No. 129526

IN THE SUPREME COURT OF ILLINOIS

CARMEN MERCADO and JORGE LOPEZ, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. S&C ELECTRIC COMPANY, Defendant-Appellee.	)	On Appeal From The Appellate Court of Illinois, First Judicial District, No. 22-0020 There heard on Appeal from the Circuit Court of Cook County, Illinois, Chancery Division, General Chancery Section, No. 2020 CH 7349 The Honorable Allen P. Walker, Judge Presiding

BRIEF OF DEFENDANT-APPELLEE S&C ELECTRIC COMPANY

MICHAEL A. SCODRO
CHARLES E. HARRIS, II
BRETT E. LEGNER
ANASTASIYA LOBACHEVA
MAYER BROWN LLP
71 South Wacker Dr.
Chicago, IL 60606
(312) 782-0600 (telephone)
(312) 706-9364 (facsimile)
mscodro@mayerbrown.com
charris@mayerbrown.com
blegner@mayerbrown.com
alobacheva@mayerbrown.com

JOHN T. ROACHE
AKERMAN LLP
71 South Wacker Drive, 46th Floor
Chicago, IL 60606
(312) 634-5700 (telephone)
(312) 424-1900 (facsimile)
john.roache@akerman.com

Counsel for Defendant-Appellee S&C Electric Company

ORAL ARGUMENT REQUESTED

E-FILED
2/28/2024 7:47 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

POINTS AND AUTHORITIES

NATURE OF THE CASE 1
ISSUES PRESENTED 2
STATEMENT OF FACTS 3
ARGUMENT 10
I. Introduction 10
56 Ill. Admin Code. § 210.420(b) 10
56 Ill. Admin. Code § 210.410(a) 10
II. The Standard Of Review Is De Novo. 11
Cahokia Unit Sch. Dist. No. 187 v. Pritzker, 2021 IL 126212 11
Zedella v. Gibson, 165 Ill. 2d 181 (1995) 11
Solaia Tech., LLC v. Specialty Publ'g Co., 221 Ill. 2d 558 (2006) 12
III. Under The Department's Regulations, The Regular Rate Of Pay Excludes Bonus Payments That Are Not Tied To Hours Worked 12
A. The Plain Language Of The Regulations Excludes Amounts Paid That Are Not Measured By Or Dependent On Hours Worked. 12
56 Ill. Admin. Code § 210.410(a) 12
1. S&C's Interpretation Affords Plain Meaning To The Text And Honors The Grammatical Structure Of The Regulation 12
56 Ill. Admin. Code § 210.410(a) 12, 13, 14, 15
People ex rel. Madigan v. Illinois Com. Comm'n, 231 Ill. 2d 370 (2008) 12, 13
Pielet v. Pielet, 2012 IL 112064 13
Nielsen v. Preap, 139 S. Ct. 954 (2019) 13
Perez v. Illinois Dep't of Child. & Fam. Servs., 384 Ill. App. 3d 770 (4th Dist. 2008) 14
M.A.K. v. Rush-Presbyterian-St.-Luke's Med. Ctr., 198 Ill. 2d 249 (2001) 14
In re Q.P., 2015 IL 118569 14
Merriam Webster, available at https://www.merriam-webster.com/dictionary/regular 14, 15

Merriam Webster, available at https://www.merriam-webster.com/dictionary/rate 15

56 Ill. Admin. Code § 210.420 15

2. Plaintiff's Reading Of The Regulation Is Implausible 15

People v. Wells, 2023 IL 127169 16

Ill. Env't Prot. Agency v. Ill. Pollution Control Bd., 2018 IL App (4th) 170144 16

56 Ill. Admin. Code § 210.410(a) 16

3. S&C's Understanding Of The Regulation Fits Well Within The Entire Regulatory Scheme 17

People ex rel. Madigan v. Illinois Com. Comm'n, 231 Ill. 2d 370 (2008) 17

56 Ill. Admin. Code § 210.430(a) 17

56 Ill. Admin. Code § 210.430(b)-(d) 17

56 Ill. Admin. Code § 210.420 18

56 Ill. Admin. Code § 210.430(b) 18

56 Ill. Admin. Code § 210.430(c) 18

56 Ill. Admin. Code § 210.430(d) 18

56 Ill. Admin Code. § 210.430 ..... 18, 19

56 Ill. Admin. Code § 210.410(b) 19

56 Ill. Admin. Code § 210.410(a) 19, 20

B. FLSA And Its Regulations Support S&C's Interpretation. 20

56 Ill. Admin. Code § 210.120 20

Fair Labor Standards Act, Public Law 81-393, ch. 736, 63 Stat. 910 (1949) 20, 21

19 Ill. Reg. 6385, 6576, 6586-87 (May 12, 1995) 20, 21

33 Fed. Reg. 986, 996 (Jan. 26, 1968) 21

29 C.F.R. § 778.212(a) & (b) 21

Kerbes v. Raceway Assocs., LLC, 2011 IL App (1st) 110318 22

Tomeo v. W&E Communications, Inc., No. 14 C 2431, 2016 WL 8711483 (N.D. Ill. Sept. 30, 2016) 22, 23

Chi. Tchrs. Union, Loc. No. 1 v. Bd. of Educ. of City of Chi., 2012 IL 112566 22

29 C.F.R. § 778.502 23

Walling v. Harnischfeger, 325 U.S. 427 (1945) 23

Walling v. Youngerman-Reynolds Harwood Co., 325 U.S. 419 (1945) 24

C. The Court Need Not Resort To Canons Of Statutory Construction, And Those Canons Would Support S&C's Reading In Any Event. 24

Ultsch v. Illinois Mun. Ret. Fund, 226 Ill.2d 169 (2007) 24

People ex rel. Madigan v. Illinois Com. Comm'n, 231 Ill. 2d 370 (2008) 24, 25

56 Ill. Admin. Code § 210.410(a) 25

Pooh-Bah Enters., Inc. v. Cook County, 232 Ill. 2d 463 (2009) 25

Corbett v. County of Lake, 2017 IL 121536 ..... 25, 27

56 Ill. Admin. Code § 210.410(b)-(g) 26

In re Estate of Crawford, 2019 IL App (1st) 182703 ..... 26, 27

56 Ill. Admin. Code § 210.410(a) 26, 27

D. Plaintiffs Fail To Plausibly Allege That S&C Paid Them Any Bonus Amounts Based On Hours Worked. 28

Zedella v. Gibson, 165 Ill. 2d 181 (1995) 28

Ill. Sup. Ct. Rule 191(a) 28

Doria v. Vill. of Downers Grove, 397 Ill. App. 3d 752 (2d Dist. 2009) 28

56 Ill. Admin. Code § 210.410(a) 28, 29

Ultsch v. Illinois Mun. Ret. Fund, 226 Ill.2d 169 (2007) 29

IV. Plaintiffs Did Not Plausibly Allege An Underpayment. 29

A. Plaintiffs Were Not Underpaid Because S&C Was Not Required To Consider The Incentive Bonuses In Calculating The Regular Rate Of Pay. 29

820 ILCS 105/12(a) 29

B. S&C's Adjustment Payment To Lopez Extinguished His Statutory Basis To Sue. 30

820 ILCS 105/4a 30

56 Ill. Admin. Code § 210.410 30

People v. Johnson, 2021 IL 125738 30

820 ILCS 105/12a 30, 31, 32, 33, 34

Illinois Landowners All., NFP v. Illinois Com. Comm'n, 2017 IL 121302 31

Goodman v. Ward, 241 Ill. 2d 398 (2011) 31

People v. Coe, 2018 IL App (4th) 170359 32

Berger v. Perry's Steakhouse of Illinois, LLC, 430 F. Supp. 3d 397 (N.D. Ill. 2019) 32

Joiner v. SVM Mgmt., LLC KKC, 2020 IL 124671 ..... 32, 33

29 U.S.C. § 1132(g)(2)(A) 33, 34

29 U.S.C. § 1132(g)(2)(C)(ii) 33, 34

Operating Eng'rs Loc. 139 Health Benefit Fund v. Gustafson Constr. Corp., 258 F.3d 645 (7th Cir. 2001) 33

Carpenters & Joiners Welfare Fund v. Gittleman Corp., 857 F.2d 476 (8th Cir. 1988) 33, 34

Bennett v. Machined Metals Co., 591 F. Supp. 600 (E.D. Pa. 1984) 34

Bates v. William Chevrolet/Geo, Inc., 337 Ill. App. 3d 151 (1st Dist. 2003) 35

Huss v. Sessler Ford, Inc., 343 Ill. App. 3d 835 (1st Dist. 2003) 35

C. Rejecting Plaintiffs' Demand For Penalties And Fees Advances The IMWL's Goals. 36

820 ILCS § 105/12a 36

V. This Court Owes No Deference To The Department's Statutory Or Regulatory Interpretations. 37

Save Our Illinois Land v. Illinois Com. Comm'n, 2022 IL App (4th) 210008 ..... 37, 38

820 ILCS 105/12a 37

56 Ill. Admin. Code § 210.410(a) 37, 38

Medponics Illinois, LLC v. Dep't of Agric., 2021 IL 125443 37

Landmarks Illinois v. Rock Island Cnty. Bd., 2020 IL App (3d) 190159 ..... 37, 39

People ex rel. Madigan v. Illinois Com. Comm'n, 231 Ill. 2d 370 (2008) 37

Walker v. Dart, 2015 IL App (1st) 140087 ..... 38, 39

Perez v. Illinois Dep't of Child. & Fam. Servs., 384 Ill. App. 3d 770 (4th Dist. 2008) 38

Boaden v. Dep't of L. Enf't, 171 Ill. 2d 230 (1996) 38

N. Tr. Co. v. Bernardi, 115 Ill. 2d 354 (1987) 38

Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012) 40

CONCLUSION 41

NATURE OF THE CASE

This appeal presents questions of statutory and regulatory interpretation. Plaintiffs-Appellants Carmen Mercado and Jorge Lopez filed a putative class action complaint in the circuit court, alleging that Defendant-Appellee S&C Electric Company ("S&C") violated the Illinois Minimum Wage Law ("IMWL") by not including certain bonuses in Plaintiffs' regular rate of pay when calculating overtime wages. S&C moved to dismiss, arguing that regulations implementing the IMWL do not require an employer to factor bonuses that are not measured by or dependent on hours the employee worked into its employees' regular rate of pay. S&C also argued that Plaintiffs lacked a basis to sue because S&C had paid them all the wages to which they were entitled under the IMWL.

The circuit court denied S&C's motion in part and granted it in part. On the first ground, the court agreed that the applicable regulations exclude bonuses measured independently from hours worked from the regular rate of pay but held that the record did not establish how S&C calculated the bonuses at issue. On the second ground, the court agreed that plaintiffs failed to plausibly allege that S&C underpaid them. The appellate court affirmed on both grounds. *Mercado v. S&C Elec. Co.*, 2023 IL App (1st) 220020. This Court granted review of that decision. The questions raised are on the pleadings.

ISSUES PRESENTED

1. Whether, pursuant to the IMWL, an employer paying employees non-hourly-based quarterly or yearly incentive bonuses must account for those bonuses in the employee's "regular rate" of pay when applicable regulations exclude "amounts not measured or determined by hours worked" from overtime rate calculation.

2. Whether an employee may recover statutory penalties and attorney's fees in a suit brought under the IMWL when an employer has tendered a claimed underpayment before the employee files suit and before the employee retains counsel.

STATEMENT OF FACTS

The applicable statutory scheme and regulations

The IMWL, 820 ILCS 105/1 *et seq.*, specifies that an employer must pay an employee an overtime rate—one-and-a-half times the "regular rate at which he is employed"—for any weekly hours the employee works above 40. 820 ILCS 105/4a(1). The "regular rate" is therefore the foundation for calculating employees' overtime wages. The IMWL does not define the term "regular rate."

The Illinois Department of Labor ("Department"), however, has promulgated regulations specifying that "regular rate" includes "all remuneration for employment" paid to an employee but excludes certain enumerated payment amounts. 56 Ill. Admin. Code § 210.410. At issue in this case is one of those exceptions: the "regular rate" does not include "[s]ums paid as gifts such as those made at holidays or other amounts that are not measured by or dependent on hours worked." *Id.* § 210.410(a).

The regulations also explain how to calculate the regular rate, specifying that the "regular rate" is one paid "per hour." *Id.* § 210.420(b). Thus, regardless of whether an employer pays an employee "on a piece-rate, salary, commission, or some other basis," the employer must convert those earnings to an hourly rate to calculate the employee's overtime wages. *Id.* Accordingly, the regulations specify that an employee's standard earnings, measured per hour, comprise the employee's "regular rate." Any other payment that is not part of the hourly rate, that is, "not measured by or dependent on hours worked," is not part of the employee's "regular rate." *Id.* § 210.410(a).

If an employer miscalculates an employee's regular rate and thereby deflates the employee's overtime rate, the IMWL contains a remedial provision allowing an employee to recover backpay and certain fees and penalties. Such an employee, who "is paid . . . less than the wage to which he or she is entitled," may recover "in a civil action" treble damages in the amount of "any such underpayments," costs and reasonable attorney's fees, as well as "damages of 5% of the amount of any such underpayments for each month following the date of payment during which such underpayments remain unpaid." 820 ILCS 105/12(a).

The parties

S&C designs products for electric power transmissions and distribution systems. A.62 ¶ 6. S&C employed Carmen Mercado and Jorge Lopez as "hourly-paid" factory assembly workers. *Id.* ¶¶ 4-5. Mercado worked for S&C from 2004 to June 2020. *Id.* ¶ 4. Lopez worked for S&C between June and December 2019. *Id.* ¶ 5.

Mercado's and Lopez's regular wages and bonuses from S&C

S&C paid employees such as Mercado and Lopez an hourly rate for any hours up to 40 they worked in a week. *Id.* ¶¶ 4-5. Consistent with the IMWL and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203 *et seq.*, S&C also paid those employees one-and-a-half times the set hourly rate for any hours worked above 40. A.62-64 ¶¶ 12, 15, 19.

In addition to those payments, S&C paid Lopez, Mercado, and other employees certain "nondiscretionary" bonuses. *Id.* ¶ 9. Those bonuses were intended to compensate Plaintiffs for services performed and not intended to be paid as gifts. *Id.*

Specifically, in 2019, S&C paid Mercado a $300 "KPI Incentive bonus" and a $640 "MIS Bonus." A.63 ¶ 12. In 2020, in addition to another $300 "KPI Incentive bonus," S&C awarded Mercado a $909 success-sharing bonus and $900 "seniority" award. A.63-64 ¶ 15. These payments supplemented her $14.20 hourly rate for up to 40 hours a week and her $21.30 overtime rate. A.63-64 ¶ 15. As for Lopez, S&C paid him a $100 "KPI Incentive bonus" and a $425 "MIS Bonus" in 2019. A.64 ¶ 19. S&C paid Lopez an hourly rate of $14 for up to 40 hours a week. *Id.* When divided by the number of weeks in a year, the annual incentive bonuses that S&C paid Mercado and Lopez were minimal compared to their weekly wages. A.63-64 ¶¶ 12, 15, 19-20.

S&C's Chief Human Development and Strategy Officer Aurelie Richard confirmed that S&C did not base the amount of any incentive bonuses that Plaintiffs received on their weekly hours. C.211 ¶ 2. When determining Plaintiffs' "regular rates" to calculate their overtime wages, S&C followed applicable IMWL regulations, which exclude amounts "that are not measured by or dependent on hours worked" from the regular rate. 56 Ill. Admin. Code § 210.410(a).

Nonetheless, S&C paid Mercado $486.74 and Lopez $10.33 in "adjustment payments" on July 31, 2020. C.211-12 ¶¶3, 5. Those payments encompassed the overtime wages Plaintiffs would have received had certain bonuses, such as the "KPI," "MIS," and "success-sharing" bonuses been included in regular rate calculations. C.211 ¶ 3.[1] The payments also included interest of five percent per year. *Id.*

Dismissal of Plaintiffs' complaint

In December 2020, Mercado and Lopez sued S&C on behalf of themselves and a purported class of employees, C.9, amending their complaint in March 2021. C.92. Plaintiffs alleged in their amended complaint that S&C awarded the KPI incentive bonuses for achieving certain "performance and safety metrics." *Id.* ¶ 20. Plaintiffs also alleged that S&C aimed to compensate employees for services performed in awarding certain other bonuses, such as Lopez's "MIS bonus" and Mercado's "success-sharing" and "seniority" bonuses. *Id.* ¶¶ 16, 20. Additionally, Mercado believed that one of her MIS bonuses rewarded her for hours she worked the previous year. *Id.* ¶ 13.

S&C moved to dismiss pursuant to 735 ILCS 5/2-619.1, asserting that the amended complaint failed as a matter of law under 735 ILCS 5/2-615 and raising an affirmative defense under 735 ILCS 5/2-619(a)(9) that Plaintiffs had already been paid all amounts to which they were entitled. C.194-95. In

---

[1] As explained on pages 9-10, those payments did not encompass the overtime wages Mercado would have received had her seniority bonus been included in her regular rate of pay.

support, S&C attached Richard's affidavit to its dismissal motion. C.194; C.211. That affidavit—which Plaintiffs did not contest—affirmed that none of the bonuses S&C paid Plaintiffs were measured by or dependent on hours worked. C.211 ¶ 2.

The circuit court granted S&C's motion to dismiss. C.248. The court first held that the plain language of the Department's IMWL regulations excludes any bonuses not measured by or dependent on hours worked from the regular rate of pay. C.246. Even though Plaintiffs did not contest Richard's affidavit, however, the circuit court found that the affidavit was unsupported. C.247-48. According to the court, an issue of fact remained as to whether the bonuses were indeed awarded independently of employee hours. C.246-47. The court also held, however, that Plaintiffs failed to allege that they ultimately received less than what the IMWL required, and therefore they could not recover damages under the statute. C.247-48.

Affirmance on appeal

The appellate court affirmed. The court agreed that the plain language of 56 Ill. Admin. Code § 210.410(a) excludes bonus payments that are not dependent on the number of hours worked from the "regular rate" of pay used to calculate overtime wages, finding that interpretation consistent with the overall regulatory scheme. A.12. The court also contrasted the language of the IMWL regulations with equivalent language in the FLSA. The court noted that, unlike in the FLSA provisions, the Department chose not to require a

bonus to be a "gift" or in the "nature of a gift" to be excluded from an employee's regular rate. The court therefore refused to read into the IMWL a requirement that a payment be a gift to be excluded from the regular rate calculation. A.13-14. The court, however, disagreed with the circuit court's decision to strike the portion of the Richard affidavit describing how S&C calculated bonuses. Instead, the court held that the stricken portion of the affidavit was properly based on Richard's personal knowledge. A.10-11.

The court continued that dismissal was appropriate because Plaintiffs failed to allege an underpayment under the IMWL because S&C tendered to Plaintiffs an adjustment payment that factored the bonuses into the regular rate. A.17. This was so even though Plaintiffs failed to show that S&C should have included the bonuses in those calculations in the first place. A.16. Because the adjustment payments extinguished any entitlement Plaintiffs may have had to recover statutory penalties or attorney's fees under 820 ILCS 105/12a, dismissal was appropriate. A.17.

Plaintiffs filed a petition for leave to appeal, which this Court granted. The Illinois Attorney General ("the State"), representing the Department, filed an amicus brief in support of Plaintiffs.

The nature of the adjustment payments

S&C wishes to clarify that the "incentive payments" it used to recalculate Mercado's regular rate of pay and overtime rate included her KPI Incentive Bonus, MIS Bonus, and success-sharing bonus, but did not include

her seniority bonus. C.211 ¶¶ 3-4.[2] To the extent the Richard affidavit suggests that the seniority bonus was also included in any recalculation, and in current overtime calculations, that suggestion was incorrect, the result of inadvertent error that came to light in the course of preparing this brief. Mercado alleges that she was underpaid in part because the seniority bonus was not included in the recalculations, A.63-64 ¶¶ 15-17, and S&C does not defend the appellate court's ruling on the grounds that the adjustment payment took into account her seniority bonus. S&C continues to assert, however, that the seniority bonus is not part of Mercado's regular rate of pay and therefore was properly excluded from any calculation of her overtime rate. This factual correction does not affect any of S&C's arguments with regard to Lopez, who never received a seniority bonus.

---

[2] S&C did not include Mercado's seniority bonus in the adjustment payment because it takes the position that "longevity" payments such as the seniority bonus awarded to Mercado qualify as "sums paid as gifts" or "payments in the nature of gifts" even under the more stringent exclusions in § 207(e)(1) of the FLSA. *See* U.S. Dep't of Labor, Wage & Hour Div., FLSA2020-3 Opinion Letter at 2-3 (Mar. 26, 2020); U.S. Dep't of Labor, Wage & Hour Div., FLSA2020-4 Opinion Letter at 3-4 (Mar. 26, 2020); *see also Moreau v. Klevenhagen*, 956 F.2d 516, 520-21 (1992), *aff'd,* 508 U.S. 22 (1993); *Shiferaw v. Sunrise Senior Living Mgmt., Inc.*, No. LACV1302171, 2016 WL 6571270, at *26 (C.D. Cal. Mar. 21, 2016); *White v. Publix Super Mkts., Inc.*, No. 3:14-CV-1189, 2015 WL 4949837, at *4 (M.D. Tenn. Aug. 19, 2015). S&C aligned Plaintiffs' adjustment payments with the FLSA's more exacting requirements.

ARGUMENT

I. Introduction

This case involves a straightforward application of the Department's IMWL regulations, which codify a common-sense distinction between a "regular rate" of pay and a "bonus" payment. S&C paid Plaintiffs, who are "hourly-paid" workers, A.62 ¶¶ 4-6, an agreed-upon hourly rate, which IMWL regulations define as "regular." 56 Ill. Admin Code. § 210.420(b). If Plaintiffs worked more than 40 hours a week, S&C paid them 1.5 times that "regular" rate for any overtime pursuant to the IMWL. In addition to that standard payment, S&C paid Plaintiffs bonus amounts to reward performance. Because those extra, bonus payments were not "measured by or dependent on hours worked," they did not form a part of Plaintiffs' standard, "regular rate" under the IMWL regulations. *Id.* § 210.410(a). This Court should uphold S&C's application of this simple standard. And it should reject Plaintiffs' invitation to impose an illogical, atextual requirement that an employer intend to "gift" a bonus to an employee for the bonus to be excluded from the regular-rate calculation.

That S&C was not required to factor the bonuses into Plaintiffs' regular rate is alone ground to affirm the appellate court. The appellate court's second basis for dismissal offers an independent ground for affirmance. S&C adjusted Plaintiffs' overtime pay to account for most of their quarterly and yearly bonuses. Because S&C did not need to factor the bonuses into Plaintiffs' regular pay, S&C paid them higher wages than they were entitled to under the

IMWL. Plaintiffs therefore had no basis to recover statutory penalties and fees under that law.

Yet another basis for affirmance exists as to Lopez's claims. In adjusting Lopez's overtime pay to account for all of his bonuses, S&C made him whole, extinguishing any claim that he was underpaid. Without a legal basis to file suit, Lopez seeks to recover statutory penalties under the IMWL for an underpayment that did not exist at the time of suit and attorney's fees for counsel that was never involved in securing any adjustment. Lopez had no basis to sue under the IMWL.

II. The Standard Of Review Is De Novo.

The circuit court granted S&C's combined 2-619.1 motion to dismiss Plaintiffs' amended complaint. The 2-615 portion of the combined motion "challenges the legal sufficiency of the plaintiff's claim," and the 2-619 motion component "admits the legal sufficiency of the claim but asserts defenses or defects outside the pleading to defeat the claim." *Cahokia Unit Sch. Dist. No. 187 v. Pritzker*, 2021 IL 126212, ¶ 23. A court construes pleadings in the light most favorable to the non-moving party. *Id.* ¶ 24. When considering a 2-619 motion, however, a trial court may consider pleadings, depositions, and affidavits from both parties. *Zedella v. Gibson,* 165 Ill. 2d 181, 185 (1995). The question on appeal is "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Id.* at 185-86. Under either section, the

standard of review is de novo. *Solaia Tech., LLC v. Specialty Publ'g Co.*, 221 Ill. 2d 558, 579 (2006).

III. Under The Department's Regulations, The Regular Rate Of Pay Excludes Bonus Payments That Are Not Tied To Hours Worked.

Both the circuit and appellate courts correctly rejected Plaintiffs' argument that, to qualify for Section 210.410(a)'s exclusion, a bonus paid to an employee—even though the bonus was determined without reference to hours worked—needs to be a gift, as Plaintiffs define that term.

A. The Plain Language Of The Regulations Excludes Amounts Paid That Are Not Measured By Or Dependent On Hours Worked.

Under its most natural grammatical construction, Section 210.410(a) excludes the bonuses S&C paid Plaintiffs from the definition of "regular rate" because those bonuses were not based on the hours Plaintiffs worked. Plaintiffs were "hourly-paid workers" who earned their regular rate at a set dollar amount per hour. Any extra remuneration, such as bonus payments, that Plaintiffs received regardless of how many hours they worked was not part of their "regular" rate of pay. S&C therefore was not required to consider those bonuses when calculating Plaintiffs' overtime payments.

1. S&C's Interpretation Affords Plain Meaning To The Text And Honors The Grammatical Structure Of The Regulation.

This Court need only apply Section 210.410(a)'s plain language to give effect to the Department's intent. Courts interpret administrative regulations using the same standards used to interpret statutes. *People ex rel. Madigan v.*

Illinois Com. Comm'n, 231 Ill. 2d 370, 380 (2008). Therefore, a court's primary objective in interpreting a regulation is "to ascertain and give effect" to the agency's intent. *Id.* And the best evidence of the drafters' intent is the "language of the regulation itself," which courts give its "plain meaning." *Id.*

Section 210.410(a)'s plain language excludes the bonuses Plaintiffs received from the definition of "regular rate." That provision states: "The 'regular rate' shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not include: (a) 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).

Read naturally, the exclusion applies to "sums" that are either (1) "paid as gifts such as those made at holidays" *or* (2) all "other amounts that are not measured by or dependent on hours worked." That is, when an employer gives an employee a gift or other payment that does not depend on hours worked, that extra payment is not "regular." The bonuses S&C paid Plaintiffs fall squarely within that category. C.211 ¶ 2.

This construction honors the grammatical structure of the exclusion. *See Pielet v. Pielet*, 2012 IL 112064, ¶¶ 37, 39 (finding persuasive federal authority that looked to "normal grammatical construction" to interpret statute's meaning); *see also Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) ("[W]ords are to be given the meaning that proper grammar and usage would assign them."). "Sums paid as gifts" and "other amounts" are two different objects of the verb

"shall not include," which introduces the exclusions. "Other amounts" are therefore one of the types of "remuneration" excluded from the statute's scope. Taken together, the two categories in this provision establish that the Department intended to exclude payments that are not based on hours, whether they are gifts or any other type of payment. In other words, "gifts" are a common example, but not the only example, of payments not measured by hours worked.

Further, the phrase, "other amounts," "must have been included for a reason." *Perez v. Illinois Dep't of Child. & Fam. Servs.*, 384 Ill. App. 3d 770, 774 (4th Dist. 2008); *see also M.A.K. v. Rush-Presbyterian-St.-Luke's Med. Ctr.*, 198 Ill. 2d 249, 257 (2001) (applying the rule against superfluities when interpreting a regulation). If the Department meant to exclude only payments made as gifts from the regular rate, it would not have needed to include the term "other amounts." Rather, "[s]ums paid as gifts . . . that are not measured by or dependent on hours worked" would have done all the work required. 56 Ill. Admin. Code § 210.410(a). The rule against superfluities therefore requires that "other amounts" contemplate payments that do not constitute a gift.

Not only does S&C's construction make sense of the text's structure, but its reading is also grounded in the "plain and ordinary meaning" of the term "regular rate." *See In re Q.P.,* 2015 IL 118569, ¶ 14. "Regular" means "constituted, conducted, scheduled, or done in conformity with established or prescribed usages, rules, or discipline." Regular definition, *Merriam Webster*,

available at https://www.merriam-webster.com/dictionary/regular. And a rate is "a quantity, amount, or degree of something measured per unit of something else." Rate definition, *Merriam Webster*, available at https://www.merriam-webster.com/dictionary/rate. In the employment context, a regular rate is thus ordinarily understood as a quantity of pay that an employee expects through a prescribed wage, measured per hour. *See* 56 Ill. Admin. Code § 210.420 ("The regular rate is a rate per hour."). Whether labeled as a gift or a bonus, an amount that an employer pays an employee independent of hours worked is not part of an hourly employee's expected wages, which are necessarily measured by the hour.

Indeed, the same result would obtain even if Plaintiffs were correct that Section 210.410(a)'s exclusion applies only to "gifts." Even if that were so, the most natural reading would be that the Section defines "sums paid as gifts" to include either (1) payments "made at holidays" *or* (2) any "other amounts that are not measured by or dependent on hours worked." *Id.* § 210.410(a). Either way, a payment not based on hours worked falls within the exception. It cannot be that, to qualify for the exclusion, the excluded "sum" must be both measured independently of hours worked and separately meet Plaintiffs' intent-dependent definition of "gift," which the statute does not provide.

2. Plaintiff's Reading Of The Regulation Is Implausible.

Plaintiffs offer an implausible reading—that to fall outside the "regular rate" of pay, a payment must be a "gift," as limited to a particular dictionary

definition. Included in Plaintiffs' definition is a subset of gifts that are not measured by hours worked. But this interpretation necessarily implies a class of gifts that *are* based on hours worked, which is non-sensical—if something were a gift under Plaintiffs' definition it *could not* be based on hours worked. And if Plaintiffs' reading were the one the Department intended, then it would have written the regulation differently, to exclude "sums paid as gifts, for example; gifts made at holidays or *gifts in other amounts* that are not measured by or dependent on hours worked." Pls.' Op. Brief in App. Ct., 2022 WL 20053313, at *12 (Apr. 10, 2022). Indeed, Plaintiffs have acknowledged that they are asking the courts to adopt precisely this atextual reading, including the italicized phrase that does not appear in the regulation. *See id.* But the Court should not read words into the regulation that are not there. *See People v. Wells*, 2023 IL 127169, ¶ 31 (court "may not add words or fill in perceived omissions" in a statute); *see also Ill. Env't Prot. Agency v. Ill. Pollution Control Bd.*, 2018 IL App (4th) 170144, ¶ 33 (agency not permitted to read words into law that are not there).

Plaintiffs' reading is also non-sensical because it relies entirely on the employer's subjective intent in paying an employee, rather than the objective basis for the payments, to guide the employers' wage calculations. Under Plaintiffs' interpretation of Section 210.410(a), the only question that matters is whether the payment is a gift. According to Plaintiffs, that means an employer would have to ask whether it intended to award the amount

"without" receiving any "compensation" from the employee in return. Op. Br. at 23 n.4 (citing Black's Law Dictionary Definition of "gift"). But Plaintiffs fail to explain how an employer's *intent* to compensate an employee relates to the plain and ordinary meaning of "regular rate," an objective determination of how much an employee received for work performed. By contrast, determining whether a bonus amount was not "measured by hours worked" implies regularity (an employee expects to be paid for hours contributed), and rate (how the quantity is measured).

3. S&C's Understanding Of The Regulation Fits Well Within The Entire Regulatory Scheme.

S&C's interpretations comport with the regulatory scheme as a whole. *See Madigan*, 231 Ill.2d at 380. A regular rate is one that an employee is paid in due course as part of compensation for work performed. For employees paid by the hour, the hourly rate is considered the regular rate. 56 Ill. Admin. Code § 210.430(a). For employees whose pay is determined otherwise, that pay is still converted to an hourly rate, the measurement of which depends on hours worked. *Id.* § 210.430(b)-(d). Any extra payment not dependent on the number of hours worked is not part of the regular rate and therefore is not used to calculate overtime.

That understanding rebuts Plaintiffs' argument that S&C's interpretation conflicts with other parts of the regulations. According to Plaintiffs, the regulations contemplate other methods of payment that are not dependent on hours worked, such as daily, piece-rate, or salaried payment, and

S&C's interpretation would exclude those methods. Op. Br. at 22. That is incorrect. No matter how an employer typically pays an employee, Section 210.420 instructs an employer to divide that base pay by the hours the employee worked or is intended to work to arrive at the regular rate, *i.e.*, an "hourly rate derived from such earnings." *See also* 56 Ill. Admin. Code 210.430(b) (pieceworker regular rate determined by adding all of the pay earned in a week and dividing by hours worked); *id.* § 210.430(c) (employee's day rate "is found by totaling all sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked"); *id.* § 210.430(d) ("If an employee is employed solely on a weekly salary basis, the regular hourly rate of pay is computed by dividing the salary by the number of hours which the salary is intended to compensate."). S&C's interpretation of the regulation to exclude all bonuses that are not dependent on hours is thus consistent with the methods of regular rate calculation contemplated in Section 210.430.

That does not mean that Section 210.430 requires employers to convert *all* employee payments into an hourly rate. Plaintiffs argue that any bonuses that S&C paid on an incentive or piece-rate basis would fall into the category of regular pay because Section 210.430 tells an employer to convert them to an hourly rate. Op. Br. at 22. But Section 210.430(b) guides overtime rate calculation "[w]hen [the] employee is *employed* on a piece-rate basis." (Emphasis added.) It does not state that any piece-rate amount that an

employer pays in addition to the regular basis of payment must be converted into an hourly rate to calculate overtime. In any event, Plaintiffs do not allege that S&C employed them on a piece-rate or incentive basis. In fact, they allege that they are "hourly-paid" workers. A.62 ¶¶ 4-6. Excluding incentive bonuses from the "regular rate" is entirely consistent with Section 210.430 and the regulatory scheme.

Nor does S&C's interpretation render Section 210.410(b) superfluous, as Plaintiffs contend (at 23). That section excludes from the definition of "regular rate" "[p]ayments made for occasional periods when no work is performed due to a vacation, holiday, illness, failure of employer to provide sufficient work, or other similar cause[.]" 56 Ill. Admin. Code § 210.410(b). Plaintiffs argue that payments made when no work is performed are also measured without regard to hours worked and therefore would fall within S&C's reading of the Section 210.410(a) exclusion as well. Op. Br. at 23. But Plaintiffs' interpretation has the same redundancy problem they attribute to S&C's construction. A "gift" made in an amount not dependent on hours worked—by Plaintiffs' definition, any payment made without "compensation" to the employer, *id.* at 23 n.4—also includes a payment made when no work is performed. A more natural reading of Section 210.410(b) is that it simply specifies another type of payment excluded from the definition of regular rate: pay when an employer works zero hours. That category of payment is logically

distinct from the one described in section (a): payments made to a working employee regardless of how *many* hours the employee works.

* * *

S&C followed the plain text of Section 210.410(a) when it excluded bonuses measured independently from hours worked from Plaintiffs' regular rate of pay. S&C's interpretation follows the text's structure, which treats "other" payment amounts separately from gifts, and is consistent with an ordinary understanding of "regular rate." Excluding bonuses calculated without regard to hours worked also aligns with the Department's regulatory scheme because all employees' regular means of pay are converted by regulation to a per-hour rate. No matter whether they are employed on a piece-rate, daily, or commissioned basis—employees' regular pay is based on hours worked. Any other payment is extra, a bonus.

B. FLSA And Its Regulations Support S&C's Interpretation.

Illinois regulations direct the Department to look to FLSA regulations for interpretative guidance. 56 Ill. Admin. Code § 210.120. Here, the differences between the FLSA and the regulations implementing the IMWL highlight the Department's choice to exclude bonuses untethered from hours worked from the regular-rate calculation.

In 1995, the Department promulgated regulations implementing the IMWL against the backdrop of the FLSA "gift exclusion," which had been in effect since 1949. *See* Fair Labor Standards Act, Public Law 81-393, ch. 736, 63 Stat. 910 (1949) (codified at 29 U.S.C. § 207(e)(1)); 19 Ill. Reg. 6385, 6576,

6586-87 (May 12, 1995). And then, as now, the FLSA excluded "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency." Fair Labor Standards Act, Public Law 81-393, ch. 736, 63 Stat. 910 (1949) (codified at 29 U.S.C. § 207(e)(1)). The FLSA thus takes care to make clear that the amounts defined modify both "sums paid as gifts" and "payments in the nature of gifts." The Department easily could have written the IMWL regulations the same way, excluding "sums paid as gifts or *in the nature of gifts* such as those made at holidays, *the amounts of which* are not measured by or dependent on hours worked." As the appellate court acknowledged, even with the FLSA as a model, the Department chose not to follow its lead in this respect. A.12-13.

Parallel FLSA regulations, also in effect when Illinois promulgated the IMWL regulations, highlight other language the Department elected to omit. *See* 33 Fed. Reg. 986, 996 (Jan. 26, 1968). FLSA regulations specify that (1) a payment must be "actually a gift or in the nature of a gift" to be excluded from regular-rate calculation, and (2) any payment "measured by or dependent on hours worked, production or efficiency" is not considered to be in the "nature of a gift" and therefore fails to qualify for the exclusion. 29 C.F.R. § 778.212(a) & (b).

The Illinois regulations, by contrast, do not emphasize the payment's purpose; nothing requires payment to "actually" be made in the "nature of a

gift" to be excluded. Nor do the Illinois regulations exclude payments made on the basis of "production or efficiency." From that choice, it follows that the Department intended to exclude any payments—regardless of an employer's intent or an employee's production or efficiency—made independently of hours worked.

The State as amicus urges this Court to ignore these differences, citing courts that looked to the FLSA for guidance in interpreting the IMWL. State Br. at 21. But courts do so only when the language they seek to interpret in the IMWL aligns with the corresponding language in the FLSA. For example, in *Kerbes v. Raceway Assocs., LLC*, 2011 IL App (1st) 110318, ¶ 25, the Court considered FLSA regulations for guidance in interpreting IMWL regulations where the two "mirror[ed]" each other. *Id.* ¶ 26. And in *Tomeo v. W&E Communications, Inc.*, No. 14 C 2431, 2016 WL 8711483, at *8 (N.D. Ill. Sept. 30, 2016), the parties "agree[d] that analysis under the two statutes is identical." That is not the case here, where the Department chose to *omit* material language from the FLSA and its regulations in promulgating its own. *Cf. Chi. Tchrs. Union, Loc. No. 1 v. Bd. of Educ. of City of Chi.*, 2012 IL 112566, ¶ 24 (noting that courts presume that drafter "acted intentionally and purposely in the inclusion or exclusion" of particular language).

Notwithstanding the obvious differences between the relevant parts of the IMWL and the FLSA, the State cites cases interpreting the FLSA to argue that any incentive payments must be included in the regular rate. State Br. at

20-22. Not only do those cases involve a different statute with materially different language and different regulations, but they also turn on different facts.

For example, *Tomeo* held that an employer could not use a nominal hourly rate to shortchange workers who were functionally employed on a piece-rate basis. 2016 WL 8711483, at *8. The employees in that case were paid hourly and received overtime based solely on that hourly rate. *Id.* But they also received a weekly "bonus" based on the difference between their base pay and a set amount designated for completing a certain number of tasks, and in reality almost every employee hit the bonus target, rendering the real base pay significantly higher than the nominal hourly rate. *Id.* at *9, *11. The court relied on federal regulations to hold that this system ran afoul of the FLSA. *Id.* at *10 (citing 29 C.F.R. § 778.502); *id.* at *11 ("Where . . . the piecework-based [payment] option routinely dwarfs the employee's supposed hourly pay, the court must treat the system like a piecework scheme to ensure faithful compliance with the FLSA.").

The State reads too much into *Tomeo* and overstates Plaintiffs' allegations when it argues that S&C's bonus system improperly "carv[es] up" the employee's compensation. State Br. at 20. Neither *Tomeo*, nor the U.S. Supreme Court decisions it cites, hold that every employer who does not factor incentive bonuses into a regular rate circumvents even the FLSA (with its different framework). *See Walling v. Harnischfeger*, 325 U.S. 427, 432 (1945)

("When employees do earn more than the basic hourly rates because of the operation of the incentive bonus plan the basic rates lose their significance in determining the actual rate of compensation."); *Walling v. Youngerman-Reynolds Harwood Co.*, 325 U.S. 419, 425-26 (1945). As explained above (at 18-19), the fact that employees are sometimes paid "piece-rate" or "incentive" earnings does not mean they are *regularly* paid those earnings. And nothing in Plaintiffs' allegations suggests that they regularly received incentive payments or that those payments overshadowed their hourly pay. To the contrary, Plaintiffs allege that they were "hourly-paid" workers, and the amounts they received in bonuses were small by comparison. A.62 ¶¶ 4-6; A.63-64 ¶¶ 12, 15, 18, 19.

In short, if the Department looked to the FLSA for guidance when promulgating its IMWL regulations, then it chose not to borrow the FLSA's gift-exclusion language in adopting its own list of regular-rate exclusions. Cases interpreting the FLSA are thus distinguishable because they interpret a statute with materially different language, and in any event, involve payment schemes that Plaintiffs do not allege. That the FLSA's gift exclusion provision differs from the IMWL's thus supports S&C's interpretation.

C. The Court Need Not Resort To Canons Of Statutory Construction, And Those Canons Would Support S&C's Reading In Any Event.

"Where the language of a statute is plain and unambiguous, a court need not consider other interpretive aids." *Ultsch v. Illinois Mun. Ret. Fund*, 226 Ill.2d 169, 184 (2007). That rule applies equally to regulations. *Madigan*, 231

Ill.2d at 380. And Section 210.410(a)'s language is plain: a sum paid that is not dependent on hours worked is not part of an employee's regular rate.

If the Court finds that language ambiguous, however, then Plaintiffs' cited statutory canons—*ejudsem generis* and *noscitur a sociis*—only support S&C's interpretation. Op. Br. at 26. Pursuant to the *ejusdem generis* canon, when a clause "specifically describes several classes of persons or things and then includes 'other persons or things,' the word 'other' is interpreted to mean 'other such like.'" *Pooh-Bah Enters., Inc. v. Cook County*, 232 Ill. 2d 463, 492 (2009). *Noscitur a sociis*, a related canon, dictates that "neighboring words" in statutory or regulatory text give an unknown word more precise content. *Corbett v. County of Lake*, 2017 IL 121536, ¶ 31. The canons recognize that a legal drafter sometimes illustrates a rule by example to avoid listing out every contingency. *See Pooh-Bah*, 232 Ill. 2d at 492. The canons do not, as Plaintiffs would have it, somehow replace the words "or other" with "and such as." That misapplication of the canons would transform "other amounts that are not measured by or dependent on hours worked" from an alternative into an example of the word "gift." *See* Op. Br. at 27.

When construing the regular-rate-exclusion provisions as a whole, rather than in isolation, *see Madigan*, 231 Ill. 2d at 382, the canons support S&C's interpretation. In addition to "[s]ums paid as gifts [and] other amounts that are not measured by or dependent on hours worked," the regulations exclude (1) payments made for occasional periods when no work is performed;

(2) payments made in recognition of services performed, such as discretionary payments, payments made pursuant to a thrift or savings plan, or payments made in recognition of a special talent; (3) benefit contributions; and (4) extra compensation for overtime work paid at a premium rate. 56 Ill. Admin. Code § 210.410(b)-(g). All those exclusions are payments outside the scope of an employee's standard expected wage, not determined by hours worked, or both. In other words, the exclusions illustrate a rule that aligns with the ordinary meaning of the term "regular rate." *See supra* pp. 14-15.

Plaintiffs cite *In re Estate of Crawford*, 2019 IL App (1st) 182703, ¶¶ 32-34, which applied *ejusdem generis* and *noscitur a sociis* to argue that "other amounts that are not measured by or dependent on hours worked" must satisfy a separate, dictionary definition of the word "gift[]" to qualify for the Section 210.410(a) exemption. But *Crawford* actually said the opposite. There, claimants to a probate estate attempted to introduce evidence that the decedent loaned them money. *Id.* ¶ 9. They relied on an exception to the Dead Man's Act permitting the introduction of "a book account or any other record or document" as evidence in probate. *Id.* ¶ 28. Before applying the canons, the *Crawford* court acknowledged that "any other record . . . must mean something *other* than a 'book account.'" *Id.* ¶ 34 (citation omitted and emphasis added). *Crawford* therefore rejected the idea that a general term introduced by the word "other" is simply an illustration of a preceding, narrower term.

Moreover, *Crawford*'s application of the *ejusdem generis* and *noscitur a sociis* canons is entirely consistent with S&C's interpretation of Section 210.410(a). Looking to the common-law backdrop when the exception to the Dead Man's Act was passed, the court concluded that the "other record" must be similar to a "book account" in a manner consistent with the statute's purpose of admitting only trustworthy evidence in probate. *Id.* ¶¶ 34-35. An "other record" thus had to be one contemporaneously recorded for a business purpose. *Id.* Here, "other amounts that are not measured by or dependent on hours worked" must reasonably distinguish between standard and extra pay in the same manner as the other exclusions. 56 Ill. Admin. Code § 210.410(a). As just discussed, all of the exclusions describe payments that employees do not earn as part of a consistent, hourly wage. Thus, "amounts not measured by or dependent on hours worked" provides another example of a supplemental payment that the regulations do not consider "regular." Plaintiffs cannot subvert the canons to create a "subjective and arbitrary" rule about gifts that has "nothing to do with" the statute's purpose. *Corbett*, 2017 IL 121536, ¶ 29.

At bottom, this Court need not look to canons of interpretation because Section 210.410(a) is clear. But in any event, if the Court were to apply those canons, they would illustrate that "sums paid as gifts" and "other amounts that are not measured by or dependent on hours worked" are examples of payments that align with the common meaning of "regular rate." Accordingly, Plaintiffs' cited canons only support S&C's interpretation.

D. Plaintiffs Fail To Plausibly Allege That S&C Paid Them Any Bonus Amounts Based On Hours Worked.

S&C submitted an affidavit from Aurelie Richard, S&C's Chief Human Development and Strategy Officer, which Plaintiffs did not contest, attesting that S&C awarded Plaintiffs bonuses in amounts that did not consider the hours they worked. C.211 ¶ 2. As the appellate court recognized, courts must accept as true facts contained in an uncontested affidavit when ruling on a 2-619 motion to dismiss. A.10-11; *see also Zedella*, 165 Ill. 2d at 185 ("When supporting affidavits have not been challenged or contradicted by counter-affidavits or other appropriate means, the facts stated therein are deemed admitted."). To support its motion, S&C properly submitted the affidavit to dispose of "easily proved issues of fact" unsupported by the complaint's vague allegations. *Id.* The appellate court correctly determined that Richard's personal knowledge as a senior officer at S&C corroborated the facts stated in the affidavit. A.10-11. Such "personal knowledge" is enough to support those facts. Ill. Sup. Ct. Rule 191(a); *see also Doria v. Vill. of Downers Grove*, 397 Ill. App. 3d 752, 756 (2d Dist. 2009). And the uncontested affidavit conclusively establishes that the bonuses fall within the Section 210.410(a) exclusion. C.211 ¶ 2.

Plaintiffs assert that the circuit court's ruling striking part of the affidavit is not before this Court. Op. Br. at 22 n.3. But this Court may uphold the circuit court's judgment on "any grounds which are called for by the record regardless of whether the circuit court relied on the grounds and regardless of

whether the circuit court's reasoning was correct." *Ultsch*, 226 Ill. 2d at 192. Contrary to an aside in the appellate court's opinion, moreover, A.10 n.1, S&C's challenge to the trial court's decision striking part of the affidavit was properly before that court as a ground upon which to affirm the judgment. And the court went on to address the issue and reject the trial court's ruling. A.10-11.

S&C submitted uncontroverted evidence that it did not consider the hours Plaintiffs worked when it paid bonuses. Because Section 210.410(a) therefore excludes these bonuses from the calculation of "regular pay," the appellate court's judgment should be affirmed.

IV. Plaintiffs Did Not Plausibly Allege An Underpayment.

Plaintiffs' failure to plausibly allege an underpayment separately warrants dismissal of this case.

A. Plaintiffs Were Not Underpaid Because S&C Was Not Required To Consider The Incentive Bonuses In Calculating The Regular Rate Of Pay.

Section 12(a) of the IMWL provides that an employee may recover underpayments, costs, attorney's fees, and statutory penalties in a "civil action" if the employee "is paid by his or her employer less than the wage to which he or she is entitled under the provisions of this Act." 820 ILCS 105/12(a). Plaintiffs were not entitled to any overtime adjustment payments based on the bonuses because, as discussed in Part III, the bonuses were not part of Plaintiffs' regular rate, but S&C paid them anyway. Having been paid more than "the wage[s] to which [they were] entitled," *id.*, Plaintiffs cannot

plausibly allege an underpayment and have no basis to recover penalties or attorney's fees.

B. S&C's Adjustment Payment To Lopez Extinguished His Statutory Basis To Sue.

Even assuming 820 ILCS 105/4a required S&C to factor the bonuses into Plaintiffs' regular rate, Lopez could not sue S&C.[3] Before Lopez filed suit, S&C's full tender of his claimed underpayment eliminated any statutory basis to recover fees and penalties. On this ground, too, Lopez's claim fails.

"[T]o sue for legislatively created relief," including civil penalties and fees, a plaintiff must "fulfill[] statutory conditions" before suit. *People v. Johnson*, 2021 IL 125738, ¶ 31. Section 105/12a conditions a civil action—and the potential to recover penalties, costs, and attorney's fees—on the existence of an underpayment. 820 ILCS 105/12(a). The structure of Section 105/12a establishes conditions for the recovery of penalties and fees: "[*i*]*f* an employee is paid by his or her employer less than the wage to which he or she is entitled

---

[3] As discussed on pages 8-9, S&C did not factor in Mercado's seniority bonus when it recalculated her regular rate of pay, because even federal law—which the State urges this Court to adopt as the model for Section 210.410(a), State Br. at 21—does not include seniority bonuses in an hourly employee's regular rate of pay. *See supra* p. 9, n.2. But because the parties did not litigate the propriety of excluding Mercado's seniority bonus, alone, from her regular rate of pay, S&C does not advance that argument in the first instance in this Court. Should the Court rule for Plaintiffs on the proper interpretation of Section 210.410(a), however, S&C reserves the argument that Mercado's seniority bonus does not fall even within Plaintiffs' reading of that section, and that Mercado—like Lopez—therefore also received a complete retroactive payment in 2023. Accordingly, S&C reserves the argument that Mercado, like Lopez, is ineligible to advance her IMWL claim for the reasons set out in this Section.

under the provisions of this Act," then an employee may recover "in a civil action" treble the amount of "such underpayments," costs and reasonable attorney's fees, and "damages of 5% of the amount of any such underpayments for each month following the date of payment during which such underpayments remain unpaid." (Emphasis added.) Thus, a *present* underpayment is the threshold requirement for a civil action, which in turn is a prerequisite for liquidated damages, costs, and attorney's fees.

Following Section 105/12a's plain language, the statutory condition to sue—that is, an underpayment—must exist at the time of suit for a plaintiff to recover any penalties or fees. The verb tense of statutory language has guided this Court in determining when a party must meet certain statutory conditions. *See Illinois Landowners All., NFP v. Illinois Com. Comm'n*, 2017 IL 121302, ¶ 40; *Goodman v. Ward*, 241 Ill. 2d 398, 408-09 (2011). For example, in *Goodman*, this Court looked to the Illinois Election Code's requirement that a judicial candidate submit a sworn statement that he or she "is qualified for the office specified" when submitting a nomination petition. 241 Ill. 2d. at 408. Noting that "is" denotes the "present tense, indicative mood," this Court concluded that the candidate must satisfy residency requirements at the time the candidate submits the petition to be eligible for nomination. *Id.*

The Illinois legislature similarly wrote Section 105/12a in the "present tense, indicative mood," focusing on the employee's extant state when suit is filed, rather than an employer's actions before suit is filed. *Id.* Only an

employee who "*is* paid . . . less than the wage to which he or she *is* entitled" may "recover in a civil action" under Section 105/12a. (Emphasis added.) The statute does not envision recovery for an employee who "was" underpaid but then received full payment before filing suit. Moreover, Section 105/12a allows an employee to recover monthly interest on any underpayments that "remain" unpaid following a deficient paycheck. Any underpayments that an employer tendered to an employee prior to suit would no longer "remain" unpaid. Section 105/12a does not allow an employee to recover interest on underpayments that "remained" unpaid only until an employer recalculated the employee's wage.

Disregarding the timing of Plaintiffs' lawsuit, Plaintiffs and the State incorrectly argue that payment did not "moot" Lopez's claim and extensively discuss when Plaintiffs' claims accrued. Op. Br. at 12-14; State Br. at 5-12. Those arguments are distractions. Mootness refers to the dissipation of injury once a lawsuit is filed. *See People v. Coe,* 2018 IL App (4th) 170359, ¶ 49. And to be sure, once a "civil action" begins, paying employees backpay would not moot the case because the fees and penalties associated with that action have become recoverable. 820 ILCS 105/12a. Courts have therefore held that defendants must pay statutory penalties and attorney's fees in addition to compensation to moot lawsuits. Those cases, however, involve offers made after a suit is filed. *See Berger v. Perry's Steakhouse of Illinois, LLC*, 430 F. Supp. 3d 397, 406 (N.D. Ill. 2019) (defendants argued that offer "preclude[s] Plaintiffs from *continuing to sue* on amounts not in dispute (emphasis added)"); *Joiner v.*

SVM Mgmt., LLC KKC, 2020 IL 124671, ¶ 52 (discussing sufficient tender once suit has commenced).

Similarly, the accrual date of an injury is of no moment if the basis for recovery no longer exists when suit is filed. Lopez may have had a claim under Section 105/12a at some point, but by the time he filed suit, he was not paid "less than the wage to which he . . . [wa]s entitled." 820 ILCS 105/12a. The absence of an underpayment ends the inquiry. With no statutory basis for recovering damages for payment, Lopez cannot argue that he is entitled to recovery under the IMWL. His claims therefore separately merit dismissal on this alternative ground.

Common sense again supports S&C's interpretation. The IMWL's penalties and fees provisions aim to punish delinquent employers who drive plaintiffs to sue for recovery. If grounds for suit no longer exist at the time of the lawsuit, grounds to punish a non-compliant employer also have ceased to exist.

Courts have recognized this basic principle in other contexts. For example, an ERISA provision allows plan fiduciaries to recover liquidated damages in the amount of a portion of an employer's "unpaid contributions" to a multiemployer plan, *see* 29 U.S.C. §§ 1132(g)(2)(A), (C)(ii), and courts have recognized that this means that the contributions must remain "unpaid" when suit is filed. *See Operating Eng'rs Loc. 139 Health Benefit Fund v. Gustafson Constr. Corp.*, 258 F.3d 645, 654 (7th Cir. 2001) (collecting cases); *Carpenters*

& Joiners Welfare Fund v. Gittleman Corp., 857 F.2d 476, 478 (8th Cir. 1988) (noting that correct interpretation of "plain language" in provision governing "unpaid contributions" means that contributions must be unpaid when suit is filed). In the seminal case in this line, the court looked to the plain language of Section 1132(g)(2)(C)(ii), which allows a plan fiduciary to recover as liquidated damages up to 20 percent of "the amount determined by the court under subparagraph (A)." *Bennett v. Machined Metals Co.*, 591 F. Supp. 600, 603 (E.D. Pa. 1984). And because subparagraph (A) refers to "*unpaid* contributions," the court held that liquidated damages were available only when contributions remained unpaid at the time of suit. *Id.* at 603-04 (emphasis added). The court explained that liquidated damages should be assessed only if the plaintiffs are "forced to file suit before the employer forwards payment." *Id.* at 606.

Here, the liquidated damages provision in Section 105/12(a) refers to "treble the amount of any such underpayments." Like the liquidated damages provision in 29 U.S.C. § 1132(g)(2)(C)(ii), which refers back to Section 1132(g)(2)(A), "such underpayments" similarly recall a condition that must exist at the time of suit: an employee being "paid by his or her employer less than the wage to which he or she is entitled." 820 ILCS 105/12(a). And because Lopez was not "forced to file suit" before S&C forwarded payment, he is not entitled to statutory fees and penalties. *Bennett,* 591 F. Supp. at 606.

Like his claims for liquidated damages, Lopez's attorney's fees are untethered to any underpayment and thus not recoverable. Plaintiffs do not allege that Lopez hired attorneys to negotiate any additional compensation; on the contrary, Plaintiffs suggest that S&C paid Lopez of its own accord. A.64 ¶ 18; A.65 ¶ 22.

For their position that S&C was required to pay attorney's fees to fully compensate them, Plaintiffs cite *Bates v. William Chevrolet/Geo, Inc.*, 337 Ill. App. 3d 151 (1st Dist. 2003). But that case stands only for the proposition that a defendant must pay reasonable fees for attorney work actually performed to secure payment. In *Bates*, a dealership failed to tender the "full amount" it owed a customer under the Consumer Fraud Act because it did not pay attorney's fees "incurred in pursuit of her claim" for a fraudulent down payment. *Id.* at 159, 162; *see also Huss v. Sessler Ford, Inc.*, 343 Ill. App. 3d 835, 839 (1st Dist. 2003) (upholding trial court's dismissal of case where defendants offered to pay reasonable attorney's fees incurred by plaintiff in negotiating pre-suit tender). Lopez sustained no attorney costs in obtaining the adjustment payment from S&C.

Absent a present underpayment or any attorney work to support a claim for fees, Lopez cannot recover the fees and penalties the IMWL renders recoverable. Thus, even if S&C's bonus payments entitled Lopez to additional overtime payments, S&C's adjustment payment dissipated any statutory basis Lopez had for filing suit.

C. Rejecting Plaintiffs' Demand For Penalties And Fees Advances The IMWL's Goals.

Lacking a statutory basis for recovery, Plaintiffs resort to exaggerating a negative policy impact of the appellate court's holding. Far from upending the IMWL's objectives, however, S&C's interpretation of Section 105/12a furthers its purpose of deterring employers from withholding employee wages by incentivizing proactive payment. S&C's reading encourages employers to correct wage payment mistakes before a plaintiff files suit or risk harsh penalties and attorney's fees. It also incentivizes employers to ensure that they accurately calculate and pay employee wages of their own accord. By contrast, if an employer knows that it must pay employees treble damages and fees simply to adjust a past wage payment, it has every incentive to risk litigation rather than pay promptly. Conditioning statutory penalties and fees on a civil action to recover an underpayment, the Illinois legislature reasonably chose to encourage employers to pay their employees or correct mistakes before litigation.

In arguing that S&C's position will "gut" the IMWL's penalty provisions or render them a "dead letter," Plaintiff and the State overstate and mischaracterize S&C's position. Op. Br. at 17; State Br. at 11. The State claims that under S&C's interpretation, an employer will never have to pay statutory damages as long as it pays an employee backpay, "even years later." State Br. at 11. Similarly, Plaintiffs argue that S&C claims to be able to compensate employees "until final judgment" to eliminate a claim. Op. Br. at 17. But S&C

argues only that a plaintiff like Lopez is not entitled to statutory penalties and fees if he does not have to resort to litigation to vindicate his claims. Accordingly, Plaintiffs' claims that S&C's interpretation of the statute eviscerates the IMWL lack merit, both broadly and as applied to this case.

V. This Court Owes No Deference To The Department's Statutory Or Regulatory Interpretations.

"No amount of agency expertise . . . can change the meaning of an unambiguous regulation or statute." *Save Our Illinois Land v. Illinois Com. Comm'n*, 2022 IL App (4th) 210008, ¶ 43, *aff'd,* 2023 IL App (4th) 221038. There is nothing ambiguous about 820 ILCS 105/12a or 56 Ill. Admin Code. § 210.410(a). Therefore, the Court need not consult agency expertise to interpret the plain meaning of these texts.

But even if Section 105/12a of the IMWL were ambiguous, an agency's statutory interpretation deserves no deference if it is "erroneous, unreasonable, or conflicts with the statute." *Medponics Illinois, LLC v. Dep't of Agric.*, 2021 IL 125443, ¶ 31; *see also Landmarks Illinois v. Rock Island Cnty. Bd.*, 2020 IL App (3d) 190159, ¶ 60 (agency's statutory interpretation position in amicus brief is not entitled to deference if it "conflicts with the statute"). The State's interpretation of the statute is erroneous because it fails to consider the requirement that an underpayment exist at the time of suit to recover statutory fees and penalties.

The same principles apply to regulations. *Madigan,* 231 Ill. 2d at 380. A court will not afford deference to an interpretation that is "plainly erroneous"

or "contrary to the clear language" of the regulatory provision. *Walker v. Dart*, 2015 IL App (1st) 140087, ¶ 51. Whether or not a regulation is ambiguous, this Court need not defer to an agency's erroneous interpretation "simply . . . because of the agency's identity as the agency." *Save Our Illinois Land*, 2022 IL App (4th) 210008, ¶ 43. The plain language of Section 210.410(a) excludes amounts paid independently from hours worked from inclusion in an employee's regular rate. The State's contrary interpretation ignores the plain text of the regulations, renders key terms superfluous, and cannot be squared with the ordinary meaning of "regular rate."

The State's interpretation is especially undeserving of deference because it skirts established mechanisms for implementing administrative rules. If the Department believes that courts are misinterpreting its regulation, or now seeks to implement a new policy, it can amend the language. But the Department may not circumvent proper administrative procedures by effectively issuing or amending regulations through its litigation positions. *Perez*, 384 Ill. App. 3d at 775 (noting that the "the appropriate resolution" to correct a regulatory error is to "amend the regulation," not to compensate "with a strained and unreasonable interpretation"). *Cf. Boaden v. Dep't of L. Enf't*, 171 Ill. 2d 230, 239 (1996) ("[O]ur deference to administrative expertise will not serve to license a governmental agency to expand the operation of a statute."); *N. Tr. Co. v. Bernardi*, 115 Ill. 2d 354, 365 (1987) ("If the act is inadequate the remedy lies with the legislature.").

Plaintiffs contend that an agency's position in an amicus brief is entitled to deference, citing *Landmarks*, 2020 IL App (3d) 190159, ¶ 60. But that decision goes on to specify that a state's position does not warrant deference if there is "reason to believe" that interpretation fails to reflect the agency's "considered judgment." *Id*. And this rule *does not* permit an agency to use its "judgment" to avoid the plain language of the regulation it promulgated. *See Walker*, 2015 IL App (1st) 140087, ¶ 51. Nor does the State's amicus brief here explain how the Department "considered" anything apart from Plaintiffs' legal arguments in interpreting the text of the IMWL or its regulations. Instead, the brief merely parrots Plaintiffs' litigation position, without suggesting that the Department has considered the interests of all of the stakeholders that it regulates.

In reaching its conclusion in *Landmarks*, moreover, the Court noted that the agency's position in its amicus brief was "consistent with . . . past practice." 2020 IL App (3d) 190159, ¶ 60. No similar consistency exists here. The State attempts to align Plaintiffs' position with the Department's past practices, but a close read of its amicus brief reveals no clear precedent for its position. According to the State, the Department has always sought statutory damages when enforcing the IMWL against employers, claiming that it consistently seeks back pay and damages on behalf of Illinois workers. State Br. at 29-30. But the Department fails to cite a single case where it sought statutory damages and attorney's fees for violations of the IMWL without also seeking

still-due backpay. Nor does it cite any cases where it sought to recover from an employer for purportedly failing to incorporate incentive bonuses into the calculation of an employee's overtime payments. The State therefore cannot argue that its position is consistent with any longstanding practice.

Indeed, to impose steep penalties on employers who either (1) reasonably excluded extra, bonus payments measured independently of hours worked from the calculation of an employee's "regular" wages or (2) adjusted workers' backpay to seek regulatory compliance before suit, would be unprecedented. Adopting the State's position would result in "unfair surprise" that proper administrative proceedings seek to prevent. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012).

In sum, the State's interpretation flouts proper rulemaking procedures and runs contrary to the plain text of the IMWL and its implementing regulations. The appellate court therefore properly chose not to defer to the State's position.

CONCLUSION

For these reasons, this Court should affirm the judgment of the appellate court.

Dated: February 28, 2024

Respectfully submitted,

/s/ Michael A. Scodro

MICHAEL A. SCODRO
CHARLES E. HARRIS, II
BRETT E. LEGNER
ANASTASIYA LOBACHEVA
MAYER BROWN LLP
71 South Wacker Dr.
Chicago, IL 60606
(312) 782-0600 (telephone)
(312) 706-9364 (facsimile)
mscodro@mayerbrown.com
charris@mayerbrown.com
blegner@mayerbrown.com
alobacheva@mayerbrown.com

John T. Roache
AKERMAN LLP
71 South Wacker Drive, 46th Floor
Chicago, IL 60606
john.roache@akerman.com

Counsel for Defendant-Appellee S&C Electric Company

E-FILED
2/28/2024 7:47 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

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 or words contained in the Rule 341(d)cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and those matters appended to the brief under Rule 342(a) is 41 pages.

s/Michael Scodro
Michael A. Scodro
Mayer Brown LLP

No. 129526

IN THE SUPREME COURT OF ILLINOIS

CARMEN MERCADO and JORGE LOPEZ, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. S&C ELECTRIC COMPANY, Defendant-Appellee.	On Appeal From The Appellate Court of Illinois, First Judicial District, No. 22-0020 There heard on Appeal from the Circuit Court of Cook County, Illinois, Chancery Division, General Chancery Section, No. 2020 CH 7349 The Honorable Allen P. Walker, Judge Presiding

TO:

Christopher J. Wilmes
Margaret E. Truesdale
Hughes Socol Piers Resnick & Dym, Ltd.
70 W. Madison Street, Suite 4000
Chicago, IL 60602
cwilmes@hsplegal.com
mtruesdale@hsplegal.com

Alex Hemmer
Deputy Solicitor General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
Alex.Hemmer@ilag.gov

NOTICE OF FILING OF BRIEF OF DEFENDANT-APPELLEE S&C ELECTRIC COMPANY

PLEASE TAKE NOTICE that on February 28, 2024, the undersigned electronically filed the Brief of Defendant-Appellee S&C Electric Company in the above-captioned case with the Clerk of the Supreme Court of Illinois using Odyssey eFileIL. A copy is hereby served upon you.

Dated: February 28, 2024

Respectfully submitted,

/s/ *Michael Scodro*

John T. Roache
Akerman LLP
71 South Wacker Drive, 46th Floor
Chicago, IL 60606
john.roache@akerman.com

MICHAEL A. SCODRO
CHARLES HARRIS, II
BRETT E. LEGNER
ANASTASIYA LOBACHEVA
MAYER BROWN LLP
71 South Wacker Dr.
Chicago, IL 60606
(312) 782-0600 (telephone)
(312) 706-9364 (facsimile)
mscodro@mayerbrown.com
charris@mayerbrown.com
blegner@mayerbrown.com
alobacheva@mayerbrown.com

Counsel for Defendant-Appellee S&C Electric Company

CERTIFICATE OF SERVICE

I, Michael Scodro, an attorney, hereby certify that on February 28, 2024, I caused a Notice of Filing and the Brief of Defendant-Appellee S&C Electric Company to be electronically filed with the Clerk of the Supreme Court of Illinois by using the Odyssey eFileIL system. I further certify that I will cause one copy of the above-named filings to be served upon counsel listed below via electronic mail on February 28, 2024.

Christopher J. Wilmes
Margaret E. Truesdale
Hughes Socol Piers Resnick & Dym, Ltd.
70 W. Madison Street, Suite 4000
Chicago, IL 60602
cwilmes@hsplegal.com
mtruesdale@hsplegal.com

Alex Hemmer
Deputy Solicitor General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
Alex.Hemmer@ilag.gov

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

s/Michael Scodro
Michael A. Scodro
71 South Wacker Drive
Chicago, IL 60606-4637
+1 312 701 8886
mscodro@mayerbrown.com

Counsel for Defendant-Appellee S&C Electric Company