 115/14(a) — that is, the day on which an employee should have been paid the wages to which he or she was entitled, but was not. On or after that date, a worker may file a civil action seeking back pay and statutory damages.

[3] This brief uses "damages" or "statutory damages" to refer to both the treble damages and the 5% monthly damages awarded by the IMWL. *See* 820 ILCS 105/12(a). Because plaintiffs pursued their IMWL remedies in court, they may also now be entitled to costs and attorney's fees, *id.*; S&C's tender of back pay also does not moot any claim plaintiffs have as to costs and fees.

This commonsense rule accords with the rule under the federal Fair Labor Standards Act ("FLSA"), the statute on which the IMWL was patterned. The Department's regulations provide that federal guidance as to the meaning of the FLSA is probative of the meaning of the IMWL. *See* 56 Ill. Admin. Code § 210.120; *see Kerbes v. Raceway Assocs., LLC*, 2011 IL App (1st) 110318, ¶ 25 (explaining that, given "their substantial similarities, provisions of the FLSA and interpretations of that legislation can be considered in applying" IMWL). And federal courts have long held that a FLSA claim accrues on the date of payment — or, in a case in which no payment was made, the date on which it was owed. *See, e.g.*, *Mid-Continent Petroleum Corp. v. Keen*, 157 F.2d 310, 316 (8th Cir. 1946) (employee's "cause of action for overtime compensation accrued on each payday"); *Atlantic Co. v. Broughton*, 146 F.2d 480, 482 (5th Cir. 1944) (similar). Federal regulations today likewise hold that a FLSA claim accrues "when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends." 29 C.F.R. § 790.21(b). For the reasons discussed, *supra* pp. 6-8, the same is true of an IMWL claim.

Once an IMWL claim has accrued, it cannot be mooted by an employer's payment of only some, but not all, of the amount the employee is owed. A claim is moot "if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief." *Joiner v. SVM Mgmt., LLC*, 2020 IL 124671, ¶ 24. But where an employer provides an

employee with only part of what he or she is owed under the IMWL, it is still possible for a court to grant relief — specifically, the rest of what the employee is owed. If an employee is entitled to $100 in back pay under the IMWL, for example, an employer cannot moot the employee's IMWL claim by giving him or her $10. Doing so would not provide the employee everything to which the law entitles him or her, and so a court could still "grant effectual relief" (*i.e.*, by awarding $90 in back pay), and the case would not be moot. *Id.*; *accord Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) ("As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.").

That principle applies with equal force where, as here, an employer provides an employee with an accrued IMWL claim with the back pay to which he or she is entitled, but not the statutory damages. Such an employee has not been made whole, for the same reason — the employee is entitled by law to statutory damages, not merely back pay. Many courts have reached this conclusion in the FLSA context. *See, e.g.*, *Atlantic Co.*, 146 F.2d at 482 (employer's payment of "the balance due as wages, even though made prior to suit, does not release the accrued liability for liquidated damages," in part because such damages are intended "as compensation for detention of a workman's pay"); *Rigopoulos v. Kervan*, 140 F.2d 506, 507 (2d Cir. 1943) (employer's failure to pay overtime when due yields "a single and entire liability, . . . not discharged in toto by paying one-half of it"); *see also Berger v.*

Perry's Steakhouse of Illinois, LLC, 430 F. Supp. 3d 397, 407 (N.D. Ill. 2019) (rejecting argument that payment of back pay, but not "attorney's fees, costs, or liquidated damages," mooted wage-and-hour claim under FLSA and IMWL). The same is true here.

To hold otherwise would rob the IMWL of all force. If an employer could moot an accrued IMWL claim by paying an employee the back pay, but not the statutory damages, to which he or she was entitled, employers would in effect *never* have to pay statutory damages, as long as they were willing to pay back wages. That result is untenable. The purpose of the statutory damages provision, as the U.S. Supreme Court has long observed in the FLSA context, is to create a "deterrent effect" for employers — "the possibility that an employer who gambles on evading the Act will be liable for payment not only of the basic minimum originally due but also damages." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 709 (1945). As the Court observed, "[k]nowledge on the part of the employer that he cannot escape liability for liquidated damages by taking advantage of the needs of his employees tends to insure compliance in the first place." *Id.* at 710. But if an employer could moot a worker's claim for damages simply by tendering back pay — even years later — employers would have little reason to pay overtime at all, because they would face no consequences from simply withholding it until threatened with liability. That result cannot be right. It would circumvent the statutory regime established by the General Assembly, under which employers that fail to pay overtime

must compensate workers by paying not only what they should have been given in the first place, but also "compensation for the retention of [the workers'] pay." *Id.* at 707. And it would have devastating consequences for workers' ability — and the ability of the Department and the Attorney General — to enforce that statutory regime with appropriate vigor.

B. The appellate court's contrary reasoning is incorrect.

The appellate court erred in reaching a contrary conclusion. The court held that, even assuming plaintiffs were owed overtime that was not paid, *see* A16 (¶ 34), S&C's issuance of "adjustment payments" constituting back wages, but not statutory damages, provided plaintiffs with all the relief "they were entitled to," A17 (¶ 35). The court's decision appears to rest primarily on its view that there is "no statutorily mandated deadline" by which an employer must "ma[k]e up for any unpaid overtime." A14 (¶ 30); *accord* A15-16 (¶ 33). On the appellate court's understanding of the IWML, an employer is entitled to provide an employee with back wages at any point until judgment, and in doing so to moot any IMWL claim for damages the employee might possess. That remarkable reading of Illinois law is seriously flawed.

To start, Illinois law does impose a "deadline" by which an employer is required to pay its workers — the deadline set out in the IWPCA. That statute establishes specific deadlines on which employers must pay workers "*all wages* earned during the semi-monthly pay period," 820 ILCS 115/3 (emphasis added) — including overtime wages. "All means all," *Aqua-Aerobic Sys., Inc. v.*

Ravitts, 166 Ill. App. 3d 168, 172 (2d Dist. 1988), and here the IWPCA's text could not be clearer: An employer is obligated to pay its workers *all* their earned wages at least semi-monthly, including overtime wages. And if the employer fails to pay its workers the overtime they are owed on the "date of payment," 820 ILCS 105/12(a), *i.e.*, the date on which an employer is required to pay its employees, the workers may assert IMWL claims against the employer.

The appellate court's contrary holding appears to rest primarily on its view that the IMWL and the IWPCA establish distinct statutory regimes. *See* A14-16 (¶¶ 31-33). In the court's view, because the IMWL "lack[s]" a "payment deadline," it would be inappropriate to "adopt the deadline" set out in the IWPCA, A15 (¶ 32) — a deadline it characterized as "simply not in the statute," *id.* (¶ 33). But that reading of the relevant statutory provisions is incorrect. As discussed, *supra* pp. 6-8, the IMWL and IWPCA operate hand in glove: The IMWL establishes *how much* an employer must pay its workers, and the IWPCA determines *when* an employer must pay its workers. To say that the IMWL lacks a "payment deadline" is to misunderstand the manner in the statutes work together; that observation makes no more sense than would a critique that the IWPCA fails to specify the amount a worker must be paid. Each statute plays a role in ensuring that Illinois workers are compensated appropriately. The appellate court thus erred in failing to "evaluate[]" the meaning of the statutory scheme "as a whole," *Ultsch v. Illinois Mun. Ret.*

Fund, 226 Ill. 2d 169, 181 (2007), instead employing a divide-and-conquer approach to statutory interpretation.

Nor can the appellate court's reading of the IMWL be squared with other provisions of the statutory regime. For one, as discussed, *supra* p. 7, the plain text of the IWPCA establishes that "all wages" must be paid at least semi-monthly, not merely a worker's non-overtime wages. 820 ILCS 115/3. But under the appellate court's reading, an employer is not required by this provision to pay a worker "all" the wages that he or she is owed, *id.*, but merely the non-overtime wages. The appellate court identified no reason the statute would operate in this manner. Likewise, certain damages authorized by the IMWL accrue with "each month following the date of payment during which [the] underpayments remain unpaid." *Id.* § 105/12(a). That provision clearly rests on the premise that there *is* a "date of payment" — *i.e.*, a date on which overtime payments are required to be made. Similarly, the statute of limitations set out in section 12(a) states that an IMWL claim brought by an employee must be raised "within 3 years from the date of the underpayment," *id.* — a limitation that likewise rests on the premise that an employer must provide overtime payments on a date certain. The appellate court provided no explanation as to how these provisions are to operate if, as it suggested, there is *no* deadline for overtime payments.

To be sure, this case presents unusual factual complications that may have clouded the appellate court's consideration of the issues. Plaintiffs argue

that S&C erred by failing to include quarterly and annual incentive payments in calculating their regular rate of pay. *See* A62-65. If plaintiffs are correct that these payments should have been included in calculating their regular rate of pay, *infra* pp. 18-28, S&C could not have paid the additional overtime that plaintiffs say they are owed during the pay period that plaintiffs worked the hours in question. Rather, S&C would have been required to recalculate the regular rate for the relevant period (*i.e.*, the quarter or year to which the incentive payments corresponded) and pay its employees additional overtime after the fact based on the hours worked during the relevant period — just as it eventually did. *See* C56 (¶ 3) (S&C took the "total incentive payment for each period [and] divided by the total hours worked in the period[] to arrive at the change in the hourly rate," then provided "adjustment payments" based on that rate). That complexity may have made it seem difficult to determine, on the facts of this case, when the relevant "payment deadline" actually occurred.

Nonetheless, the fact that the alleged unpaid overtime could not have been paid during the relevant pay period does not mean S&C had no obligation to *ever* pay it. Indeed, the U.S. Supreme Court rejected essentially that very argument almost 80 years ago. The employees in *Walling v. Harnischfeger Corp.*, 325 U.S. 427 (1945), were (like plaintiffs here) paid both an hourly wage and incentive payments based on production targets. *Id.* at 428-29. Their employer calculated their overtime rates based only on their hourly wages, a practice the Supreme Court explained could not be squared with the FLSA.

Id. at 431-32. In so holding, the Court also rejected the employer's argument that the fact that the incentive payments were not paid on biweekly paydays made compliance impossible. That such payments may not be "determined or paid until weeks or even months after . . . paydays," the Court explained, and accordingly may require retroactive overtime calculation, does not "excuse[]" an employer "from making the proper computation and payment." *Id.* at 432. Rather, the law "requires only that the employees receive [the payments] as soon as convenient or practicable under the circumstances." *Id.* at 433. The same is true here: The fact that the overtime in question could not have been paid during the relevant pay periods does not "excuse[]" S&C from paying it at the earliest practical opportunity, *id.* at 432-33 — presumably on the dates the incentive payments themselves were made.

But the unusual facts of this case should not distract this Court from establishing a general rule regarding overtime payments — one that will apply in *all* IMWL cases, not merely those with claims that look like plaintiffs'. The holding of the decision below is that employers face no deadline to pay their employees overtime wages in *any* circumstance, even where the obligation to pay (or to pay in a timely manner) is not open to good-faith debate. That rule would severely disadvantage workers who rely on overtime pay for a large part of their compensation by allowing their employers to indefinitely detain their wages. And it would, as discussed, *supra* pp. 11-12, hamstring enforcement of the IMWL by eliminating altogether the prospect of statutory damages,

robbing the statute of the "deterrent effect" created by those damages and vitiating employers' incentives to "insure compliance" with the IMWL "in the first place." *See Brooklyn Sav. Bank*, 324 U.S. at 709-10. The appellate court identified no reason that the General Assembly would have intended such a result, and the Court should decline to give the statute such a strained reading.

The appellate court's decision cannot be justified on any other ground. The appellate court appeared to criticize plaintiffs at points for accepting the "adjustment payments," as if doing so somehow mooted their claims. *See* A17 (¶ 35) ("Plaintiffs admit that they received, accepted, and kept the adjustment payments."). To the extent the appellate court's decision rests on that view, it is wrong. S&C has never argued (nor could it) that it entered into some form of settlement agreement with plaintiffs pursuant to which they would accept the adjustment payments in exchange for releasing their claims. Nor is plaintiffs' decision to accept the adjustment payments relevant in any other way to the case. Although this Court has held that a defendant can generally moot a case by "admit[ting] liability and provid[ing] the plaintiff with all relief requested" (*i.e.*, by "tendering" complete relief), *Joiner*, 2020 IL 124671, ¶¶ 44-46, S&C did not tender complete relief or admit liability here. To the contrary, S&C has steadfastly refused to provide plaintiffs statutory damages and insists it is not liable for them. In such a case, it is irrelevant that plaintiffs accepted partial payment on their claims.

In sum, the appellate court erred in holding that an employer is not obligated to provide overtime wages to an employee in a timely manner and can instead moot the employee's IMWL claim by providing those wages at any point before judgment. The decision below should be reversed on that basis alone.

II. The appellate court erred in holding that incentive payments can be excluded from computation of the regular rate.

The appellate court also erred in holding that employers can exclude incentive payments from the computation of the regular pay rate as long as those payments are not tied to hours worked. A5-6. That holding misreads the relevant regulations and invites gamesmanship by employers. The Court should reverse on this ground, too.

A. Non-discretionary incentive payments generally cannot be excluded from the computation of the regular rate.

As discussed, Illinois law requires an employer to pay its employees "at a rate not less than [one and one-half] times the regular rate" for every hour worked over 40 in an employee's workweek. 820 ILCS 105/4a(1). Although the IMWL does not define the statutory term "regular rate," the Department has promulgated regulations that define the term expansively "to include all remuneration for employment paid to . . . the employee," subject to only a handful of exceptions. *See* 56 Ill. Admin. Code § 210.410. These regulations establish that employers must generally include non-discretionary incentive payments in the "regular rate," even if they are not tied to hours worked.

To start, the regulations establish a baseline rule under which "*all* remuneration" must be included in calculating the regular rate. 56 Ill. Admin. Code § 210.410 (emphasis added). The regulations underscore that the regular rate is the "rate at which the employee is *actually* employed," *id.* § 210.420(a) (emphasis added), taking all forms of compensation into account. A separate regulation lays out multiple ways in which non-hourly compensation must be included in calculating the regular pay rate. *Id.* § 210.430. As one example, compensation paid out "on a piece-rate basis," *i.e.*, per item manufactured or completed, must be included in the regular rate in the manner described above, *supra* p. 15 — that is, by adding "the total earnings for the workweek from piece rates and all other earnings" and then dividing the total by the number of hours worked that week. *Id.* § 210.430(b). Employers must also (and using essentially the same method) include compensation paid on a per-day or per-job basis, *id.* § 210.430(c); salaried compensation, *id.* § 210.430(d); and more in the regular pay rate. The regulations require, in other words, an employer to include all forms of "remuneration" in calculating the regular pay rate.

As a general matter, non-discretionary incentive payments are "remuneration" of this sort, and so must also be included in calculating an employee's regular pay rate. An employer that pays its employees in part by offering them regular incentive payments — whether tied to production targets, seniority, or any other metric — has simply chosen to tie its

compensation, in part, to a factor other than hours worked. Indeed, an incentive payment tied to performance metrics (of the kind plaintiffs allege is at issue here, *see* A63-64 (¶¶ 13, 16)) is functionally indistinguishable from piece-rate compensation: Both compensate employees not by time, but by output. *Cf. Harnischfeger Corp.*, 325 U.S. at 428 (describing "incentive bonuses" and "piecework earnings" as functionally identical). The regulations expressly provide that piece-rate compensation must be included in the regular rate, *see* 56 Ill. Admin. Code § 210.430(b), and the same is true of most incentive payments.[4] Indeed, the regulations expressly link the two, providing that a piece-rate employee's regular pay rate "is computed by adding together the total earnings for the workweek from piece rates and *all other earnings (such as bonuses)*," alongside "other hours worked." *Id.* (emphasis added).

At least one court applying the IMWL to a "hybrid" payment system of the kind of at issue here has reached the same conclusion. In *Tomeo v. W&E Communications, Inc.*, No. 14-cv-2431, 2016 WL 8711483 (N.D. Ill. Sept. 30, 2016), a federal district court applied the IMWL to a comparable payment system, in which employees were paid both an hourly wage and a "bonus" based on a production target. *Id.* at *3-4. The court explained that the IMWL

[4] The Department's regulations provide that "[s]ums paid in recognition of services performed" can be excluded from computation of the regular rate if they are paid at the employer's "sole discretion." 56 Ill. Admin. Code § 210.430(c)(1). So an incentive payment that is not tied to specific metrics, but instead is awarded on a purely discretionary basis, need not be included in the calculation of the regular rate.

required the employer to "pa[y] its employees an overtime premium for both their base pay and their bonus pay." *Id.* at *9. Any other arrangement, the court reasoned, would result in "carving [up]" employees' total compensation into "slice[s]," one of which would earn overtime and one of which would not. *Id.* at *11.

Indeed, as the *Tomeo* court observed, the rule is the same in the federal context. As discussed, *supra* p. 9, Illinois courts frequently look to federal law for guidance on the IMWL and its implementing regulations. *Kerbes*, 2011 IL App (1st) 110318, ¶ 25; *see* 56 Ill. Admin. Code § 210.120. And federal courts for decades have read FLSA to require employers to pay overtime even on forms of compensation not tied to hours worked, such as piecework wages and other incentive payments. *See Harnischfeger Corp.*, 325 U.S. at 432 ("When employees do earn more than the basic hourly rates because of the operation of [an] incentive bonus plan," the regular rate must incorporate the incentive payments, not just the hourly rates); *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 425-26 (1945) (similar). Given "the[] substantial similarities" between the FLSA and the IMWL, this federal caselaw strongly suggests that the same rule should apply here. *Kerbes*, 2011 IL App (1st) 110318, ¶ 25.

Below, S&C argued that incentive payments can be excluded from the regular rate as long as they are not tied to hours worked. It did so based on a Department regulation that allows employers to exempt "[s]ums paid as gifts

such as those made at holidays or other amounts that are not measured by or dependent on hours worked" from the regular wage. 56 Ill. Admin. Code. § 210.410(a). But this regulation cannot be stretched to encompass incentive payments like those at issue here.

For one, the plain text of the regulation does not permit that reading. The regulation's purpose is, as it says, to allow employers to exclude "gifts" and similar payments. A non-discretionary incentive payment is not a "gift"; it is an alternative form of compensation for labor, in the same way that piece-rate pay is. *See Provena Covenant Med. Ctr. v. Dep't of Revenue of State*, 384 Ill. App. 3d 734, 751 (4th Dist. 2008) ("[A] gift is, by definition, free goods or services: 'something voluntarily transferred by one person to another without compensation.'" (quoting *Merriam-Webster's Collegiate Dictionary* 491 (10th ed. 2000)). The relevant federal regulation, 29 C.F.R. § 778.212(b), says as much explicitly, explaining that "[t]o qualify for exclusion under [the FLSA's gift exception], the bonus must be actually a gift or in the nature of a gift." The same rule should apply here. *See Kerbes*, 2011 IL App (1st) 110318, ¶ 25; *see also infra* pp. 26-27 (discussing the equivalent provisions of federal law).

To be sure, such a payment may not be "measured by or dependent on hours worked." But the IMWL and its implementing regulations do not allow employers to exclude all payments not tied to hours worked. If that were so, an employer could exclude all manner of non-hourly compensation, including piece-rate pay and monthly or salaried compensation — none of which is

"measured by or dependent on hours worked." But the regulations expressly provide that such payments — indeed, that "all remuneration," 56 Ill. Admin. Code. § 210.410, subject to a small handful of exceptions — must be included in calculating the wage rate. *Id.* § 210.430. An expansive reading of the "gifts" exception of the kind S&C has suggested would thus swallow the regulations' specific and detailed treatment of non-hourly compensation and conflict with the regulations' broader command to consider all compensation in calculating the regular rate. It thus cannot be squared with the text and structure of the regulations.

B. The appellate court applied the wrong standard to the incentive payments at issue here.

The appellate court nonetheless appeared to adopt S&C's reading of the IMWL and its regulations, reasoning that the exclusion for "gifts" set out in the Department's regulations encompassed all payments made to employees "not measured by or dependent on hours worked." A11-13 (¶¶ 26-28). The appellate court ultimately affirmed the circuit court's decision denying S&C's motion to dismiss on this issue, holding that the record did not show whether the incentive payments at issue here were tied to hours worked. A12-13 (¶ 28). But the court's underlying interpretation of the IMWL and its regulations was incorrect, and this Court should correct that interpretation so that the proper interpretation may be applied on remand.

The appellate court's decision appears to rest primarily on its view that the "plain reading" of the gifts provision allows employers to exclude payments

that are "'not measured by or dependent on hours worked.'" A12 (¶ 27) (quoting 56 Ill. Admin. Code § 210.410(a)). That is not correct. As discussed, *supra* pp. 19-22, the plain language of the regulation allows employers to exclude "gifts," not all non-hourly compensation. Specifically, the regulation states that employers may exclude from the regular rate "sums paid as gifts such as those made at holidays or other amounts that are not measured by or dependent on hours worked." 56 Ill. Admin. Code § 210.410(a). The rule thus allows employers to exclude "gifts" — the term at the start of the provision — alongside other payments that are not meant as "remuneration," *id.* § 210.420. The remaining text in the rule, including the phrase on which the circuit court relied, is illustrative: It is a list of examples of the regulatory term "gifts," not a list of regulatory requirements. *Cf. United States v. Copenhaver*, 185 F.3d 178, 180 (3d Cir. 1998) (reading statutory term "such as" to "indicate[]" a list "by way of example rather than limitation"). It thus explains that a "gift" can include a sum paid "at holidays," but can also include an "amount[]" that is "not measured by or dependent on hours worked." *Id.* § 210.410(a).

Thus, the regulation does not allow employers to exclude *all* payments "not measured by or dependent on hours worked." To read the regulation this way is to overlook the key term — "gift" — around which the regulation revolves. *Cf. Bullman v. City of Chicago*, 367 Ill. 217, 226 (1937) ("It has been repeatedly held by this and other courts that, where general words follow particular and specific words in a statute, the general words must be construed

to include only things of the same kind as those indicated by the particular and specific words . . . ."). And it would put the regulation in conflict with the rest of the Department's regulatory regime, which directs employers to include "all remuneration" in the regular pay rate as a general matter, 56 Ill. Admin. Code § 210.410, and instructs them specifically to *include* compensation not tied to hours worked, including piece-rate pay, in that rate, *id.* § 210.430. In reading a regulation, as with a statute, a court must "construe[] words and phrases not in isolation but relative to other pertinent [regulatory] provisions." *In re Julie M.*, 2021 IL 125768, ¶ 27. Here, doing so requires reading the "hours worked" language, on which the appellate court relied, in light of the approach taken by the Department's regulations more generally. The appellate court failed to do so.

The appellate court acknowledged plaintiffs' argument that its reading created an "inconsistency" between the gift provision and section 210.430(b), which requires employers to include piece-work compensation in calculating workers' regular rate of pay, but it flatly dismissed that possibility in light of the "plain reading" of the regulatory text. A11-12 (¶¶ 26-27). But that is no answer. The inconsistency the parties identified, *supra* pp. 18-19, 22-23, is powerful evidence that the regulatory text does *not* bear the meaning that the appellate court gave it. A court's task is to read each provision of a statute or regulation in context, *In re Julie M.*, 2021 IL 125768, ¶ 27, an admonition the appellate court failed to heed. To the extent the appellate court's reasoning

was driven by its belief that the parties were litigating the interpretive question through the lens of the absurdity doctrine, under which a court may deviate from the "literal reading of a statute" if it produces "absurd" results, *see People v. Hanna*, 207 Ill. 2d 486, 498 (2003), that, too, was error: Plaintiffs and amici did not argue that the plain meaning of the regulation's text would "result[] in an 'absurd interpretation,'" A9-10 (¶ 22), but that the structure and context of the regulation was critical to the interpretation of that text in the first instance. The appellate court erred in concluding otherwise.

The appellate court also drew the wrong lesson from the text of the relevant federal provisions. *See* A12-14 (¶ 28). The appellate court reasoned that the relevant FLSA provision and its implementing regulation differ from the text of section 210.410(a), in that the FLSA expressly states that employers cannot exclude payments that are "dependent on hours worked, production, or efficiency," 29 U.S.C. § 207(e)(1); *see also* 29 C.F.R. § 778.212(b) (same). But federal courts read the FLSA to require employers to include non-discretionary incentive payments in calculating the regular rate even *before* the relevant text was added to the statute in 1949. *See Harnischfeger Corp.*, 325 U.S. at 432 (rejecting an employer's argument, in 1945, that "incentive bonuses" could be excluded from the computation of the regular rate on the ground that it would "open an easy path for evading the plain design" of the FLSA); *Youngerman-Reynolds*, 325 U.S. at 425-26 (similar). The General Assembly should not be deemed to have rejected the federal rule simply by failing to copy verbatim the

FLSA's text. Indeed, the appellate court identified no reason the legislature would have wanted to deviate from federal practice in this area.

The appellate court thus applied the incorrect legal standard to the incentive payments at issue here. Because the circuit court resolved the case on S&C's threshold motions, however, it is not possible to determine on the present record whether the incentive payments plaintiffs have alleged were made should have been excluded. The case should be remanded for further proceedings so that the correct legal standard can be applied to plaintiffs' claims.

Nonetheless, the complaint's allegations, taken as true, *see Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006) (on section 2-615 motion, court must accept all well-pleaded facts), suggest that at least some of the payments at issue should have been included in the regular rate. Plaintiffs allege that the "KPI Incentive" payments that both plaintiffs received were given to them "for achieving certain previously announced performance and safety metrics on [their] production line[s]." A63-64 (¶¶ 13, 20). Plaintiffs likewise allege that they were given an "MIS" bonus "designed to reward [them] for the number of hours that [they] worked during the previous year." A63 (¶ 13) (Mercado); *see also* A64 (¶ 19) (Lopez). If these incentive payments, at least, were made for the reasons set out in the complaint, they are just an alternative form of compensation for labor, and if they are not otherwise excludable they should have been included in plaintiffs' regular pay rate.

Indeed, S&C's conduct since the filing of this lawsuit reflects its tacit agreement that the incentive payments at issue should have been reflected in the regular pay rate. That is, S&C did not just make adjustment payments to plaintiffs; it "changed the way that it calculates the regular rate for purposes of calculating overtime and now includes incentive payments" of the kind at issue here "in the regular rate for purposes of calculating overtime." C57 (¶ 9). That decision presumably reflects S&C's determination that it is required by the IMWL to include such payments in the regular rate.

Nonetheless, because the circuit court has not had the opportunity to apply the appropriate legal standard to plaintiffs' claims, this Court should clarify the appropriate standard and remand to permit the circuit court to do so in the first instance.

III. At minimum, the Court should defer to the Department's interpretation of the statutes and rules.

For the reasons discussed above, the appellate court erred twice over, both in interpreting the IMWL to permit employers to indefinitely withhold workers' overtime wages and in reading the Department's regulations to allow employers to exclude certain incentive payments from the calculation of their workers' regular pay rates. As the Attorney General and the Department have explained, each position is at odds with the text and structure of the statute or regulation, and the Court can reverse on that ground alone.

Nonetheless, if the Court finds that either the IMWL itself or the Department's regulations interpreting the IMWL is ambiguous, it should defer

to the Department's interpretation of each. As this Court has explained, "an agency's interpretation of a statute is given deference on *de novo* review unless it is erroneous, unreasonable, or conflicts with the statute." *Medponics Illinois, LLC v. Dep't of Agric.*, 2021 IL 125443, ¶ 31; *accord Hadley v. Ill. Dep't of Corr.*, 224 Ill. 2d 365, 370-71 (2007) ("[W]here . . . an agency is charged with the administration and enforcement of the statute, courts will give deference to the agency's interpretation of any statutory ambiguities."). "[A]n agency's interpretation of its own regulations" is likewise "entitled to substantial deference and weight." *Medponics*, 2021 IL 125443, ¶ 31.

Here, the Department's interpretations of the statute and regulations are, at a minimum, reasonable ones that "harmonize[] with the [IMWL's] purpose," namely the protection of Illinois workers, *id.* ¶ 53, and are accordingly entitled to deference. The appellate court provided no reason for failing to defer to the Department's reading of the statute and the regulations; indeed, it did not even *acknowledge* the Department's interpretation. That alone was error. Regardless, this Court should defer those interpretations if it concludes that either the statute or regulations are ambiguous.

Deference is particularly appropriate as to the statutory question, *i.e.*, whether an employer is entitled to moot an IMWL claim simply by providing back wages. This Court has held that deference is especially important "where [an agency's] constructions have been consistently adhered to for a long period of time." *Illinois Consol. Tel. Co. v. Illinois Com. Comm'n*, 95 Ill. 2d 142, 153

(1983). Here, the Department has enforced the IMWL against Illinois employers since the statute's initial enactment in 1971. During that time, its consistent practice in IMWL cases has been to seek not only back pay on behalf of Illinois workers, but also statutory damages, consistent with the plain text of the statute. *See* 820 ILCS 105/12(a) (treble damages and compounding interest where the Department is assigned a claim directly by an employee); *id.* § 105/12(b) (double damages where the Department pursues a claim). During that time, to amici's knowledge, no employer has asserted that it could moot an IMWL claim, and pay *no* damages, simply by paying an employee back wages. And the Department and the Attorney General regularly settle IMWL claims for some or all of the statutory damages authorized by the General Assembly — a result that would be impossible if S&C were correct that an employer could simply moot a claim, and the accompanying statutory damages liability, by furnishing back pay. *See, e.g.*, Press Release, *Attorney General Raoul Announces Settlements with Construction Subcontractors at Rivian Automotive Over Unpaid Overtime Wages* (Dec. 21, 2021) (joint investigation between the Attorney General and the Department resulted in recovery of "nearly 270% of the overtime wages" owed to employees).[5] The Department, that is, has consistently taken the position — consistent with this brief — that an employer is obligated to pay overtime wages on a date certain, not merely at some future point, and that an employer's failure to do so gives rise to an

[5] https://ag.state.il.us/pressroom/2021_12/20211221.html.

IMWL claim. The appellate court's contrary reading of the IMWL cannot be squared with the Department's decades-long practice enforcing the Act.

CONCLUSION

For these reasons, the court should reverse the judgment below and remand for further proceedings.

Respectfully submitted,

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SUPREME COURT RULE 341(c)
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 32 pages.

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CERTIFICATE OF FILING AND SERVICE

I certify that on December 6, 2023, I electronically filed the foregoing Motion for Leave to File Brief Amicus Curiae In Support of Plaintiffs-Appellants, accompanied by the proposed Amicus Brief, with the Clerk of the Court for the Illinois Supreme Court, using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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