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 Petition for Leave to Appeal from the Appellate Court of Illinois
First District, No. 22-0020
There Appealed from the Circuit Court of Cook County, Illinois
Chancery Division, General Chancery Section, No. 2020 CH 7349
The Honorable Allen P. Walker, Judge Presiding

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E-FILED
4/25/2024 1:02 PM
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ORAL ARGUMENT REQUESTED

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INTRODUCTION

Defendant's position—that employers can evade Illinois Minimum Wage Law ("IMWL") penalties and fees by paying mere single damages any time before employees file suit—is absurd and unsupported by the statutory language. When it passed the IMWL, the Illinois General Assembly carefully crafted a scheme of penalties to incentivize employers to pay employees in full and on time. And yet Defendant contends that its "adjustment payments," which were in some cases *years late*, erased any liability it had under the IMWL because it happened to make those tardy payments before Plaintiffs hired a lawyer and filed this lawsuit. Under Defendant's novel interpretation, an unscrupulous employer could refuse to pay employees overtime or pay them a sub-minimum wage for years, without penalty, so long as the employer eventually paid the required amount before getting sued. Allowing this escape-hatch for employers who violate the IMWL not only defies all logic, it also finds no support whatsoever in the statutory text. Defendant advances a multitude of imaginative arguments, but none justifies this get-out-of-jail-free card, and none defeats the Illinois Department of Labor's ("IDOL") reasoned interpretation of the IMWL, which forecloses Defendant's position.

Moreover, despite Defendant's best efforts, it cannot reconcile its reading of the gift exclusion, § 210.410(a), with the regulatory text or framework. Nothing therein warrants excluding from the regular rate all pay not based on hours worked. Yet even if the text were ambiguous, this Court would be bound to defer to IDOL's interpretation of § 210.410(a), rejecting Defendant's reading.

This Court should rule that the IMWL's penalty provision and the gift exclusion unambiguously support IDOL's and Plaintiffs' reading. But if it finds any ambiguity in

these provisions, it should, and is, in fact, required to, defer to IDOL's reasoned interpretations.

ARGUMENT

I. Even If The IMWL And Its Implementing Regulations Were Ambiguous, This Court Owes Deference To IDOL's Interpretation.

Defendant raises four primary attacks to the deference owed to IDOL: (i) that the relevant provisions unambiguously support Defendant's reading, and that, even if the provisions are ambiguous, IDOL's interpretations are clearly erroneous and conflict with the provisions' plain language; (ii) that because IDOL presents its interpretations in an amicus brief, they are "especially undeserving of deference"; (iii) that IDOL's interpretations do not reflect its "considered judgment"; and (iv) that IDOL failed to demonstrate consistent past practice. Def. Br. at 37-39. All four attacks fail.

As detailed in Plaintiffs' Opening Brief and below, *see infra* Part II-III, the plain text of § 210.410(a) and § 105/12(a) does not unambiguously support Defendant's readings, and indeed unambiguously supports the interpretations advanced by IDOL (which are identical to Plaintiffs' own interpretations). But even if the text were ambiguous, deference to IDOL would be appropriate because IDOL's reading is, at the very least, not plainly erroneous or contrary to the statutory and regulatory text. *See infra* II-III. Defendant urges that this Court "need not consult agency expertise" because "[t]here is nothing ambiguous about 820 ILCS 105/12a or 56 Ill. Admin Code. § 210.410(a)." Def. Br. at 37. Yet, at the same time, it strains to support its own interpretation of § 105/12(a) by reference to certain federal courts' interpretations of particular ERISA penalty provisions and urges this Court to infer the meaning of § 210.410(a) from slight, non-substantive differences in the language of the FLSA. Quite

simply, if the plain language of § 210.410(a) and § 105/12(a) so unambiguously supported Defendant's reading, Defendant would find it unnecessary to invoke these authorities so far afield of the IMWL to purportedly illuminate their meaning. Moreover, if this Court were to find it necessary to resort to external aids of construction, it should, and in fact must, consider the reasoned judgment of IDOL in interpreting: (a) the IMWL—a statute IDOL is tasked with administering and enforcing—and (b) the implementing regulations IDOL itself enacted. *See Church v. State*, 164 Ill. 2d 153, 161–62 (1995); *Portman v. Dep't of Hum. Servs.*, 393 Ill. App. 3d 1084, 1092–93 (2d Dist. 2009). That is a better indicator of these provisions' meaning than Defendant's reading of various tea leaves.

Defendant also contends that IDOL's interpretations expressed in litigation proceedings (not through formal rulemaking or agency adjudication) are "especially undeserving of deference." Def. Br. at 38. But Defendant does not contest the validity of *Landmarks Illinois v. Rock Island County Board*, 2020 IL App (3d) 190159, ¶ 60, which held that deference is still warranted "even if [the State agency] has articulated its interpretation for the first time in an amicus brief." Nor does Defendant cite any authority contrary to *Landmarks*.

Defendant argues, in an attempt to distinguish *Landmarks*, that IDOL's interpretations do not reflect IDOL's "considered judgment." Def. Br. at 39. Indeed, Defendant levies the bold accusation that IDOL did not "'consider[]' anything apart from Plaintiffs' legal arguments." *Id.* This accusation falls flat in the face of IDOL's reasoned interpretations that it supported with 59 pages of thoughtful briefing in this Court and the appellate court. Defendant has not even attempted to identify what supposed "self-

interest[]" could be driving IDOL to eschew "considered judgment." *Landmarks Illinois*, 2020 IL App (3d) 190159, ¶ 60. In reality, IDOL simply seeks to ensure the accurate interpretation and application of the statute it is tasked with enforcing and the regulation it enacted. *See* IDOL Amicus Br. at 1-4.

Next, though *Landmarks* advises against deference to an agency decision that "conflicts with prior agency decisions," 2020 IL App (3d) 190159, ¶ 60, Defendant twists that principle to argue that deference is improper here because IDOL has not identified a case it previously prosecuted on identical facts. Def. Br. at 39-40. *Landmarks* requires no such thing. Defendant has not and cannot identify any conflict between IDOL's prior decisions and the interpretations in its amicus brief. Furthermore, IDOL regularly reaches *pre-suit* IMWL settlements with employers for sums that far exceed single damages. *See, e.g.,* IDOL Amicus Br. at 30 (citing pre-suit IMWL settlement for nearly 270% of single damages); Press Release, *Attorney General Raoul Files Lawsuit and Consent Decree with Rivian Subcontractors Over Unpaid Overtime Wages* (Aug. 23, 2022)[1] (announcing pre-suit IMWL settlement for 150% of single damages). If IDOL understood a pre-suit tender of single damages to extinguish an IMWL claim, it would not, and could not, settle such claims for multiples of that sum. For these reasons, this Court is duty-bound to defer to IDOL's interpretations.

II. Defendant's Unilateral, Pre-Litigation "Adjustment Payments" Did Not Extinguish Plaintiffs' IMWL Claims.

Defendant advances a position that defies the statutory text, Illinois case law, and logic. According to Defendant, an employer that underpays its employees under the

[1] https://illinoisattorneygeneral.gov/dA/6ce0b7c80f/202208-23%20RAOUL%20FILES%20LAWSUIT%20AND%20CONSENT%20DECREE%20WITH%20RIVIAN%20SUBCONTRACTORS%20OVER%20UNPAID%20OVERTIME%20WAGES.pdf.

IMWL may emerge scot-free, without any liability for treble damages or statutory penalties, so long as it pays single damages before its employee retains an attorney and files suit. All Defendant's creative arguments to bolster this theory are baseless.

A. Mercado's IMWL Claims Survive Even If Defendant's Adjustment Payments Extinguished Lopez's Claims.

Importantly, Defendant concedes that Defendant's "adjustment payments" provide a potential "basis for affirmance" only as to Mr. Lopez. Def. Br. at 11. As to Ms. Mercado, her IMWL claims survive unless the Court determines the gift exclusion encompassed the bonuses at issue here. This is so because Defendant admits that the adjustment payments made to Ms. Mercado did not factor her seniority bonus into her regular rate. Def. Br. at 8-9 & n.2. Moreover, Defendant accepts that because it never before singled out Ms. Mercado's seniority bonus as being properly excluded from her regular rate, it cannot do so in the first instance in this Court. Def. Br. at 30 n.3. Thus, unless this Court concludes that the gift exclusion covered the bonuses, it must reverse the dismissal of Ms. Mercado's IMWL claims.

B. Nothing In The Text Of The IMWL Allows An Employer To Correct An Underpayment Before A Lawsuit Is Filed Without Incurring Liability for Treble Damages, Attorneys' Fees And Costs, And Statutory Penalties.

At every prior stage of litigation, Defendant has always argued that "the IMWL provides no payment deadline" and thus does not "require[] payment by any particular date." C 51, C 205, C 228, C 235-36. Defendant has suddenly changed course from one incorrect reading to another. It now argues that a deadline does exist by which an employer can make up for an underpayment without incurring liability and that this deadline is the date the underpaid employee files a lawsuit. Perhaps even Defendant recognizes the unacceptable consequences that would result if an employer could

extinguish a claim for treble damages, attorneys' fees and costs, and statutory penalties by paying mere single damages on the eve of trial. *See* Opening Br. at 17-18. Defendant's proposed payment deadline—the date a complaint is filed—is only slightly more palatable from a policy perspective than its prior no-deadline position, however. Defendant's reading would still allow employers to underpay vulnerable workers for months or years—effectively taking an unauthorized loan on their wages—without paying any penalty or interest as long as the employers eventually paid the full wages sometime before getting sued.

In any event, Defendant's new proposed payment deadline suffers the same fatal flaw: it finds no support in the statutory text. Section 105/12(a) of the IMWL provides:

> If any 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, the employee may recover in a civil action treble the amount of any such underpayments together with costs and such reasonable attorney's fees as may be allowed by the Court, 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.

820 ILCS 105/12(a). In an attempt to conjure up some link between its newly minted pre-suit deadline and the statutory text, Defendant points to the words "is paid" in § 105/12(a) and claims they connote the "present tense" and therefore mean that an employee can file a complaint seeking treble damages and statutory penalties under the IMWL only if her employer neglects to make up for any shortfall in wages before the date of filing. Defendant is grasping at straws. What Defendant ignores is that "is paid" is a past participle, which expresses a completed action. *Paid*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/paid ("paid" is the "past tense and past participle of PAY"); *Past participle*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/past%20participle ("past participle" is "a

participle that typically expresses completed action"). In other words, an employee has a claim under the IMWL once she completes work for the employer and the employer underpays her for that work. Defendant's citation to *Goodman v. Ward*, 241 Ill. 2d 398 (2011), is inapposite. There, this Court reasoned that an Election Code provision that requires a candidate to swear that he or she "is qualified" for office means that the candidate is presently qualified for the office sought—not that he or she will be qualified at some future date. *Id.* at 408-09. The phrase "is qualified" expresses a state, in contrast to "is paid," which expresses a completed action. No contortion of the English language could justify an analogy between the Election Code provision analyzed in *Goodman* and § 105/12(a) of the IMWL.

If, as Defendant contends, the words "is paid" foreclosed a civil action for statutory penalties after the wage shortfall was belatedly corrected, this would hamper enforcement not only of the IMWL, but also of the Illinois Equal Pay Act (IEPA), which, like the IMWL, provides in pertinent part:

> If an employee **is paid** by his or her employer less than the wage to which he or she is entitled in violation of Section 10 or 11 of this Act, **the employee may recover in a civil action** the entire amount of any underpayment together with **interest**, **compensatory damages** if the employee demonstrates that the employer acted with malice or reckless indifference, **punitive damages** as may be appropriate, injunctive relief as may be appropriate, and **the costs and reasonable attorney's fees** as may be allowed by the court and as necessary to make the employee whole.

820 ILCS 112/30 (emphasis added). Under Defendant's reading of "is paid," an employer's payment of mere single damages would wipe out an injured employee's statutory right to interest, compensatory damages, punitive damages, and attorneys' fees and costs. *Id.* Defendant's reading of "is paid" would also gut the penalty provisions of the Illinois Prevailing Wage Act ("IPWA"), which establishes a "right of action" for

"[a]ny laborer, worker or mechanic . . . who **is paid** for his services in a sum less than the prevailing rates" to recover not only the underpayment but also monthly statutory penalties and attorneys' fees and costs. 820 ILCS 130/11 (emphasis added). Plaintiffs have not located—and Defendant has not cited—any decision holding that mere correction of the initial underpayment in an IEPA or IPWA action destroys a plaintiff's claim for interest, compensatory damages, statutory penalties, punitive damages, or attorneys' fees and costs. Thus, the phrase "is paid" does not support a pre-suit deadline, and Defendant advances no other supposed textual hook for its theory.

What is more, the IMWL already contemplates that an employer might belatedly pay employees wages due under the Act. To disincentive delay of such payments, the IMWL imposes "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). Nothing in the text of § 105/12(a) even hints that this monthly penalty could be excused if the belated adjustment payment predated the filing of a lawsuit. To the contrary, the monthly penalties continue to accumulate each month after the employee initially receives a payment that is too low.

Defendant also claims "[c]ommon sense" supports its inventive interpretation of § 105/12(a), contending, without any citation to authority, that "[t]he IMWL's penalties and fees provisions aim to punish delinquent employers *who drive plaintiffs to sue for recovery*." Def. Br. at 33 (emphasis added). Not so. Treble damages and monthly statutory penalties serve to incentivize all employers to properly pay the minimum wage to all employees (who may live paycheck to paycheck) on time and correctly in the first instance. *People ex rel. Dep't of Labor v. MCC Home Health Care, Inc.*, 339 Ill. App. 3d

10, 21 (1st Dist. 2003); *see also* Illinois Senate Transcript, 2019 Reg. Sess. No. 10, at 17. Defendant's reading would allow employers to pay their employees less than the required minimum wage and overtime entirely without consequences, and in many cases, would allow them to avoid making corrected payments indefinitely, so long as they were never threatened with suit. Such an outcome would be contrary to the IMWL's purpose and cannot be what the legislature intended when designing its monthly penalty provision.

Defendant asserts that the State "overstate[s] and mischaracterize[s] S&C's position" by claiming that under Defendant's interpretation an employer could avoid statutory penalties by tendering back pay "even years later." Def. Br. at 36. Yet, here, that's precisely what has happened. Defendant's pre-suit adjustment payments made in July 2020 included incentive payments going back to 2017—*three years prior*. C 211-12. Neither the text nor "[c]ommon sense" supports Defendant's pre-suit deadline.

C. Defendant's Attempt To Bypass Mootness Doctrine Is Futile.

Defendant concedes that "defendants must pay statutory penalties and attorney's fees in addition to compensation to moot lawsuits," but is under the unfortunate misapprehension that mootness doctrine does not apply to a pre-suit tender. Def. Br. at 32. On the contrary, in *Bates v. William Chevrolet/Geo, Inc.*, 337 Ill. App. 3d 151, 162 (1st Dist. 2003), which Plaintiffs' cited in their Opening Brief, the court ruled that the plaintiff's claim was not mooted by the defendant's tender *submitted before the filing of the lawsuit* because it did not include the attorneys' fees recoverable under the Consumer Fraud Act. In *Bates*, at issue were attorneys' fees and no other statutory penalties, but *Bates* nonetheless reflects the principle that even a pre-lawsuit tender must cover any applicable statutory fees or penalties to moot a plaintiff's claim. In an effort to circumvent *Bates*, Defendant proposes a caveat to its purported bright-line rule that a pre-

suit tender of single damages eviscerates any IMWL claim. Defendant contends that, so long as the plaintiff has not yet retained counsel when the tender is offered, the tender destroys a plaintiff's IMWL claim. Def. Br. at 35. Again, nothing in the text of § 105/12(a) justifies Defendant's payment deadline rule, and, similarly, nothing in the text supports Defendant's creative carveout to its rule. Both are invented out of whole cloth, and the fact that Defendant felt the need to tweak its rule to conform to Illinois mootness case law reflects that it was baseless in its inception.

Defendant cites one case—*People v. Coe*, 2018 IL App (4th) 170359, ¶ 48—to support its proposition that the mootness doctrine does not apply to pre-suit tenders, but it is inapposite. *Coe* does not evaluate whether any tender (before or after the filing of a complaint) mooted a claim. Instead, it addresses the problematic "conflation of statutory standing and the common-law prohibition against deciding moot issues." *Id.* ¶¶ 28, 46-50. Any dicta from *Coe* that Defendant might rely upon certainly does not override the clear holding of *Bates*.

Notably, Defendant admits that "Lopez may have had a claim under section 105/12a at some point," Def. Br. at 33, but it fails to explain what, in fact, happened to that claim if it was never mooted. Illinois case law is clear that once a claim accrues, it cannot be mooted by tendering mere single damages without any statutory penalties or fees. Defendant's "adjustment payments" are no exception to this well-established rule.

D. Federal Courts' Interpretation Of An Unrelated ERISA Provision Is Plainly Inapposite.

Finding no support in the text of § 105/12(a) or Illinois case law, Defendant asks this Court to conform its interpretation of the IMWL to certain federal courts' interpretations of wholly unrelated ERISA provisions. However, as discussed above (*see*

supra Part I), this Court must not resort to such external aids of construction unless the plain language is ambiguous, and, if it is ambiguous, this Court is bound to defer to any reasonable interpretation of the IMWL advanced by the IDOL.

Even if it were appropriate to consider them, the ERISA authorities Defendant cites only undermine its position. For instance, in *Bennett v. Machined Metals Co., Inc.*, 591 F. Supp. 600, 604 (E.D. Pa. 1984), though the district court declined to award liquidated damages authorized under ERISA, it specifically awarded double interest on the belated contributions as a penalty for the employer's tardiness, reasoning that "[t]o hold an employer completely free from liability because payment was forwarded in advance of litigation would frustrate Congress' remedial purpose." *Id.* at 604-05. Similarly, in *Operating Engineers Loc. 139 Health Benefit Fund v. Gustafson Const. Corp.*, 258 F.3d 645, 654–55 (7th Cir. 2001), another case Defendant relies upon, the court diverged from another opinion holding that ERISA preempts liquidated damages for belated but pre-suit contributions, reasoning: "We can't see the sense of that; the harm to the fund is not affected by *the happenstance of when suit is brought* in relation to the payment of the delinquent contributions[.]" (emphasis added).

In short, no amount of fancy footwork can allow Defendant to use its belated "adjustment payments" to sidestep its liability for treble damages, monthly penalties, and attorneys' fees and costs under the IMWL.

III. Contrary To Defendant's Urging, The Gift Exclusion Does Not Exclude From The Regular Rate All Payments Not Based On Hours Worked.

In defense of its contention that the gift exclusion set forth in § 210.410(a) excludes from the regular rate all payments not based on hours worked, Defendant

advances various flawed arguments. It argues that its reading conforms with the grammatical structure of § 210.410(a) and the regulatory context, despite blatant inconsistencies. Then it attributes its own meaning to the term "regular rate" ignoring that § 210.410 sets forth an express statutory definition for that term. Last, Defendant speculates as to the IDOL's intentions in enacting § 210.410(a) by drawing comparisons with the FLSA. However, it completely disregards that the IDOL has expressly declared its intentions and has interpreted that provision in accordance with Plaintiffs' reading. Each of Defendant's arguments is a dead-end. [2]

A. The Grammatical Structure Of § 210.410(a) Supports Plaintiffs' Reading—Not Defendant's.

Defendant wrongly claims that its reading of § 210.410(a) fits the provision's grammatical structure but conveniently ignores the use of the phrase "such as." Def. Br. at 13-14. The phrase "such as" is "used to introduce an example or series of examples." *Such as*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/such%20as. The gift exclusion removes 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. Adm. Code § 210.410(a) (emphasis added). The words "such as" introduce a series of examples of gifts that illustrate the types of remuneration that fall within the exception. *Id.* The takeaway is that remuneration must be a gift before it can satisfy the § 210.410(a) exclusion.

Defendant contends that in § 210.410(a), "'gifts' are a common example, but not the only example, of payments not measured by hours worked." Def. Br. at 14. But this assertion flips the language of the gift exclusion on its head, reading "gifts" as an

[2] Defendant does not dispute that the appellate court erred in stating that an employee bears the burden for *disproving* a regular rate exclusion. *See* Opening Br. at 27-28.

example of "amounts that are not measured by or dependent on hours worked" instead of the other way around. Defendant again overlooks that "such as" precedes "amounts that are not measured by or dependent on hours worked," making clear that it is an illustration of a gift. For the same reason, "other amounts" is not superfluous as Defendant suggests (Def. Br. at 14). It introduces an illustration of a type of payment that may qualify as a gift and thus provides a guidepost for employers and courts alike in determining whether a payment constitutes a gift and should thus be excluded from the regular rate. In sum, the grammatical structure of § 210.410(a) supports Plaintiffs' and the IDOL's interpretation thereof—not Defendant's reading.[3]

B. Defendant Fails To Harmonize Its Reading Of § 210.410(a) With The Regulatory Context.

Despite its efforts, Defendant cannot reconcile its reading of § 210.410(a) with the regulatory framework. The IMWL regulations set forth several ways in which non-hourly compensation must be included in calculating the regular rate, which is at odds with Defendant's reading of § 210.410(a) as excluding from the regular rate all pay not measured by or dependent upon hours worked. In response to the provisions requiring payments made on a piece rate, salary, per-day, and per-job basis to be included in the regular rate, *see* 56 Ill. Adm. Code 210.430(b), (c), (d), Defendant contends that these types of non-hourly pay are somehow still pay "dependent on hours worked" because one must convert that pay to its hourly equivalent in order to calculate an employee's regular rate. Def. Br. at 17-18. This argument overlooks § 210.420(b), which provides:

[3] Defendant argues that Plaintiffs' definition of "gift" "necessarily implies a class of gifts that *are* based on hours worked." Def. Br. at 16. This is incorrect. Plaintiffs' definition of gift excludes all payments based on hours worked because they are payments for which the employer receives something in return. *See* Opening Br. at 23 n.4.

> The regular rate is a rate per hour. The Act does not require employers to pay employees on an hourly rate basis. Their earnings may be determined on a piece-rate, salary, commission, or some other basis, but in such case the overtime pay due must be computed on a basis of the hourly rate derived from such earnings.

56 Ill. Adm. Code § 210.420(b). In short, for practical reasons, all earnings—whether based on hours worked or not—are converted to an hourly rate derived from such earnings in order to calculate the regular rate. That does not mean, however, that an employee's piece-rate payments are "dependent on hours worked" any more than the incentive bonuses at issue in this case are dependent on hours worked. Rather, the incentive bonuses fall within payments determined on "some other basis" referenced in § 210.420(b) and must thus be converted to an hourly rate for the purpose of calculating the regular rate and overtime pay.[4] Simply put, Defendant's argument proves too much. If piece-rate and salary compensation become hours-based compensation by virtue of being converted to an hourly rate to calculate the regular rate, so do Plaintiffs' production bonuses. This attempt to reconcile Defendant's reading of the gift exclusion with the regulatory context clearly fails.

Defendant likewise fails to harmonize its reading of § 210.410(a) with § 210.430(b), which provides that piece rate payments are converted to a regular rate by combining "the total earnings for the workweek from piece rates *and all other earnings (such as bonuses)* and any sums paid for waiting time or other hours worked." 56 Ill. Adm. Code § 210.430(b) (emphasis added). Acknowledging this express requirement that bonuses be incorporated into the regular rate, Defendant seems to assert that its

[4] Defendant is, of course, aware of this computation method because that is precisely how Defendant claims to have calculated its own adjustment payments. *See* C 211-12 (Affidavit of Aurelie Richard) ("S&C paid Carmen Mercado . . . $486.74. That amount was arrived at by the taking [sic] total incentive payment for each period, divided by the total hours worked in the period, to arrive at the change in the hourly rate.").

interpretation of § 210.410(a) does not apply to workers who are typically paid on a piece-rate basis. Def. Br. at 18-19. This line of thinking—that the meaning of § 210.410(a) somehow varies based on the method by which an employee is typically paid, whether on an hourly, piece-rate, salary, or commission basis—is completely divorced from the regulatory text. It fails just like the appellate court's assertion that its narrow reading of the gift exclusion applied only to hourly workers, which also lacked any textual basis. *See* Opening Br. at 21-22.

In a similarly misguided effort, Defendant mischaracterizes § 210.430(a), contending that, "[f]or employees paid by the hour, the hourly rate is considered the regular rate." Def. Br. at 17. Defendant's rephrasing of § 210.430(a) omits a key word: "solely." Under § 210.430(a), "[i]f an employee is employed ***solely*** on the basis of a single hourly rate, the hourly rate is the 'regular rate.'" (emphasis added). Here, Plaintiffs were not paid "solely" on the basis of a single hourly rate; their pay consisted of a combination of hourly pay and non-discretionary production bonuses that they frequently received to reward efficient work. Section 210.430(a) does not limit the types of pay incorporated into the regular rate for workers, like Plaintiffs here, who are paid production bonuses in addition to an hourly rate.

In response to Plaintiffs' argument that Defendant's reading of the gift exclusion renders § 210.410(b) redundant, Defendant acknowledges the "redundancy problem" but mistakenly argues that the "redundancy problem" exists whether the Court adopts Defendant's interpretation of § 210.410(a) or the one advanced by Plaintiffs and IDOL. Def. Br. at 19. Section 210.410(b) excludes from the regular rate "[p]ayments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of

employer to provide sufficient work, or other similar cause." 56 Ill. Adm. Code § 210.410(b). These payments, as Plaintiffs have argued, are clearly not based on hours worked, and thus, under Defendant's reading, the subsection of § 210.410 that immediately follows the gift exclusion would be rendered superfluous. Defendant argues, absurdly, that any payments that fall under this prong would constitute gifts, and thus, even if the gift exclusion were limited to gifts, it would create redundancy. Def. Br. at 19.

This argument is baseless. No employee would consider a paid vacation in accord with the employer's company policy to be a gift. Nor are paid sick leave and paid holidays regarded as gifts. To the contrary, paid vacation and sick days are an important part of an employee's compensation that are typically negotiated at the outset of an individual's employment. The redundancy with § 210.410(b) would arise only if the Court adopted Defendant's strained reading of the gift exclusion.

In sum, Defendant fails in each one of its attempts to conform its reading to the regulatory framework, and, quite notably, is unable to identify any disharmony between Plaintiffs' reading and the surrounding provisions.

C. Because The IMWL Expressly Defines "Regular Rate," Defendant's Musings As To This Term's "Plain And Ordinary Meaning" Are A Distraction.

Although Defendant spills much ink defining the contours of what it sees as the "plain and ordinary meaning" of "regular rate," *see* Def. Br. at 10, 14-15, 17, 20, 26-27, 38, this Court should ignore those musings because the IMWL itself defines regular rate. Only when a term is undefined in the statute will Illinois courts give it its plain and ordinary meaning. *See People v. Davison*, 233 Ill. 2d 30, 40 (2009). Illinois courts do not consult the dictionary to determine the meaning of terms for which the statute itself supplies a definition; they are bound instead by the statutory definition. *See People v.*

Fiveash, 2015 IL 117669, ¶ 13; *iMotorsports, Inc. v. Vanderhall Motor Works, Inc.*, 2022 IL App (2d) 210785, ¶ 21. Section 210.410 itself supplies the definition of "regular rate" that this Court must apply. Accordingly, this Court should not replace the statutory definition of regular rate with Defendant's gloss on dictionary definitions of those words.

Incredibly, based upon its purported plain meaning interpretation of regular rate, Defendant argues that bonuses cannot form part of the regular rate of an employee who is primarily paid on an hourly basis. Def. Br. at 15. Yet it is beyond debate that Plaintiffs' bonuses would be included in the "regular rate" under the FLSA. In other words, when Defendant argues that including bonuses in the "regular rate" is contrary to the plain meaning of that term, it attacks not just Plaintiffs' and the IDOL's interpretation of the regulations, but also the well-settled meaning of the FLSA. In the FLSA, just as in the IMWL, the word "regular" in "regular rate" does not mean "base rate" or "usual rate" or "hourly rate without incorporation of other payments." Instead, the rate is "regular" as compared to the "overtime rate," which is 1.5 times the regular rate. *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945) ("[T]he regular rate refers to the hourly rate actually paid the employee for the normal, *non-overtime* workweek for which he is employed.") (emphasis added); *see also Sarmiento v. Sealy, Inc.*, No. 18-CV-01990-JST, 2019 WL 3059932, at *10 (N.D. Cal. July 12, 2019) (explaining that "regular rate" is "normally understood" to be "regular" as compared to the "overtime rate"). Indeed, no one with a passing familiarity with wage and hour law would seriously consider the idea that the phrase "regular rate" by its plain meaning excludes consideration of bonus payments. Rulings to the contrary abound. *See, e.g., Gilbertson v. City of Sheboygan*, 165 F. Supp. 3d 742, 750 (E.D. Wis. 2016) (holding that

employer was required to factor bonuses into hourly workers' "regular rate"); *Paswaters v. Krones Inc.*, No. 19-CV-993-JPS, 2020 WL 419336, at *2 (E.D. Wis. Jan. 27, 2020) (same); *Szarka v. BDH Custard, Inc.*, No. 21-CV-845, 2021 WL 3550322, at *2 (N.D. Ill. Aug. 11, 2021) (same); *Kruger v. Arrow Container, LLC*, No. 1:19-CV-1402-JRS-MJD, 2019 WL 6468334, at *2 (S.D. Ind. Dec. 2, 2019) (same). For this independent reason, any reliance on the plain meaning of regular rate to exclude performance bonuses is deeply misguided.

Similarly, decades of federal practice under the FLSA undermines Defendant's argument that it is "illogical" to limit a gift exclusion to payments in the nature of a gift. Def. Br. at 10. Defendant calls such a reading "non-sensical because it relies entirely on the employer's subjective intent," Def. Br. at 16, and yet admits that the FLSA's gift exclusion is limited to payments in the nature of a gift, Def. Br. at 21. Moreover, Defendant is wrong to contend that a gift exclusion limited to payments in the nature of gift relies on an "employer's subjective intent." Courts applying the FLSA's gift exclusion consider *objective* factors to determine whether a payment falls within or without its boundaries, and Illinois courts should do the same. *See, e.g., McPhee v. Lowe's Home Centers, LLC*, 860 F. App'x 267, 270 (4th Cir. 2021) (considering *inter alia* whether the payments were made in honor of a special occasion and whether they were made pursuant to a contract).

D. Defendant's Comparison To The FLSA Does Not Support Its Reading Of § 210.410(a).

Although Defendant implores this Court to infer the meaning of § 210.410(a) in comparison to the FLSA's corollary provision, this Court should decline the invitation. Defendant attributes specific intentions to IDOL in enacting § 210.410(a) based on subtle

clues it derives from minor, non-substantive differences in language between the FLSA's and the IMWL's respective gift exclusions. Def. Br. at 20-22. The differing language appears to be the result of the removal in the IMWL regulation of filler words and non-essential details concerning the examples of gifts provided in the FLSA. If the IDOL had truly intended to exclude from the regular rate all bonuses and other payments not tied to hours worked, thereby drastically restricting the scope of the IMWL as compared to its federal counterpart, it would be strange to do so by way of a subtle language tweak. In any event, the IDOL itself, which enacted § 210.410(a), has announced in two amicus briefs its actual interpretation of its own regulation. Yet Defendant asks this Court to ignore it. As discussed above (*supra* Part I) and in Plaintiffs' Opening Brief (at 24-26), if this Court deems § 210.410(a) ambiguous, it is bound to defer to IDOL's interpretation of that provision. This Court should not resort to the guesswork that Defendant pushes.[5]

E. Defendant's Attempt to Distort the Canons of Statutory Construction Fails.

Defendant does not dispute that Plaintiffs properly articulated the canons of *ejusdem generis* and *noscitur a sociis* or that they would apply if the Court deemed § 210.410(a) ambiguous. Instead, in response to these canons, Defendant merely repeats its ill-fated argument about the purported "ordinary meaning" of "regular rate," Def. Br. at 26-27, and futilely attempts to twist *In re Estate of Crawford*, 2019 IL App (1st) 182703, to support its reading. Yet *Crawford* simply illustrates the uncontroversial notions that in proper context "other" should be read to mean "other such like" (*ejusdem*

[5] For the same reasons, this Court should decline the invitation of the Amici Curiae Illinois Chamber of Commerce, et al. to speculate as to the meaning of § 210.410(a) based on the U.S. Department of Labor's interpretation of the FLSA and its implementing regulations (Chamber of Commerce Br. at 9-12). The IDOL's own interpretation of the IMWL's implementing regulations is instructive.

generis), and that when construing one term in a list, courts should "avoid interpreting the term so broadly that it is inconsistent with its accompanying words . . . ." (*noscitur a sociis*). *See id.* ¶¶ 32-33.

IV. The Brief of Illinois Chamber Of Commerce Et Al. Is Inapposite.

The question raised in the brief of Amici Curiae Illinois Chamber of Commerce et al.—whether the value of certain non-monetary fringe benefits should be included in the calculation of an employee's regular rate—is simply not at issue in this case. That question has nothing to do with the proper interpretation of the gift exclusion, but rather, whether such non-monetary fringe benefits qualify as "remuneration for employment" at all under § 210.410. Here Defendant paid Plaintiffs monetary bonuses as compensation for meeting certain pre-announced performance and safety metrics and seniority goals, which constitute "remuneration for employment" under any definition.[6]

CONCLUSION

For the foregoing reasons and those set forth in their Opening Brief, Plaintiffs respectfully ask this Court to reverse the appellate court's decision and remand to the circuit court for further proceedings.

Dated: April 25, 2024 Respectfully submitted,

[6] In reference to the Affidavit of Aurelie Richards, Defendant argues that the circuit court erred in striking a portion of the Affidavit and asks this Court to reverse that decision. As the Appellate Court correctly observed, "[t]he circuit court's ruling on striking a portion of Richard's affidavit is not before us on appeal," A-010 n.1, and, likewise, the propriety of that ruling is not before this Court because Defendant failed to file a cross-appeal on this issue. *Deutsche Bank Nat'l Tr. Co. v. Barrera*, 2020 IL App (3d) 180419, ¶ 30 ("A notice of cross-appeal is mandatory and jurisdictional," and "[i]n the absence of a cross-appeal, the appellate court may address and decide only the issues raised by the appellant.").

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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 Petition for Leave to Appeal from the Appellate Court of Illinois
First District, No. 22-0020
There Appealed from the Circuit Court of Cook County, Illinois
Chancery Division, General Chancery Section, No. 2020 CH 7349
The Honorable Allen P. Walker, Judge Presiding

CERTIFICATE OF SERVICE/NOTICE OF FILING

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You are hereby notified that on April 25, 2024, I caused to be electronically filed with the

Clerk of the Illinois Supreme Court through the Odyssey/eFileIL system, the *Reply Brief of Plaintiffs-Appellants*. On April 25, 2024, by 5:00 p.m., a copy of the *Reply Brief of Plaintiffs-Appellants* will also be electronically mailed to the above-named opposing counsels.

Within five days of acceptance by the Court, the undersigned certifies that 13 paper copies of the *Reply Brief of Plaintiffs-Appellants* will be sent to the Office of the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

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.

Date: April 25, 2024

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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) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under 342(a), is 20 pages.

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.

Date: April 25, 2024

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