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 A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Title 29 U.S.C. § 207(e)(2) permits " . . . other similar payments to an employee which are not made as compensation for his hours of employment . . . " to be excluded from the Fair Labor Standards Act ("FLSA") regular rate of pay calculation. Title 29 C.F.R. § 778.224(a) states that section 207(e)(2) does not permit the exclusion of payments " . . . which, though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services." In this case, the employer makes bi-weekly payments to employees who decline medical coverage and elect instead to receive the value of their employer provided health benefits as additional wages. These "cash-in-lieu of benefits" payments are compensation for services. The questions presented are:

1. Whether cash-in-lieu of benefits payments, which are compensation for services, are excludable from the regular rate of pay calculation under 29 U.S.C. § 207(e)(2).

2. Whether an employer willfully violates the FLSA when it is "on notice" of its obligation to properly calculate the regular rate of pay, yet it arbitrarily and improperly excludes substantial payments from the regular rate calculation over a period of more than two decades, not once inquiring into whether its conduct complied with the Act.

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BRIEF IN OPPOSITION

Danny Flores, Robert Barada, Kevin Watson, Vy Van, Ray Lara, Dane Woolwine, Rikimaru Nakamura, Christopher Wenzel, Shannon Casillas, James Just, Steve Rodrigues, Enrique Deanda, and Cruz Hernandez ("Respondents") respectfully submit this brief in opposition to the petition for a writ of certiorari ("Petition") filed by the City of San Gabriel ("Petitioner" or the "City").

Petitioner seeks review of the Ninth Circuit's decision that it violated the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq*. ("FLSA"), by failing to include in the regular rate of pay "cash-in-lieu of benefits" payments made directly to its employees in the form of taxable wages on their bi-weekly paychecks. Petitioner's violation caused Respondents and other employees to be underpaid for overtime hours worked. Affirming the district court, the Ninth Circuit held: (1) that the at-issue cash-in-lieu of benefits payments were not excludable from the regular rate of pay pursuant to 29 U.S.C. § 207(e)(2) because the payments, as Petitioner concedes, are compensation for services, Pet. App. 19a-21a; and (2) that Petitioner's FLSA violation was willful pursuant to 29 U.S.C. § 255(a), entitling Respondents to a three-year statute of limitations. Pet. App. 37a.

Petitioner offers no "compelling reasons" to grant certiorari. Sup. Ct. R. 10. The Ninth Circuit's decision regarding section 207(e)(2) does not materially conflict with a decision of this Court or any circuit court, nor

does the decision below rest on an issue of national importance that needs to be settled by this Court. Sup. Ct. R. 10(a), (c). Rather, the Ninth Circuit's interpretation of section 207(e)(2) is consistent in all material respects with the decisions of all other federal courts of appeals who have addressed this particular regular rate exemption.

Across the circuits, the resolution of the same question determines the excludability of payments under the "other similar payments" clause of section 207(e)(2): Whether the payment at-issue is understood to be compensation for services. If so, those payments are not excludable from the regular rate of pay. See 29 C.F.R. § 778.224. The cash-in-lieu of benefits payments in this case were compensation for services, so the Ninth Circuit correctly concluded that those payments were not excludable from the regular rate under section 207(e)(2).

Additionally, while the Ninth Circuit correctly applied section 207(e)(2) to the payments before it, the application of section 207(e)(2) to cash-in-lieu of benefits payments was a matter of first impression. Pet. App. 13a. Therefore, granting review in this case would be premature. Other circuit courts of appeals if confronted with the same question would likely reach the same answer. Nevertheless, before this Court grants review the issue should first be allowed to percolate through the lower courts.

And lastly, the Ninth Circuit's willfulness caselaw as articulated in *Alvarez v. IBP, Inc*., 339 F.3d 894 (9th

Cir. 2003) ("*Alvarez*"), and applied in this case, is consistent with this Court's decision in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) ("*McLaughlin*"). Moreover, on these facts, Petitioner's conduct would be found willful under *McLaughlin*, irrespective of *Alvarez*.

Respondents therefore respectfully request that this Court deny the Petition.

STATEMENT OF THE CASE

1. Respondents are current and former police officers of the City of San Gabriel. Pet. App. 4a-5a. As full-time employees of the City, Respondents participated in the City's "Flexible Benefit Program", which is offered to City employees as part of the compensation they earn in exchange for work performed for the City. Pet. App. 7a-8a, 13a, 19a.

2. The Flexible Benefit Program allows employees who have alternative medical insurance, like those covered under a spouse's plan, to decline coverage and receive the value of their health benefits in the form of monetary compensation. *Id*. Additionally, full-time employees who do not use their entire monthly benefit allowance receive the remainder as taxable income. Pet. App. 8a.

3. These "cash-in-lieu" of benefits payments are made bi-weekly as designated line items on employees' paychecks. *Id*. Like other wages, these payments are

subject to federal and state tax withholdings, Medicare taxes and garnishments. *Id*.

4. In 2009, full-time City employees, including Respondents, had the option to decline medical coverage and receive instead $1,036.75 in additional wages per month. *Id*. By 2012, this number had steadily increased, and full-time City employees could elect to receive $1,304.95 in monthly wage payments in place of their health benefit compensation. *Id.*

5. Between 2009 and 2012, direct cash payments to employees made up between 42.8% and 46.7% of total plan contributions. Pet. App. 8a-9a.

6. Since the Flexible Benefit Plan's inception, the City never included the value of direct cash-in-lieu of benefits payments in the calculation of its employees' regular rates of pay. Pet. App. 9a. The City arbitrarily designated these payments as exempt "benefits", and excluded them from the regular rate calculation on that basis. *Id*. This means that for almost two decades, millions of dollars in taxable wage payments escaped inclusion in the regular rate calculation. *Id*. The City never inquired into whether these substantial payments of monetary compensation were excludable from the FLSA regular rate calculation. *Id*.

7. Respondents filed their Complaint in 2012. They alleged that the City was violating the FLSA by failing to include cash-in-lieu of benefits payments in their regular rate calculations. Pet. App. 10a. The parties filed cross-motions for Summary Judgment.

The City argued that cash-in-lieu of benefits payments were excludable from the regular rate under 29 U.S.C. §§ 207(e)(2) and 207(e)(4). Pet. App. 47a. The district court rejected these arguments. The district court determined that because cash-in-lieu of benefits payments were part of Respondents' "compensation for services" those payments were not excludable under § 207(e)(2). Pet. App. 63a-70a; see *Local 246 Util. Workers Union of Am. v. S. Cal. Edison Co.*, 83 F.3d 292, 296 (9th Cir. 1996) ("*Local 246*").

The district court also rejected Petitioner's argument for exclusion under section 207(e)(4) because the payments are undisputedly made directly to employees, not to "trustees or third persons" as the statute requires. Pet. App. 73a-74a. But even though in practice close to half of all benefit "contributions" were paid by the City directly to employees as wages, the district court determined that the City's Flexible Benefit plan was nevertheless still a "bona fide plan for providing . . . " benefits under 29 U.S.C. § 207(e)(4) and 29 C.F.R. § 778.215(a)(5). Pet. App. 83a. This meant that the City could exclude from the regular rate the value of those contributions it made on behalf of its employees that went toward employee benefits, as opposed to being paid out as cash-in-lieu thereof. Pet. App. 84a. The district court also ruled that the City was entitled to claim the 29 U.S.C. § 207(k) partial overtime exemption for law enforcement. Pet. App. 92a. And the district court held that Petitioner's violation was not willful under 29 U.S.C. § 255(a), limiting Respondents to a two-year statute of limitations; and

it further held that Respondents were not entitled to liquidated damages under 29 U.S.C § 216(b). Pet. App. 84a-86a, 103a-104a.

8. Based on the district court's rulings, the parties stipulated to the individual Respondent's damages. Pet. App. 107a. The district court entered judgment in favor of seven Respondents against the City. *Id*. The damages awarded totaled only $2,243.86. *Id*. The remaining eight Respondents, due to credits available to the City under the FLSA, and the effect of the district court's holdings regarding the section 207(k) partial exemption, the "bona fide" status of the benefit plan, and willfulness, were unable to demonstrate entitlement to damages. Pet. App. 107a-108a. The City appealed the district court's judgment, and Respondents timely cross-appealed. Pet. App. 10a-11a.

9. The Ninth Circuit affirmed in part and reversed in part. Pet. App. 4a-5a. The panel was comprised of Judge Trott, Judge Owens and Judge Davis, who is a senior status judge visiting from the Fourth Circuit Court of Appeals, and who drafted the majority opinion. *Id*.

a. Affirming the district court, the Ninth Circuit first held that the City's cash-in-lieu of benefits payments were not excludable from the regular rate of pay under section 207(e)(2) because they were compensation for services, a fact conceded by Petitioner. Pet. App. 7a-8a, 13a, 19a. In so holding, the court rejected Petitioner's argument that payments to employees, even though they are compensation for

services, can be excluded from the regular rate under section 207(e)(2) if they are not directly attributable to particular hours worked, or linked to specifically designated services provided. Pet. App. 13a.

The Ninth Circuit looked first to the "other similar payments" clause found in 29 U.S.C. § 207(e)(2), which allows employers to exclude from the regular rate payments to employees:

> . . . made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and *other similar payments to an employee which are not made as compensation for his hours of employment*. . . . (Emphasis added)

Pet. App. 12a-13a.

The Ninth Circuit looked next to 29 C.F.R. § 778.224, which in relevant part provides: "It is clear that the clause was not intended to permit the exclusion from the regular rate of payments such as bonuses or the furnishing of facilities like board and lodging which, *though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services*." (Emphasis added) 29 C.F.R. § 778.224(a); Pet. App. 14a.

The Ninth Circuit observed that the Department of Labor's interpretation of section 207(e)(2) was "directly contrary" to Petitioner's. Pet. App. 15a. Additionally, the Ninth Circuit cited to *Local 246*, 83 F.3d at 296, in which it previously concluded, consistent with 29 C.F.R. § 778.224, that in determining whether a payment can be excluded from the regular rate under section 207(e)(2), "[t]he key point is [whether] the pay or salary is compensation for work . . . ", not whether the amount of the payment varies with the quality or quantity of the work performed. Pet. App. 15a-17a.

The Ninth Circuit noted also that the analysis employed in two cases from other circuits relied on by the City, *Reich v. Interstate Brands Corp*., 57 F.3d 574 (7th Cir. 1995) ("*Reich*"), and *Minizza v. Stone Container Corp. Corrugated Container Division East Plant*, 842 F.2d 1456 (3d Cir. 1988) ("*Minizza*"), was substantially consistent with its reading and application of the statute. Pet. App. 18a-19a. In both cases, the excludability of a payment under section 207(e)(2) turned on whether the payments were generally understood as compensation to the employee. *Id*.

b. The Ninth Circuit next rejected the City's attempt to exclude its cash-in-lieu payments from the regular rate of pay under 29 U.S.C. § 207(e)(4). Pet. App. 22a. That section allows only for the exclusion of "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old age, retirement, life, accident, or health insurance or similar benefits for employees." *Id*.

Because the City's cash-in-lieu payments were made directly to employees, not to a trustee or third person, the Ninth Circuit had " . . . no trouble concluding that [they] are not properly excluded from the regular rate of pay pursuant to § 207(e)(4)." Pet. App. 23a.

The Ninth Circuit next addressed whether the funds that were actually applied by the City to employee health benefits qualified for exclusion from the regular rate. Pet. App. 23a. Reversing the district court, it determined they did not. *Id*. Section 207(e)(4) only allows for the exclusion from the regular rate of benefit contributions made "pursuant to a bona fide plan. . . ." Pet. App. 23a-24a. So the Ninth Circuit looked to the "bona fide plan" requirements set forth in 29 C.F.R. § 778.215(a)(5). Pet. App. 24a. For a plan to maintain its "bona fide" status, among other things, cash-in-lieu payments cannot be more than an "incidental" part of the plan. 29 C.F.R. § 778.215(a)(5) Pet. App. 24a. Because 42-47% of all funds allocated to Petitioner's benefit plan were paid to employees as taxable wages, the Ninth Circuit concluded that "The City's cash payments are simply not an 'incidental' part of its Flexible Benefits Plan under any fair reading of that term." Pet. App. 27a-28a. The effect of the Court's "bona fide" plan holding was that the value of *all* plan contributions had to be included in the regular rate of pay. Pet. App. 28a.

c. The Ninth Circuit, again reversing the district court, held that the City's FLSA violation was willful pursuant to 29 U.S.C. § 255(a), entitling Respondents to a three-year statute of limitations. Pet. App. 37a. A

"willful" violation occurs when the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]." *McLaughlin*, 486 U.S. at 134; Pet. App. 35a. In *Alvarez*, 339 F.3d at 908-09, the Ninth Circuit found that the employer's conduct was willful because it "'recklessly disregarded the possibility that [it] was violating the FLSA.'" Pet. App. 35a. Applying *Alvarez* and *McLaughlin* to these facts, the majority opinion found that the City's conduct was willful because the City was "'on notice of its FLSA requirements, yet [took] no affirmative action to assure compliance with them.'" Pet. App. 35a.

However, Judge Owens wrote in a concurring opinion, which was joined by Judge Trott, that willfulness case law within the Ninth Circuit had strayed too far from *McLaughlin*; and that absent *Alvarez*, he would have affirmed the district court's decision denying a three-year statute of limitations for willfulness. Pet. App. 39a-40a.

d. The Ninth Circuit reversed the district court's denial of liquidated damages to Respondents, and affirmed the district court's holding that the City qualified for the section 207(k) partial overtime exemption for law enforcement.

e. The City petitioned for rehearing and rehearing en banc. No active judge voted for rehearing and the petition was denied.

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REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S INTERPRETATION OF 29 U.S.C. § 207(e)(2) DOES NOT CONFLICT WITH ANY DECISION OF ANY OTHER COURT OF APPEALS.

There is no conflict among the circuits. Consistent with the language and purpose of the statute, the Ninth Circuit held that whether a payment can be excluded from the regular rate under the "other similar payments" clause of section 207(e)(2) depends on "[whether] the pay or salary is compensation for work . . . ", not on whether the amount of the payment varies with the quantity of the work performed. *Local 246*, 83 F.3d 292, 295; see also 29 C.F.R. §§ 778.109, 778.224; Pet. App. 15a-16a. All other circuits who have addressed the issue engage in substantially the same analysis. Petitioner's argument that payments constituting compensation for services are excludable from the regular rate of pay if they are not directly attributable to particular hours worked has been routinely rejected. Pet. 15-16.

For example, the Sixth Circuit in *Featsent v. City of Youngstown*, 70 F.3d 900, 904 (6th Cir. 1995) ("*Featsent*"), rejected a similar argument made by an employer regarding bonuses for education degrees. The Sixth Circuit explained that "Section 7(e)(2) does not exclude every payment not measured by hours of employment from the regular rate." Quoting 29 C.F.R. § 778.224(a), the Court continued, "In fact, the 'similar payments' clause of Section 7(e)(2) was not intended to exclude bonuses from inclusion in the regular rate

when those bonuses are understood to be compensation for services even when they are 'not directly attributable to any particular hours of work.'" *Featsent*, 70 F.3d at 904. The "compensation for services" standard articulated by the Sixth Circuit and the Department of Labor is precisely the one followed by the Ninth Circuit in this case. Pet. App. 18a-19a.

Additionally, the Seventh Circuit's interpretation of section 207(e)(2) is substantially no different. See *Reich*, 57 F.3d 574. In *Reich*, the Seventh Circuit rejected an interpretation of the "other similar payments" clause that excluded any payment "not measured by the number of hours spent at work," which is precisely the untenable interpretation advanced by Petitioner in this case. *Id*. at 577-78; see Pet. App. 16a-17a. Therefore the Seventh Circuit and the Ninth Circuit both focus on whether a payment qualifies as compensation for services generally, "not whether the payment is tied to specific hours worked by the employee." Pet. App. 18a.

The First Circuit, moreover, agreed that the key question with respect to the "other similar payments" clause under section 207(e)(2) is whether the payments are understood generally to be compensation for services. See *O'Brien v. Town of Agawam*, 350 F.3d 279, 296-97 (1st Cir. Mass. 2003) ("*O'Brien*"). The *O'Brien* court, citing to 29 C.F.R. § 778.207(b), which provides that "lump sum premiums which are paid without regard to the number of hours worked . . . must be included in the regular rate", also noted that section 207(e)(2) cannot be read as allowing for the exclusion

from the regular rate of all payments that do not fluctuate based on the amount of hours worked. *Id*. at 296 (" . . . [C]ourts have consistently rejected such a hard rule. . . .").

The Eighth Circuit interprets section 207(e)(2) in a similar manner. See *Acton v. City of Columbia*, 436 F.3d 969, 978-79 (8th Cir. 2006) ("*Acton*"). In *Acton*, the Eighth Circuit held that buy backs of unused sick leave could not be excluded from the regular rate of pay under section 207(e)(2). *Id*. at 978. The court observed that the language "not made as compensation for [the employee's] hours of employment" contained in section 207(e)(2) is a "mere re-articulation of the 'remuneration for employment' requirement set forth in the preambulary language of § 207(e)." *Id*. at 977. And because sick leave buy backs, though untethered to any particular hours worked, were "remuneration" generally for "hours of employment", they could not be excluded from the regular rate under section 207(e)(2). *Id*. at 979; see also *Chavez v. City of Albuquerque*, 630 F.3d 1300, 1310 (10th Cir. 2011).

Petitioner leans most heavily on *Minizza* in support of its mistaken claim that an intolerable conflict exists among the circuits. 842 F.2d at 1456. Pet. 10-11. In fact, *Minizza* does nothing but confirm the absence of any material conflict. Initially, the two lump sum payments made to employees in *Minizza* were made only as an inducement for bargaining unit members to ratify the collective bargaining agreement. *Minizza*, 842 F.2d at 1461. Discussing *Minizza*, the Eighth Circuit in *Reich* aptly pointed out that the

payments were more akin to monies received in "litigation" than payment for work. *Reich*, 57 F.3d at 578. Therefore, the lump sum payments were not excludable from the regular rate because they were untethered to the number of hours worked, as Petitioner suggests. *Minizza*, 842 F.2d at 1457, 1462. The payments were excludable because they were understood to be "nothing more or less than an inducement for ratification of the employment agreement" – hence, *not compensation for services*. *Id*. While it is true that the majority in *Minizza* looked for a connection between the payments and an amount of hours worked, the decision still was decided based on the appropriate question: whether the payments were compensation for services. *Minnizza*, 842 F.2d at 1457, 1462; see *Wheeler v. Hampton Twp*., 399 F.3d 238, 244 (3d Cir. 2005) (The Third Circuit observing that the two lump-sum payments in *Minizza* were excludable from the "regular rate because they were an incentive to conclude a labor agreement, not compensation for services rendered.").

And importantly, the Ninth Circuit stated that if confronted with the payments at-issue in *Minizza*, it would have reached the same result as did the Third Circuit. Pet. App. 19a. Again, this is because lump sum payments made as an "incentive to conclude a labor agreement" are not compensation for services. *Id*. But in this case, the regular and recurring cash-in-lieu payments made directly to fulltime employees as taxable wages on their bi-weekly paychecks are obviously and concededly compensation for services,

and therefore not subject to exclusion from the regular rate under section 207(e)(2). Pet. App. 19a-21a.

Thus, there is no split among the circuit courts of appeals that must be mended by this Court.

II. SUPREME COURT REVIEW WOULD BE PREMATURE BECAUSE THE APPLICATION OF SECTION 207(e)(2) TO CASH-IN-LIEU OF BENEFITS PAYMENTS IS A MATTER OF FIRST IMPRESSION THAT HAS NOT YET PERCOLATED THROUGH THE COURTS.

The application of section 207(e)(2) to cash-in-lieu of benefits payments was a matter of first impression. Pet. App. 13a. This fact further counsels against Supreme Court review at this juncture. No other circuit court of appeals has been given an opportunity to weigh in on this specific question. The issue should be permitted to percolate through the lower courts. Likely a consensus with the Ninth Circuit will be reached. If not, then the imagined conflict claimed by Petitioner may become a real one. But until that happens, this Court's review would be premature.

III. THE NINTH CIRCUIT CORRECTLY INTERPRETED AND APPLIED 29 U.S.C. § 207(e)(2) TO THE FACTS BEFORE IT.

This Court has observed that "[t]he keystone of Section 7(a) is the regular rate of compensation." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325

U.S. 419, 424 (1945). Interpreting section 207(e)(2) in the manner urged by Petitioner would fracture that keystone and lead to absurd results, effectively relegating the FLSA to an easily avoidable inconvenience for employers. The Ninth Circuit declined Petitioner's invitation to undermine the statute in this manner. Instead, it reached the only result supported by the language of section 207(e)(2), sound agency interpretations, and case law from other circuits: because the City's cash-in-lieu payments are compensation for services they are not excludable from the regular rate of pay under section 207(e)(2). Pet. App. 21a.

Title 29 U.S.C. § 207(e), in a near all-encompassing fashion, instructs that the "regular rate" shall include "all remuneration for employment paid to, or on behalf of, the employee. . . ." 29 U.S.C § 207(e). The statute does, however, enumerate eight specific exemptions from the regular rate for certain narrow categories of payments made to employees. See 29 U.S.C. § 207(e)(1)-(8). The burden of proof to establish the applicability of an exemption to the regular rate rests squarely with the employer. *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 206, 209 (1966). And these exemptions are to be "construed liberally in favor of employees . . . [and] narrowly . . . against the employers seeking to assert them. . . ."[1] *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

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[1] Petitioner for the first time takes issue with the application of the "narrow construction" principle to the exclusions from the

Under 29 U.S.C. § 207(e)(2), employers may exclude from the regular rate payments to employees:

> . . . made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment. . . .

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regular rate found in sections 207(e)(1)-(8). Pet. 20. This argument is waived. It was not made in the district court or in front of the Ninth Circuit. Nor did Petitioner at any point object to the doctrine's viability in any other respect below. See *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) ("question presented in petition but not raised in court of appeals is not properly before us"). In fact, in Petitioner's Opening Brief before the Ninth Circuit, it conceded the narrow construction doctrine applies to exclusions from the regular rate when it invoked the doctrine in support of its desired interpretation of section 207(e)(2). See Appellants Opening Brief, Ninth Circuit Dkt. No. 11-1, 17. Even if not deemed waived, Petitioner's argument lacks merit. This Court's holding that the doctrine was "inapplicable to a provision appearing in §203, entitled 'Definitions[]'", does nothing to negate its applicability to exclusions from the regular rate of pay. See *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 879 n.7 (2014) (stating only that exemptions from the Act are "generally" found in section 203, not that they are exclusively found in section 203.). But most importantly, while the Ninth Circuit did reference the principle, it is evident from the court's sound reasoning that the same result would have been reached regardless of its use.

In this case, it is important to start from the premise that cash-in-lieu of benefits payments are part of the compensation the City pays to full-time employees in exchange for the services they provide. Pet. App. 19a. Although it glosses over this important fact in its Petition, the City has conceded as much. *Id*. Even if Petitioner had not conceded the point, the law, the undisputed facts and commonsense required the Ninth Circuit to find that cash-in-lieu of benefits payments, just like the benefits they are paid in lieu of, are compensation for services. *Id*; see *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180, 193 (4th Cir. 2007) ("Healthcare benefits are a part of the total package of employee compensation an employer gives in consideration for an employee's services.") Cash-in-lieu of benefits payments, along with actual health benefits, fixed salaries, in addition to certain reimbursements, non-discretionary bonuses, lump sum longevity bonuses, and employer provided lodging, are types of compensation that may not be provided for a specific hour worked or task performed; but instead are rightly considered as compensation for *all* hours worked and services provided. See *Featsent*, 70 F.3d 900, 904. Therefore, Petitioner's premise that "cash-in-lieu payments are not paid to City employees as compensation based on hours worked or services provided" is not only irreconcilable with Petitioner's previous admission to the contrary, it also finds no support otherwise in the facts or law. Pet. 15.

It being settled that cash-in-lieu payments are compensation for services, Petitioner's argument boils

down to the claim that payments are excludable from the regular rate under section 207(e)(2) if they are not specifically attributable to particular hours worked, or a specified service provided. In order to get there, Petitioner effectively inserts words into the statute that are not there. Section 207(e)(2) allows for the exclusion of " . . . other similar payments to an employee which are not made as compensation for his hours of employment. . . ." Petitioner for some reason reads "particular" or "specific" in front of the phrase "hours of employment."

Petitioner further fails to adequately reconcile its extratextual interpretation of section 207(e)(2) with 29 C.F.R. § 778.224 ("It is clear that [section 207(e)(2)'s 'other similar payments'] clause was not intended to permit the exclusion from the regular rate of payments such as bonuses or the furnishing of facilities like board and lodging which, though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services.") Employer paid for health benefits or taxable wage payments made to employees in their place are no less compensation for services than employer provided lodging, which is specifically referenced in 29 C.F.R. § 778.224.

Moreover, the interpretation of section 207(e)(2) proffered by Petitioner would lead to absurd results. Suppose an employer provided its employees lodging plus the federal minimum wage for each hour worked. However, if an employee did not need the lodging, he or she could opt out and instead receive an additional

$1,000.00 per month in taxable wages. Under Petitioner's interpretation of section 207(e)(2), both the value of the lodging and the $1,000.00 per month for employees opting out would be excludable from the regular rate of pay. This is because neither the value of the lodging nor the cash payment is tied to any specific hours of work or service performed, even though both are clearly understood to be compensation for services.[2] See *Reich*, 57 F.3d at 578. Courts and the Department of Labor have uniformly and correctly concluded that the Act cannot so easily be evaded.

Petitioner claims that the Ninth Circuit's interpretation of section 207(e)(2) renders the "other similar payments" clause superfluous. Pet. 16. Not so. The Ninth Circuit has, in past cases, identified other payments that would would be excludable from the regular rate under the "other similar payments" clause. See *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004). And in this case the Ninth Circuit identified another type of payment that would be excludable under the clause, the payments made as an inducement to ratify the collective bargaining agreement in *Minniza*. Pet. App. 19a; see *Minizza*, 842 F.2d at 1457, 1462.

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[2] Like employer provided lodging, cash-in-lieu of benefits payments are analogous to payments for expenses normally incurred by an employee primarily for his or her benefit. These reimbursements must be included in the regular rate of pay. See 29 C.F.R. § 778.217(d); see *Adoma v. Univ. of Phoenix, Inc.*, 779 F. Supp. 2d 1126 (E.D. Cal. 2011).

Adopting the interpretation of section 207(e)(2) urged by Petitioner, on the other hand, would render entire subsections of section 207(e) meaningless. The very existence of the section 207(e)(4) exemption for benefit contributions shows that the statutory scheme presumes that benefit contributions are "compensation for hours of . . . employment." Pet. App. 20a. If Congress had considered fixed value benefit contributions as something other than "compensation for hours of employment", there would be no need for section 207(e)(4), because these contributions would already be excluded under section 207(e)(2). See *Reich*, 57 F.3d at 578 ("we hesitate to read § 7(e)(2) as a catch-all, one that obliterates the qualifications and limitations on the other subsections and establishes a principle that all lump-sum payments fall outside the 'regular rate,' for then most of the remaining subsections become superfluous."). Such an absurd result cannot be what Congress intended.

Thus, the Ninth Circuit correctly held that the City's cash-in-lieu of benefits payments were not excludable from the regular rate under section 207(e)(2). No further review of this decision is warranted.

IV. THE TREATMENT OF CASH-IN-LIEU OF BENEFITS PAYMENTS UNDER SECTION 207(e)(2) IS NOT AN ISSUE OF SUFFICIENT NATIONAL IMPORTANCE TO WARRANT THIS COURT'S REVIEW.

Petitioner and *Amici Curiae* claim that employers and employees alike will be devastated by the Ninth Circuit's decision. Pet. 22-23. Employers will be less likely to offer a cash-out option to their employees, the argument goes, if the Ninth Circuit's decision stands.

Initially, the Ninth Circuit did not outlaw cash-in-lieu of benefit payments. And one can see from this very case, which included 15 Plaintiffs, that employers will not automatically be crushed by soaring overtime costs if they continue to offer them. In the district court, there was a grand total of $2,243.86 in damages divided among seven of the 15 plaintiffs. Pet. App. 107a-108a. Significant offsets and credits available to the City under the FLSA, along with the effect of the section 207(k) partial overtime exemption limited overtime liability in this case dramatically and will do so elsewhere. It is true that based on the Ninth Circuit's rulings on willfulness, liquidated damages and the bona fide plan issue, those damages numbers will increase in this case, but not dramatically. So the suggestion that employers will be forced to scrap similar plans for less employee friendly options is without support.

Additionally, the relatively small percentage of employers who offer similar plans have several options

that do not involve immediately punishing their employees for their own FLSA violations by eliminating cash-in-lieu payments. Employers can maintain their current plans and simply increase their employees' regular rates in accordance with the law. They can make very minor adjustments to their plans to offset potential increased overtime costs. Additionally, some plans allow for employees to accept the value of their health benefits in the form of contributions to qualifying deferred compensation or retirement plans, which if done correctly preserves the excludability of those payments under section 207(e)(4). And public employers like Petitioner, and other unionized private employers, moreover, could lessen the already slight impact of the Ninth Circuit's ruling through the collective bargaining process. While the sums included in calculating the regular rate of pay are non-negotiable for purposes of overtime pay required by the FLSA, the rate at which contract overtime is paid – overtime required under a CBA but not federal law – is negotiable.

Amici Curiae International Municipal Lawyers Association, et al., claim that differing overtime rates for employees electing cash payments and employees receiving benefits is somehow illogical or inequitable. Brief for *Amici Curiae* International Lawyers Association, et al., in Support of Pet. 10-11. But it is not a novel concept that an employer's decision to offer, or an employee's decision to receive, compensation in one form versus another carries legal consequences both under the FLSA and otherwise. For instance, differing

tax treatment. Note as well that this feared disparity will not be an issue in San Gabriel, given that the Ninth Circuit held that all benefit contributions, whether taken in cash or benefits, need to be included in the regular rate due to the non-bona fide status of the plan.

Most importantly, as the Ninth Circuit rightly observed, "[t]he potential effect of [its] ruling on municipal decision-making d[id] not give [the Court] license to alter the terms of the FLSA." Pet. App. 21a. Accordingly, Respondent respectfully requests that this Court deny the instant Petition. The policy arguments made by Petitioner and *Amici Curiae* in opposition to the Ninth Circuit's ruling are matters better resolved by Congress.

V. PETITIONER'S INDIRECT CHALLENGE TO THE NINTH CIRCUIT'S BONA FIDE PLAN HOLDING UNDER SECTION 207(e)(4) IS NOT PROPERLY PRESENTED FOR THIS COURT'S CONSIDERATION.

Petitioner in passing takes issue with the Ninth Circuit's ruling that the City's flexible benefit program did not qualify as a bona fide plan pursuant to section 207(e)(4) and 29 C.F.R. § 778.215(a)(5). Pet. 19. However, Petitioner does not specifically set forth its challenge in a question presented, and merely argues that reversal of the section 207(e)(2) holding would require reversal of the Ninth Circuit's bona fide plan holding. Pet. 19.

But this is not necessarily so. The plan's "bona fide" status under section 207(e)(4) hinged on whether the cash-in-lieu payments were more than an "incidental" part of the plan under 29 C.F.R. § 778.215(a)(5). Pet. App. 27a-28a. The potential excludability of cash-in-lieu payments under a different subsection was not part of the analysis. A holding that cash-in-lieu payments from the benefit plan are excludable under section 207(e)(2) does not necessarily require a holding that the plan itself qualifies as "bona fide" under section 207(e)(4). And even if answering the section 207(e)(2) question did have bearing on the bona fide plan question, Petitioner has failed to satisfy Sup. Ct. R. 14.1(a). See *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995), O'Connor, J., dissenting ("The mere fact that one question must be answered before another does not insulate the former from Rule 14.1(a) and other waiver rules.").

VI. THE NINTH CIRCUIT CORRECTLY APPLIED THIS COURT'S WILLFULNESS STANDARD.

Under 29 U.S.C. § 255(a), willful violations of the FLSA entitle aggrieved employees to a three-year statute of limitations. A "willful" violation occurs when the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]." *McLaughlin v. Richland Shoe Co*., 486 U.S. 128, 134 (1988) ("*McLaughlin*"). In *McLaughlin*, this Court rejected the "*Jiffy June*" standard, which

required a finding of willfulness any time an employer knew that there was a possibility that its conduct was governed by the FLSA (that the FLSA was "in the picture"). *Id*. at 134-35; see *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1971) ("*Jiffy June*"). Under the *Jiffy June* standard, FLSA violations were deemed "willful" even if the employer took reasonable steps to ascertain whether its conduct violated the law, like consulting an attorney, in an attempt to comply with the Act. *Id*. at 1042-43; see also *Castillo v. Givens*, 704 F.2d 181, 193 (5th Cir. 1983) (recognizing that under the *Jiffy June* standard "a violation committed in good faith can indeed be 'willful.'").

In *Alvarez*, 339 F.3d 894, applying *McLaughlin*, the Ninth Circuit found that the employer's conduct was willful because it "'recklessly disregarded the possibility that [it] was violating the FLSA. (Citation)'" *Id*. at 909. The Ninth Circuit explained that the employer " . . . was on notice of its FLSA requirements, yet took no affirmative action to assure compliance with them." *Id*. The employer " . . . could easily have inquired into" the meaning of the relevant FLSA terms and the types of steps necessary to comply therewith. . . . It failed to do so." *Id*.

In this case, the Ninth Circuit's majority opinion, citing *Alvarez*, correctly found that Petitioner's conduct was willful because Petitioner was "'on notice of its FLSA requirements, yet [took] no affirmative action to assure compliance with them.'" Pet. App. 36a.

However, Judge Owens wrote in his concurring opinion that *Alvarez*'s "gloss" on *McLaughlin* hued too close to the *Jiffy June* "in the picture" standard, and that absent *Alvarez*, he would have upheld the district court's finding on willfulness. Pet. App. 40a-41a. Petitioner now argues that *Alvarez* is incompatible with *McLaughlin*. Pet. 16. Not so.

Initially, *Alvarez* is far from the unholy resurrection of the *Jiffy June* standard feared by the concurring judges. Pet. App. 39a. *Alvarez*'s holding that an employer has acted willfully when it was "on notice of its FLSA requirements, yet [took] no affirmative action to assure compliance with them[]", *Alvarez*, 339 F.3d at 908-09, is quite distinct from the "in the picture" standard under *Jiffy June*. Under *Jiffy June*, conduct was found willful even if the employer attempted to ascertain whether it was complying with the Act. See *Jiffy June*, 458 F.2d at 104-43.

It is true that *McLaughlin* requires more than mere negligence. But the *Alvarez* Court properly recognized that an employer who knows where to look to determine its obligations under the FLSA, but refuses to look there, is acting recklessly. *Alvarez*, 339 F.3d at 908-09. This is especially the case on these facts based on Petitioner's arbitrary exclusion of millions of dollars in cash-in-lieu payments from its employees' regular rates of pay for a period of more than 20 years. Pet. App. 9a. Between 2009 and 2012 cash-in-lieu payments accounted for between 42-47% of all funds allocated to the Petitioner's "benefit" plan. Yet no one at the City ever looked into whether the payments

were excludable from the regular rate of pay. Instead of taking steps to determine whether it was meeting its obligations under the FLSA, Petitioner merely labeled the payments as exempt "benefits", the result that best served the City's financial interests, and never looked back. This conduct constitutes "reckless disregard" under any fair reading of the phrase.[3] See *McLaughlin*, 486 U.S. at 134; *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc*., 515 F.3d 1150 (11th Cir. 2008) ("*Alvarez Perez*"); see also 5 C.F.R. § 551.104.

In addition to being consistent with *McLaughlin*, *Alvarez* is consistent with other circuits' willfulness precedent. The Eleventh Circuit, citing to the Code of Federal Regulations, defines reckless disregard as the "'failure to make adequate inquiry into whether conduct is in compliance with the Act.' 5 C.F.R. § 551.104." *Alvarez Perez*, 515 F.3d 1150, 1163. This standard nearly mirrors *Alvarez*'s language on "recklessness." Moreover, the Second Circuit in *Herman v. RSR Sec. Servs.*, 172 F.3d 132, 143 (2d Cir. 1999), found

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[3] The dissent in *McLaughlin*, 486 U.S. at 139 (Marshall, J., dissenting), suggests that this Court did not necessarily view its ruling as a safe harbor for employers who demonstrate a cavalier indifference to their obligations under the Act, as did Petitioner. Justice Marshall wrote:

> . . . It is not entirely clear that the "knowing or reckless" definition of willfulness adopted by the Court will differ significantly in practical application from the approach that I would adopt. Employers who know that there is an appreciable possibility that the FLSA covers their operations but fail to take reasonable measures to resolve their doubts may well be deemed "reckless" in many cases under the *Thurston* standard. *Id*.

willfulness where the employer did not have "actual knowledge of the violative practices", but "the proof demonstrated he recklessly disregarded the possibility that [the company] was violating the FLSA." This application of the willfulness standard is also in line with *Alvarez*, which itself cites *Herman*. See *Alvarez*, 339 F.3d at 909-10.

Accordingly, because *Alvarez* is consistent with *McLaughlin*, this Court's review is unwarranted. This Court has recently declined to address the Ninth Circuit's willfulness standard, and nothing about this case suggests it should be addressed now. See *City of Los Angeles v. Haro*, 745 F.3d 1249 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 138 (2014). Further, no active Ninth Circuit Judge, including Judge Owens, voted to rehear the instant case en banc. And even if this Court were inclined to evaluate the Ninth Circuit's willfulness caselaw, this case is not the vehicle to use, as the requisite "reckless disregard" is present under *McLaughlin*, irrespective of *Alvarez*.

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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