NO. 16-911

In the

Supreme Court of the United States

CITY OF SAN GABRIEL, CALIFORNIA,

Petitioner,

v.

DANNY FLORES, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America ("Chamber") and the National Federation of Independent Business Small Business Legal Center ("NFIB") respectfully submit this brief as *amici curiae* in support of Petitioner City of San Gabriel.

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. The NFIB is the nation's leading small business association, representing members across the country. To that end, the Chamber and NFIB regularly file *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

Collectively, *amici* represent a wide cross-section of the employer community throughout the United States. American employers dedicate considerable

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, all parties were notified of *amici*'s intent to file this brief at least 10 days before it was due, and counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

time, energy, and resources to achieving compliance with federal workplace laws, including the Fair Labor Standards Act. *Amici*'s members can only do so, however, insofar as the courts commit to interpreting the FLSA in a manner that is consistent, predictable, and evenhanded—rather than placing a thumb on the scales at the outset of the interpretive process. Moreover, many of *amici*'s members are nationwide employers, whose efforts to plan their employment policies are greatly undermined when divergent interpretations of federal law persist in different parts of the country.

This case implicates both concerns: it affords this Court an opportunity to retire the wholly baseless "canon" that FLSA exemptions must be construed against employers, and it presents an ideal vehicle to resolve a circuit split over the proper interpretation of the FLSA's overtime-pay provisions.

SUMMARY OF ARGUMENT

This case involves allegations that Petitioner City of San Gabriel made insufficient overtime payments to its employees, in violation of the Fair Labor Standards Act. But 29 U.S.C. §207(e)(2) makes clear that when the City calculated its employees' "regular rate" of compensation—and with it their overtime rate—the City did nothing wrong by excluding the "cash in lieu" benefits payments it distributed to employees alongside their ordinary wages. As Petitioner explains, the Ninth Circuit's contrary conclusion distorts the Act, opens a circuit split on an important question of national significance, and will ultimately harm employers and employees alike.

That would be bad enough, but the story of how the Ninth Circuit arrived at its skewed reading of the statute is even more troubling. A central culprit is the so-called "anti-employer canon" of construction, a relic of a bygone era that has been causing mischief in the lower courts for years. Beginning from the grand abstraction that the FLSA is a species of "humanitarian and remedial legislation" that was "designed 'to extend the frontiers of social progress,'" the anti-employer canon instructs that "[a]ny exemption" to the FLSA "must … be narrowly construed." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). As applied by some lower courts, the canon is akin to a clear-statement rule, requiring courts to reject any interpretation proffered by an employer unless such reading is "plainly and unmistakably within [the statute's] terms and spirit." *Id.*

The anti-employer canon was likely the decisive factor in the decision below. While the Ninth Circuit conceded that the statutory question was a "close" one, the court considered itself bound to rule for the employee-plaintiffs, professing that "[w]e will not find an FLSA exemption applicable 'except in contexts plainly and unmistakably within the given exemption's terms and spirit.'" Pet.App.12a.

Although the lower courts continue to invoke the canon in many FLSA cases, it has been relegated to an afterthought (at best) in *this Court's* FLSA jurisprudence. In recent Terms this Court has cited the anti-employer canon only in the course of *declining* to apply it. *See*, *e.g.*, *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 879 n.7 (2014) (reserving

question of whether Court should "disapprove" anti-employer canon); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 n.21 (2012) (canon does not apply to FLSA's definitions). Indeed, it has been decades since this Court has cited the anti-employer canon in the course of ruling in favor of an FLSA plaintiff. And just last Term, Justice Thomas (joined by Justice Alito) explicitly called for the anti-employer canon to be interred. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2131 (2016) (Thomas, J., dissenting).

The time has come for this Court to explicitly disavow the anti-employer canon. At its core, the canon rests on the assumption that in enacting the FLSA, Congress meant to pursue a single, broad objective—whether styled as social progress, employee welfare, or some other abstract notion—without limit or compromise. But that assumption is demonstrably false. The Act's numerous explicit exemptions (some of which are quite broad and others quite narrow) make clear that the FLSA, like all legislation, is an attempt to reconcile competing values as best as the enacting Congress was able to do. The anti-employer canon disrespects Congress' careful line-drawing by impelling courts to select interpretations of the Act that may diverge from the best reading of the statutory text.

In light of its untenable assumptions about the legislative process, the anti-employer canon is unsurprisingly out of step with the modern principles of statutory interpretation this Court has articulated in scores of cases, speaking through many Justices across many different areas of law. Yet this archaic

rule continues to inflict substantial damage on FLSA jurisprudence in the lower courts. The anti-employer canon not only leads courts to stray from what they would otherwise think is the best reading of the FLSA, but is also plagued by serious uncertainty about its scope and relative weight. As long as the canon remains in play, it will continue to skew the interpretation of the FLSA, especially in cases (like this one) that involve complex or technical provisions of the statute. Such confusion is deeply problematic, especially for nationwide employers struggling to craft uniform employment policies in compliance with federal law.

* * *

The Court should take this opportunity to instruct the lower courts that their duty is to construe the FLSA according to their best lights—adopting the interpretation a given provision's text, structure, and purposes most plausibly reflect—and not short-circuit the process by reflexively adopting whichever reading advantages the employees who happen to appear before them. This case is an ideal vehicle to make that course correction: the canon was likely decisive in the decision below, and the resulting circuit split warrants certiorari in its own right. The petition should be granted.

ARGUMENT

I. The Court Should Grant Certiorari To Expressly Repudiate The Purported Canon That FLSA Exemptions Must Be Construed Narrowly Against Employers.

As the decision below well illustrates, the lower courts understand the anti-employer canon to be a

substantive rule of construction dictating that, in any FLSA case that arguably presents a close question, they should adopt whichever reading of the statute most advantages the specific employees before them. That approach is deeply misguided. It reflects long-discredited assumptions about the legislative process, is out of step with the interpretive practices that now form this Court's standard operating procedure, and has caused considerable mischief in the lower courts.

A. The Anti-Employer Canon Cannot Be Squared With This Court's Modern Approach To Statutory Interpretation.

1. The anti-employer canon is a relic of a bygone era. The canon does not rest upon any textual provision of the FLSA or explicit instruction from Congress. It instead descends from the following dictum in this Court's decision in *AH Phillips*:

> The Fair Labor Standards Act was designed 'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.' Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed …. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

324 U.S. at 493. The anti-employer canon is typically cast as an offspring of the more general maxim that "remedial statutes should be liberally construed."

SEC v. CM Joiner Leasing Corp., 320 U.S. 344, 353 (1943). Eight Justices have more recently described "the proposition that the statute at hand should be liberally construed to achieve its purposes," as the "last redoubt of losing causes." *OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995).

The anti-employer canon requires courts to interpret certain provisions of the FLSA to prohibit or require more than their text, structure, and purpose would otherwise indicate. Indeed, the canon does no work *except* where it compels a court to select an interpretation other than the one it thinks best or most probable—so long as it favors the employee-plaintiffs in the case and is arguably defensible. As applied by some lower courts (including the Ninth Circuit in this case), this is akin to a clear statement rule; when the anti-employer canon applies, courts will read an FLSA provision to disfavor the employees *only* if Congress wrote the provision with a higher degree of clarity than would otherwise be necessary.

That purported rule of interpretation is anathema to this Court's modern jurisprudence and should be repudiated once and for all. By loading the interpretive dice in a way that impels courts to "extend the frontiers of social progress" beyond the stopping point most plausibly suggested by the FLSA's text, *AH Phillips*, 324 U.S. at 493, the anti-employer canon betrays a set of assumptions that are empirically and conceptually untenable. In particular, the canon's instruction to read the FLSA with a bias in favor of certain abstract values (social

progress, employee welfare, or the like) ignores that the legislative process is one of compromise, in which Congress decides not only what values to pursue, but also—and perhaps more importantly—to what degree and by what means to pursue them. *See Encino Motorcars*, 136 S. Ct. at 2131 (Thomas, J., dissenting) ("[T]his canon appears to 'res[t] on an elemental misunderstanding of the legislative process,' viz., 'that Congress intend[s] statutes to extend as far as possible in service of a singular objective.'" (quoting Brief for Chamber of Commerce of the United States of America et al. as *Amici Curiae* 7)).

Whatever values the FLSA seeks to promote, the anti-employer canon overlooks that Congress did not choose to pursue those objectives single-mindedly and at all costs. That is readily apparent from the Act's more than 50 exemptions for certain types of employers and employees. Some exemptions broadly cover an entire industry, such as the exemptions for all employees of certain rail and air carriers, 29 U.S.C. §213(b)(2), (3), and all employees engaged in the "catching, taking, propagating, harvesting ... or farming of any kind of fish," *id.* §213(a)(5). Others cover more specific activities, such as the exemption for employees "engaged in the processing of maple sap into sugar," *id.* §213(b) (15), and "any employee employed on a casual basis in domestic service employment to provide babysitting services," *id.* §213(a)(15).

The one unifying thread of those many exemptions is a recognition by Congress that certain types of activities or employees *should not* be subject to the FLSA's overtime requirements. It is thus both

artificial and contrary to Congress' intent to interpret the exemptions either "narrowly" or "broadly." Congress itself did the hard work of deciding whether an exemption should be narrow or broad, and the sole task for the courts should be to interpret the statute *correctly*.

2. The anti-employer canon's unrealistic assumptions about the legislative process only serve to skew the interpretive process, for reasons this Court has repeatedly articulated in recent years in a wide array of statutory contexts. For instance, as Justice Blackmun wrote for the Court, "[n]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646-47 (1990) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam)).

Likewise, as Justice Stevens wrote for the Court, "[s]tatutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994). In the same vein, Justice Kennedy has explained for the Court that "any key term in an important piece of legislation … [is] the result of compromise between groups with marked but divergent interests in the contested provision," and "[c]ourts … must respect

and give effect to these sorts of compromises." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002).

Also highly instructive is Justice Kagan's majority opinion for eight Justices in a recent case involving FOIA, a statue that—like the FLSA—has been read to pursue a broad goal (*i.e.*, disclosure) subject to exemptions that courts have long said must be construed narrowly. *Milner v. Dep't of Navy*, 562 U.S. 562, 571 (2011). Even when interpreting the statute in light of its background objectives, the Court emphasized that "nothing in FOIA either explicitly or implicitly grants courts discretion to expand (or contract) an exemption" in derogation of its best reading. *Id.* at 572 n.5. That is because "[i]n enacting FOIA, Congress struck the balance it thought right—generally favoring disclosure, subject only to a handful of specified exemptions." *Id.* The only proper role of the courts is "to enforce that congressionally determined balance rather than … to assess case by case … whether disclosure interferes with good government," or any other value abstracted from the statutory text. *Id.* Rather than place an artificial thumb on the scale by way of an anti-exemption canon, courts must "give[] the exemption the … reach Congress intended through the simple device of confining the provision's meaning to its words." *Id.* at 572; *see also W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 99 (1991) (refusing to allow a civil rights statute's "broad remedial purposes" to overcome the best reading of the statutory text).

These decisions make crystal clear that it exceeds the judicial role for a court to read the FLSA

by detaching one of its animating values from the means Congress selected to implement it, and then allowing that abstract value to lead the court away from the best reading of the statutory text. Put differently, a court may not pretermit its FLSA analysis in hard cases by simply adopting whichever minimally defensible reading aligns with the interests of one party to the case.

Yet that is exactly what the anti-employer canon compels courts to do—and what the lower courts have *in fact* done, *see infra* Part I.B—in tricky FLSA disputes like this one. But courts should not be loading the interpretive dice at the outset of FLSA disputes. Instead, the proper judicial duty in every case is simply to give the FLSA its *best* reading based on the statutory text Congress enacted. *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 582 (1990) ("[T]he effort, with respect to *any* statute, should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right…. I see no reason, *a priori,* to compound the difficulty, and render it even more unlikely that the precise meaning will be discerned, by laying a judicial thumb on one or the other side of the scales.").

B. The Anti-Employer Canon Has Caused Observable Damage In The Lower Courts.

Likely due to its dubious ongoing validity, the anti-employer canon has largely fallen by the wayside in *this Court's* jurisprudence. In recent years, the Court has generally cited the canon only in

the course of explaining why it does *not* apply to the case at hand. *See*, *e.g.*, *Sandifer*, 134 S. Ct. at 879 n.7 (reserving question of whether Court should "disapprove" anti-employer canon); *Christopher*, 132 S. Ct. at 2172 n.21 (canon does not apply to FLSA's definitions); *see also Encino*, 136 S. Ct. 2117 (not citing anti-employer canon despite plaintiffs' and lower court's reliance on it). To the best of *amici*'s knowledge, it has been decades since this Court has invoked the anti-employer canon in the course of ruling in favor of an FLSA plaintiff.

But it would be a mistake to regard the anti-employer canon as a conceptually dubious but ultimately innocuous throwback to an earlier era in statutory interpretation. To the contrary, numerous lower court decisions confirm that the canon continues to exert significant, even dispositive, weight in courts' analysis of the FLSA.

The decision below is a prime example. The anti-employer canon was literally the *first sentence* of the "Analysis" section of the Ninth Circuit's decision. *See* Pet.App.11a-12a. The panel conceded that the case involved "a close question," Pet.App.13a, but resolved it in favor of the employee-plaintiffs after invoking the anti-employer canon no fewer than four times, Pet.App.11a-12a, 21a, 23a. As the court explained, "in light of the command that we interpret the FLSA's exemptions narrowly in favor of the employee, we conclude that the City has failed to carry its burden to demonstrate that its cash-in-lieu of benefits payments 'plainly and unmistakably' constitute excludable payments under §207(e)(2)." Pet.App.21a; *see also* Pet.App.23a (court was

reluctant to adopt City's reading of §207(e)(4) "particularly … where exemptions to the FLSA's requirements are to be narrowly construed in favor of the employee").[2]

This case is hardly the first time the anti-employer canon has made all the difference in the Ninth Circuit's analysis. For instance, in *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003), the court held that protective outfits worn by employees of a meat processing plant did not count as "clothing" for purposes of the FLSA's exemption for time spent donning and doffing clothing. The court explained that it was merely heeding this Court's instruction to "read FLSA exemptions … tightly, refusing to apply FLSA exemptions 'except in contexts *plainly and unmistakably* within the given exemption's terms and spirit.'" *Id.* Because the court concluded that "[t]he protective gear at issue does not 'plainly and unmistakably' fit within [the FLSA's] 'clothing' term," it held that the anti-employer canon "requires that we construe [the provision] against the employer seeking to assert it." *Id.* When this Court later reviewed the same question without invoking the anti-employer canon, it reached precisely the opposite conclusion. *See Sandifer*, 134 S. Ct. at 879 & n.7.

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[2] Similarly, the district court acknowledged that the City made "a compelling argument" that plaintiffs' interpretation of §207(e)(2) would make "employers … less likely to allow employees to receive the surplus as cash" going forward, but nevertheless concluded that "a narrow construction of the FLSA exemptions compels a finding that cash payments are not excludable." Pet.App.70a-71a.

Similarly, in *Encino Motorcars*, the Ninth Circuit created a circuit split when it applied the anti-employer canon to conclude that certain automobile dealership employees were entitled to overtime compensation, in contrast to a number of other courts that declined to apply the canon and reached the opposite conclusion. *Compare Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1271-72 (9th Cir. 2015), *vacated*, 136 S. Ct. 2117 ("[W]e cannot conclude that service advisors such as Plaintiffs are 'persons plainly and unmistakably within [the FLSA's] terms and spirit.'"), *with Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1097-98 (5th Cir. 1973) (construing FLSA without invoking anti-employer canon and ruling for employers, even though "[t]he intended scope of [the exemption] is not entirely clear," because the employers put forth "the better reasoned interpretation of the section"); *Thompson v. J.C. Billion, Inc.*, 294 P.3d 397, 401-02 (Mont. 2013) (declining to apply canon, and ruling for employers based on a "grammatical reading" of the statute).

Nor is the Ninth Circuit alone in allowing the anti-employer canon to distort its interpretation of the FLSA. A number of other courts continue to invoke this rule to tip the scales in favor of employees claiming to be covered by the statute. *See*, *e.g.*, *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 472 (S.D.N.Y. 2008) (distinguishing decisions in factually identical cases because the courts did "not acknowledge that the FLSA's exemptions must be narrowly construed against employers"); *Lawrence v. City of Philadelphia*, 527 F.3d 299, 310 (3d Cir. 2008) ("There are additional considerations in an FLSA case because the FLSA must be construed

liberally in favor of employees…. FLSA exemptions should be construed narrowly, that is, against the employer."); *id.* at 321 (Hardiman, J., dissenting) ("Although FLSA exemptions are to be construed narrowly," "the majority's construction is supported by neither the text and structure of §203(y) nor the dictionary definition of 'responsibility.'"); *Miller v. Team Go Figure, LLP*, No. 3:13-CV-1509-O, 2014 WL 1909354, at *7 (N.D. Tex. May 13, 2014) (ruling in favor of plaintiff because "[i]n a nutshell, [the employer] has failed to meet its burden of proving that [its employee] …. 'plainly and unmistakably' fall[s] within the 'terms and spirit' of the exemptions").

Worse still, the lower courts do not even agree on *when* the anti-employer canon applies, for they do not agree on which provisions of the FLSA count as "exemptions" that are to be construed narrowly. *Compare, e.g.*, *Alvarez*, 339 F.3d at 905 ("Following the Supreme Court's lead, we have also read FLSA exemptions—such as §[20]3(*o*)—tightly, refusing to apply FLSA exemptions 'except in contexts *plainly and unmistakably* within the given exemption's terms and spirit.'"), *with, e.g.*, *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 957 (11th Cir. 2007) (splitting with the Ninth Circuit and "conclud[ing] that §203(*o*) is not an exemption under the FLSA but is instead a definition that limits the scope of the FLSA's key minimum wage and maximum hour provisions"), *and Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 595 (7th Cir. 2012), *aff'd*, 134 S. Ct. 870 (2014) (anti-employer canon does not apply because "[§]203(*o*) creates an exclusion rather than an exemption").

At the end of the day, it should not be surprising that lower courts are having difficulty applying an artificial rule that is squarely at odds with this Court's modern approach to the interpretation of federal statutes. An explicit holding from this Court that the anti-employer canon is not a valid tool of statutory interpretation would be a significant step in the right direction toward ensuring a coherent and nationally uniform application of the FLSA consistent with the language enacted by Congress.

II. The Underlying Questions Presented About The Scope Of The FLSA Warrant This Court's Review.

This case is an ideal vehicle for the Court to address the ongoing validity of the anti-employer canon. Not only was the canon likely dispositive to the decision below, but the Ninth Circuit's holding also creates a circuit split on two important questions regarding the interpretation of the FLSA, for which Petitioner and *amici* need a clear and nationally uniform answer.

A. The Decision Below Exacerbates Disarray In The Lower Courts.

As the City explains in its petition for certiorari, the decision below entrenches rival readings of §207(e)(2) in the courts of appeals. Had this suit been brought in the Third Circuit, the Sixth Circuit, or the Seventh Circuit, there is little doubt the City would have prevailed. Those disparate results are intolerable, as the difference between the Ninth Circuit's approach to §207(e)(2) and the approach that applies elsewhere will affect a wide array of public and private-sector compensation programs in

addition to the cash-in-lieu policy at issue here. Such disarray will not only produce inequitable results, but will also make it exceedingly difficult for nationwide employers to provide uniform benefits programs for all employees.

The Third Circuit's reading of §207(e)(2) directly contradicts the Ninth Circuit's holding in the decision below. The Ninth Circuit held that the §207(e)(2) exclusion "does not turn on whether the payment is tied to an hourly wage, but instead turns on whether the payment is a form of compensation for performing work." Pet.App.16a. The court later reiterated that the exclusion "look[s] to whether the payment at issue is generally understood as compensation to the employee, *not* whether the payment is tied to specific hours worked by the employee." Pet.App.18a. (emphasis added); *see also* Pet.App.19a ("[W]e focus our inquiry on whether a given payment is properly characterized as compensation, *regardless of whether* the payment is specifically tied to the hours an employee works." (emphasis added)).

By contrast, in *Minizza v. Stone Container Corp. Corrugated Container Division East Plant*, the Third Circuit concluded that the payments at issue were excludable because "we interpret the phrase 'other similar payments'" to mean "*payments not tied to hours of compensation*," full stop. 842 F.2d 1456, 1461 (3d Cir. 1988) (emphasis added). As the court explained: "The employers assert, and we agree, that the payments are [excludable] … because … they are not payments relating to hours of employment or service," precisely because they were not "conditioned

on a certain number of hours worked or on an amount of services provided." *Id.* at 1462. Indeed, the Third Circuit even agreed with the plaintiff-employees that the payments at issue were "wage substitutes," and hence could reasonably be characterized as "compensation for employment" in a technical sense. *Id.* at 1459-60. But that ultimately made no difference to the outcome of the case because the amount of the payments did not vary based on the amount of time an employee spent working.

The interpretations of §207(e)(2) adopted by the Third Circuit and the Ninth Circuit simply cannot be reconciled, as the Ninth Circuit all but conceded. As the decision below recognized, "the Third Circuit's greater focus on a direct tie to hours worked or services provided hews more closely to the interpretation that the City urges here." Pet.App.18a-19a. The Ninth Circuit nonetheless "decline[d] to adopt a similar requirement." *Id.*

The Third Circuit is not the only court whose reading of §207(e)(2) splits from the Ninth Circuit's. In *Reich v. Interstate Brands Corp.*, for instance, the Seventh Circuit held that the payments at issue were excludable because the employer distributed them to employees regardless of the "number of days and hours per week" employees worked; in other words, the Seventh Circuit held that payments are excludable if they "do not depend at all on when or how much work is performed." 57 F.3d 574, 576, 578 (7th Cir. 1995). Of course, exactly the same could be said of the cash-in-lieu payments the City paid here: the amount an employee receives has nothing to do with the "number of days and hours per week" he

works, and the cash-in-lieu payments "do not depend at all on when or how much work is performed." The Ninth Circuit's conclusion that cash-in-lieu payments are nevertheless non-excludable cannot be squared with *Reich*.

Finally, the Sixth Circuit has also held that §207(e)(2) excludes "payments [that] are unrelated to … compensation for services and hours of service." *Featsent v. City of Youngstown*, 70 F.3d 900, 905 (6th Cir. 1995). That reading, too, would dictate that the cash-in-lieu payments made by the City are excludable, contrary to the reasoning of the decision below.

This split of authority is highly consequential and deeply troubling.[3] Cash-in-lieu programs are far from the only policies at stake; rather, the expansive reasoning of the Ninth Circuit's decision will produce recurrent splits in authority over the excludability of a whole host of other compensation policies used by countless companies. And a checkerboard regulatory landscape is especially problematic for the many companies that operate in multiple jurisdictions on different sides of the split. As explained below, the inevitable result—especially in light of the Ninth Circuit's equally baseless conclusion that the City engaged in a *knowing* violation of the FLSA—is that

[3] This split of authority also underscores the confusion caused by the anti-employer canon. In the decision below, the Ninth Circuit repeatedly cited the canon and held that the exemption in §207(e)(2) did not apply to the payments at issue. In reaching the opposite conclusion, the Sixth and Seventh Circuits did not cite the anti-employer canon at all, and the Third Circuit cited it only once in passing.

cautious employers will scale back or eliminate flexible benefit programs that might lead to additional overtime-pay requirements under the Ninth Circuit's deeply flawed interpretation of §207(e)(2).

B. The Decision Below Will Have Negative Consequences for Both Employees And Employers.

Even setting aside the Ninth Circuit's distortion of the text of §207(e)(2), *see* Pet.13-22, the decision below will have profoundly negative consequences for employers and employees alike.

If allowed to stand, the Ninth Circuit's decision may result in some additional, purely retrospective overtime compensation for the small class of plaintiffs here, a number of whom no longer work for the City. But for everyone else—the City's current employees, as well as the many public and private sector employees within the Ninth Circuit who are not parties to this case—the inevitable result will be reduced benefits and compensation going forward. That result is plainly not what Congress intended, and is particularly ironic given the Ninth Circuit's professed effort to construe the statute in favor of employees.

It is easy to see why the decision below will have a net negative impact on both employees and employers. Employers like the City are under no obligation to give employees the cash value of their unclaimed benefits; employers could just as easily retain any surplus themselves. The City's decision to implement a flexible cash-in-lieu benefits plan thus resulted in *greater* benefits for City employees than

the employees would have enjoyed otherwise. And the amounts were considerable: from 2009 to 2012, each employee stood to gain as much as $55,000 total cash in lieu of benefits—an average of nearly $14,000 per year, per employee—and the numbers were trending steadily upward. *See* Pet.App.8a-9a.

Now that those payouts will *also* trigger a mandatory obligation to pay time-and-a-half overtime compensation, however, the City and other employers like it will have a powerful incentive to simply abandon their cash-in-lieu benefits going forward. Indeed, the decision below readily acknowledged that this was the likely consequence of its holding. *See* Pet.App.21a (acknowledging, without disputing, the City's warning "that a ruling in favor of the Plaintiffs in this case will encourage municipalities to discontinue cash-in-lieu of benefits payment programs due to the consequent increase in overtime costs to the detriment of municipal employees"); *see also* Pet.App.70a-71a (district court conceding same). This inevitable reduction in benefits will harm everyone except the plaintiffs to this case, who will collect windfall retroactive money damages under the FLSA but will lose nothing if the City eliminates the cash-in-lieu benefits going forward.

Finally, the decision below is especially egregious in light of the Ninth Circuit's standard for assessing "willful" violations of the FLSA, which can double the employer's liability, *see* 29 U.S.C. §216(b), and which even a majority of the panel below recognized was in outright defiance of this Court's precedents. Pet.App.38a-40a. The Ninth Circuit reached that

harsh result even though the City "agreed to pay overtime more generously than required by law," Pet.App.34a, and even though "there was no case authority on the proper treatment of cash-in-lieu of benefits payments under the FLSA in this circuit," Pet.App.36a. Incredibly, the court even found that the City had acted in bad faith, and was thus liable for liquidated damages, thereby *punishing* the City for having adopted its generous cash-in-lieu plan in the first place. Pet.App.31a-34a.

This "gotcha" retroactive liability is profoundly unfair to employers and will benefit few outside the coterie of plaintiffs' attorneys who line up to bring such claims. Those unfortunate consequences are surely not contemplated by the FLSA, and make this Court's intervention all the more imperative.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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February 21, 2017