No. 16-911

IN THE

Supreme Court of the United States

CITY OF SAN GABRIEL,

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 of *Amici Curiae* International Municipal Lawyers Association, International Public Management Association for Human Resources, National Public Employer Labor Relations Association, National School Boards Association, California State Association of Counties, League of California Cities, and California Special Districts Association in Support of Petitioner

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STATEMENT OF INTEREST[1]

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan professional organization comprising local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state leagues, and individual attorneys. Established in 1935 and consisting of more than 2,500 members, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country.

The International Public Management Association for Human Resources (IPMA-HR) represents human resource professionals and human resource departments at all levels of government. IPMA-HR was founded in 1906 and has over 8,000 members. IPMA-HR promotes public sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

The National Public Employer Labor Relations Association (National PELRA) is a national nonprofit organization for public sector labor relations and human resources professionals. The National PELRA has a network of state and regional affiliations, with over 2500 members, that represent agencies

[1] No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsel of record for all parties received notice of Amici's intention to file this brief more than 10 days before it was due, and all parties have consented to its filing.

employing more than 4 million federal, state, and local government workers in the full scope of public sector labor relations. The National PELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest; to promote the interests of public sector management in the judicial and legislative arenas; and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

The National School Boards Association (NSBA) represents state associations of school boards across the country and their more than 90,000 local school board members. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before Congress and in federal and state courts, and frequently participates in cases involving the impact of federal employment laws on public school districts.

The California State Association of Counties (CSAC) is a nonprofit corporation. Its membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is overseen by the Litigation Overview Committee of the County Counsels' Association of California. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this is a matter with the potential to affect all California counties.

The League of California Cities (the League) is an association of 474 California cities dedicated to providing for the public health, safety, and welfare of

their residents, and to enhancing the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, composed of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California Special Districts Association The California Special Districts Association (CSDA) is a California nonprofit corporation consisting of approximately 1,000 special districts throughout the state. These special districts provide a wide variety of public services to both suburban and rural communities, including water supply, treatment, and distribution; sewage collection and treatment; fire suppression and emergency medical services; recreation and parks; security and police protection; solid waste collection, transfer, recycling, and disposal; library; cemetery; mosquito, and vector control; road construction and maintenance; pest control and animal control services; and harbor and port services. CSDA is advised by its Legal Advisory Working (LAW) Group, made up of attorneys from all regions of the state with an interest in legal issues related to special districts. CSDA monitors litigation of concern to its members and identifies those cases that are of statewide significance. CSDA's LAW Group has identified this case as being of such significance with the potential to affect California special districts.

SUMMARY OF ARGUMENT

The Fair Labor Standards Act ("FLSA") requires employers to compensate employees at one and a half times their "regular rate" of pay for overtime hours. 29 U.S.C. § 207(a). To properly calculate that "regular rate" of pay, the employer must take into account "all remuneration for employment paid to, or on behalf of, the employee," subject to certain statutory exclusions. *Id.* § 207(e). As relevant here, one such exclusion exempts payments that "are not made as compensation for [an employee's] hours of employment." *Id.* § 207(e)(2).

For decades, public employers organized their affairs in reliance on the plain language of the statute. Among other things, they established flexible benefits plans—akin to the plan created by Petitioner City of San Gabriel ("San Gabriel" or the "City")—that allowed employees who declined all or part of the health coverage offered under such plans to receive some form of cash payments in lieu of any unused benefits. Employers concluded that these cash-in-lieu payments should not be included in total remuneration when calculating the regular rate of pay. After all, these payments were not tied to an employee's "hours of employment." *Id.* § 207(e)(2). Rather, they resulted from an employee's decision to accept or forgo employer-provided medical coverage (either because the employee had an alternative source of coverage or because, prior to the Affordable Care Act, coverage was not mandatory).

The Ninth Circuit upended years of employers' expectations by misreading the FLSA in numerous ways. Most significantly, the court read the phrase

"made as compensation for . . . hours of employment," *id.* § 207(e)(2), to mean "*regardless* of whether [payments are] specifically tied to . . . hours" of employment. Pet. App. 19a (emphasis added). This led the court to conclude that cash-in-lieu payments must be included when calculating the regular rate of pay. Pet. App. 21a. It went on to declare that because many employees had decided to avail themselves of the City's generous offer of cash in lieu of benefits, the City's entire flexible benefits plan was not "a bona fide plan for providing . . . health insurance or similar benefits for employees" under 29 U.S.C. § 207(e)(4). Pet. App. 21a-28a. Consequently, the court required the City to include *all* payments under the plan—whether made directly to employees in cash or to trustees/third parties for the provision of health coverage—when calculating the regular rate of pay. Pet. App. 28a. The Ninth Circuit then relied on its watered-down willfulness standard to add a year to the two-year statute of limitations. Pet. App. 34a-37a. After thus increasing potential damages by 50% (i.e., by subjecting the City to three years of liability rather than two), the court doubled the total award by concluding that the City had not acted in good faith and was therefore liable for liquidated damages. Pet. App. 31a-34a.

"Apparently no good deed goes unpunished." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 31 (2008). No provision of federal law requires employers to offer employees a plan that allows them to receive cash payments if they opt out of medical benefits. Indeed, many employers choose to reap the savings from unused benefits. Yet under the Ninth Circuit's ruling, employers who instead decided to

make cash-in-lieu payments available to their employees now face a wave of lawsuits and potentially significant liability—all for their generosity to their employees. *See* Pet. at 23 n.4 (listing twenty-nine pending cases alleging violations of the Ninth Circuit's newly minted standard).[2]

As Petitioner argues, the circuits are divided on the scope of § 207(e)(2). *See* Pet. at 10-13. While the Ninth Circuit looks to "whether a given payment is properly characterized as compensation, regardless of whether the payment is specifically tied to the hours an employee works," Pet. App. 19a, the Third Circuit properly focuses on whether the payment is "conditioned on a certain number of hours worked or on an amount of services provided," *Minizza v. Stone Container Corp. Corrugated Container Div. E. Plant*, 842 F.2d 1456, 1461 (3d Cir. 1988). *See* Pet. at 10-22. And as Petitioner further maintains, the Ninth Circuit's interpretation of the FLSA's willfulness standard cannot be reconciled with this Court's precedent. *See* Pet. at 25-31.

Rather than reiterate those arguments, Amici submit this brief to highlight the practical implications of the Ninth Circuit's decision, particularly as it relates to employers in the public sector. To that end, Amici first discuss the

[2] At least three additional complaints, not listed in Petitioner's brief, have been filed. *See* Compl., *Quiroz v. City of Ceres*, No. 2:17-at-00170 (E.D. Cal. Feb 17, 2017); *Foster v. County of Solano*, No. 2:17-cv-00159 (E.D. Cal. Jan 24, 2017); *Anderson v. Marinwood Cmty. Servs. Dist.*, No. 3:16-cv-07381 (N.D. Cal. Dec. 29, 2016). That means that, in the state of California alone, there are now over thirty lawsuits pending against public-sector employers alleged to offer health plans with a cash-in-lieu of benefits option.

circumstances and motivations that prompted the development of flexible benefit plans offering cash-in-lieu payments. Amici then illustrate the catch-22 in which the Ninth Circuit has placed many public employers. Maintaining their existing cash-in-lieu plans will result in substantial additional liabilities as well as inequitable (and irrational) pay differentials. Not only will employers be forced to pay increased overtime rates, but those rates will vary among employees based solely on whether they have an alternative source of medical coverage. And the only way for employers to avoid these added costs and pay disparities is to discontinue programs that provide a significant source of income to some of their employees.

ARGUMENT

I. Cash-in-Lieu Payments Allow Employers to Equalize Employee Benefits Packages

A significant portion of the American population has long received health coverage through employer-based plans. Over time, many employees came to expect such plans. Indeed, as this Court has acknowledged, employer-provided "[h]ealth insurance is a benefit that employees value." *Burwell v. Hobby Lobby Stores*, *Inc.*, 134 S. Ct. 2751, 2776 (2014).

Nonetheless, other employees do not need health insurance from their employers, typically because they receive alternative medical coverage through a spouse's plan. Consequently, employees who choose to participate in an employer's health plan receive a valuable benefit that their colleagues with alternative coverage do not. As an equalizing measure, many employers decided to offer some form

of financial credit to employees with alternative coverage. This was viewed as a way to provide them with all or part of the value of the health benefit received by their colleagues who enroll in employer-provided coverage.

Employers have structured these cash-in-lieu plans in a variety of ways. Some employers, like Petitioner, "furnish[] a designated monetary amount to each employee for the purchase of medical, vision, and dental benefits." Pet. App. 7a. "If an employee elects to forgo medical benefits because she has alternate coverage, she may receive the unused portion of her benefits allotment as a cash payment added to her regular paycheck." Pet. App. 8a. Other employers designate a specific amount (which can range from around a hundred dollars to well over a thousand dollars a month) that employees receive if they opt out of employer-provided benefits.

Particularly in the public sector, such cash-in-lieu plans have been a valuable recruiting tool. Among other things, the ability to obtain cash in lieu of benefits can make a public-sector salary more attractive to potential employees who have alternative coverage. Cash-in-lieu plans can also help employers keep benefits' costs down. A city that offers employees a $250 per month cash payment for opting out of benefits could induce, for example, a parent to enroll the family on a spouse's plan. This, in turn, would result in a savings to the employer on coverage premiums.

While it is difficult to pinpoint exact figures, a substantial number of employers nationwide offer such plans. In California alone, a 2014 employee

benefits survey covering ninety-one cities, counties, and special districts revealed that seventy percent of the surveyed organizations offered cash in lieu of medical benefits. *See* Keenan & Associates, 2014 Employee Benefits Survey 3-5, 17 (2014); *see also* Pet. at 23 n.4 (listing numerous pending lawsuits filed against public entities alleged to offer such plans).

II. The Ninth Circuit's Decision Places Public Employers in an Impossible Position

The Ninth Circuit's ruling has placed public employers offering cash-in-lieu programs in an untenable position. If that ruling stands, they will be forced to choose between maintaining their existing programs—which will result in substantial increased costs and inequitable overtime rates among employees who select different benefits options—or eliminating or reducing cash-in-lieu payments—which will deprive their employees of a valuable benefit.

1. Employers who decide to retain their cash-in-lieu plans will face a number of challenges. At the most basic level, they will be forced to pay substantially "increase[d] . . . overtime costs." Pet. App. 21a. For example, "[i]f the city implements the changes mandated by the Ninth Circuit" in this case, "San Gabriel estimates they could cost . . . an extra $350,000 per year," which "could require cuts in city programs and overtime hours."[3] Ironically, employers that offer the most generous cash-in-lieu programs

[3] Christopher Yee, *San Gabriel Might Take Its Police Officers to the Supreme Court Over Benefits*, Pasadena Star-News (Aug. 29, 2016), http://www.pasadena starnews.com/general-news/20160829/san-gabriel-might-take-its-police-officers-to-the-supreme-court-over-benefits-heres-why.

will be the most heavily penalized—the higher the cash-in-lieu payment, the higher the overtime rates. Likewise, jurisdictions with large numbers of employees forced to work significant amounts of overtime—i.e., jurisdictions already confronting staffing shortages or a high demand for first responders due to wildfires, mudslides, or other emergencies—will see substantially increased costs.

These increased costs go beyond higher overtime rates. Depending on how employers have structured their labor agreements, changes in the regular rate of pay could also impact pension contributions, wage continuation agreements for injured workers, the value of paid time off that is cashed out at resignation/retirement, or other similar programs.

Moreover, insofar as employers offer cash-in-lieu payments as part of "a bona fide plan for providing . . . health insurance or similar benefits for employees," 29 U.S.C. § 207(e)(4), including such payments in the regular rate will result in unequal overtime compensation, with employees receiving different pay for the same work. Consider two police officers who make $30 per hour. One has no alternative medical coverage, and therefore participates in his municipality's health plan. Because the other officer is covered by his spouse's health plan, he decides to take advantage of his employer's cash in lieu option. That results in an additional payment of $300 per week (an amount roughly equivalent to the figure paid by the City of San Gabriel in 2012). Were these two police officers to each work 50 hours over the course of a workweek (i.e., 40 hours of regular work and 10 hours of overtime), the regular rate of pay for the officer who

participates in the city's health plan would remain at $30 per hour. The regular rate for his colleague who opted out, however, would jump to $36 per hour.[4] That means that over and above each officer's hourly wage, the first officer would receive an additional $15 per hour for his 10 hours of overtime,[5] while the second officer would receive an extra $18 per hour *for the exact same work*.[6] In other words, employees who are unable to opt out—such as those who need employer-provided coverage for their dependents—will have a lower overtime rate solely because they do not have an alternative coverage option for themselves or their families. There is no basis in law or logic for this disparity.

As the example above illustrates, making the regular rate of pay turn on an individual employee's benefits election also means employers will have to track those elections to properly calculate the regular

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[4] "The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." 29 C.F.R. § 778.109. For the officer participating in the employer's health plan, that means dividing $1500 (50 hours at $30 per hour) by 50. For the officer that opted out, it requires adding the $300 cash-in-lieu payment to $1500 (50 hours at $30 per hour) and dividing that total by 50.

[5] For the week, he would be paid $30 an hour (i.e., his regular rate of pay) for the first 40 hours of the week, and then $45 per hour (i.e., one and half times his regular rate of pay) for his 10 hours of overtime. *See* 29 C.F.R. § 778.110(a).

[6] For the week, he would effectively be paid $36 an hour (i.e., his regular rate of pay) for the first 40 hours of the week, and then $54 per hour (i.e., one and half times his regular rate of pay) for his 10 hours of overtime. *See* 29 C.F.R. § 778.110(b).

rates of pay for individual employees. This, in turn, will result in increased administrative costs and budgeting difficulties as employers attempt to discern exactly what their overtime expenditures will be. For example, assume a flexible benefits plan that allots a designated amount of money to employees and allows them to retain whatever portion they do not spend on medical, dental, or vision benefits. Under those circumstances, an employee that selects vision and dental coverage will have a different regular rate of pay than an employee who selects only medical, who, in turn, will have a different rate than an employee that selects only vision. The potential permutations only increase if employers make *more* options available to their employees (i.e., long-term care, health savings accounts, group-term life insurance), once again penalizing employers for offering additional benefits.

2. Faced with these costs and complexities, many employers may react to the Ninth Circuit's ruling by eliminating their cash-in-lieu programs altogether. Indeed, the panel itself acknowledged that its ruling could "encourage municipalities to discontinue cash-in-lieu of benefits payment programs due to the consequent increase in overtime costs," and that the elimination of such programs would be "to the detriment of municipal employees." Pet. App. 21a; *see also* Pet. App. 70a-71a (describing this argument as "compelling").

The temptation for employers to simply refuse to offer cash in lieu of benefits is real. Some employers have already modified their plans in light of the

Ninth Circuit's decision, and more will likely follow.[7] After all, eliminating their cash-in-lieu programs would allow cash-strapped municipalities not only to avoid the increased costs detailed above, but also to recoup whatever amounts their current programs pay out to employees.

And the amount of money at stake is significant. While the size of payments available to employees who opt out varies depending on the cash-in-lieu program at issue, San Gabriel "employees who declined medical coverage received . . . $1,304.95" per month—$15,660 per year—in 2012. Pet. App. 8a.[8]

These cuts would have a major impact on affected employees. In 2012, the median pay for full-time, year-round City employees was $96,976 (excluding benefits).[9] Thus, if San Gabriel were to eliminate its cash-in-lieu program, an employee receiving the median income who opted out of medical coverage

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[7] For example, Tuolomne County, California, now offers employees only $100 per month if they opt out of coverage. *See* Mem. of Understanding for 2017–2021 Between the Tuolumne County Health Care Unit & the County of Tuolumne art. 11, http://www.co.tuolumne.ca.us/ DocumentCenter/View/2543. Previously, they were able to retain whatever portion of a $1,000 allotment they did not use on benefits. *See* Mem. of Understanding for 2016 Between the Tuolumne County Health Care Unit & the County of Tuolumne art. 12, http://tuolumneco.granicus.com/MetaViewer.php?view_id=5&clip_id=198&meta_id=33644.

[8] This amount had increased annually. "[A]n employee who declined medical coverage" in 2009 received $1,036.75, $1.112.28 in 2010, and $ 1,186.28 in 2011. Pet. App. 8a.

[9] Summary for San Gabriel (2012), Transparent California, http://transparentcalifornia.com/salaries/2012/ san-gabriel/summary/ (last visited Feb. 17, 2017).

would lose approximately fourteen percent of his pre-tax income. Of course, that percentage—and the corresponding impact of its loss—would be substantially higher for employees making less than the median salary.

If the Ninth Circuit's decision does in fact prompt employers to drop their cash-in-lieu offerings, that result would turn the FLSA on its head. A statute expressly designed to ensure a "minimum standard of living necessary for [the] health, efficiency, and general well-being of workers," 29 U.S.C. § 202(a), should not be interpreted in a way that will, as a practical matter, *reduce* the standard of living for numerous workers throughout the country—particularly those employed in the public sector. *Cf. Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945) (stating that the FLSA was enacted to, inter alia, "protect certain groups of the population from substandard wages").

For that reason, it is ironic that the Ninth Circuit invoked the narrow construction canon to decide the "close question" of whether "the City's cash-in-lieu of benefits payments may . . . be excluded under § 207(e)(2)." Pet. App. 13a. According to the panel, that canon requires courts to construe FLSA exemptions "narrowly in favor of the employee." Pet. App. 21a. But a construction that ultimately compels employers to drop a program that provides substantial monetary benefits to employees—up to $15,660 annually in this case—can hardly be described as an interpretation that "favor[s]" employees. Indeed, if offered the choice between (1) the state of affairs prior to the Ninth Circuit's decision and (2) a scenario in which including cash-

in-lieu payments in the regular rate resulted in the elimination or substantial reduction of such payments, the vast majority of affected employees would naturally choose the former.

CONCLUSION

For the foregoing reasons, Amici support the City's petition for certiorari, and respectfully request that the petition be granted.

Respectfully submitted,

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