No. 21-984

IN THE

Supreme Court of the United States

HELIX ENERGY SOLUTIONS GROUP, INC.;
HELIX WELL OPS, INC.,

Petitioners,

v.

MICHAEL J. HEWITT,

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Petitioners paid Michael Hewitt by the day to work as a "toolpusher" on an offshore oil rig for 28 consecutive 12-hour days every other month with no overtime. Petitioners claim Hewitt was exempt from the Fair Labor Standards Act's overtime requirements because he worked in a "bona fide executive capacity." To establish that exemption, the Department of Labor's duly promulgated regulations require Petitioners to satisfy three tests: (i) the salary-basis test; (ii) the salary-level test; and (iii) the duties test.

Consistent with decisions of the Sixth and Eighth Circuits, and with no appellate court reaching a contrary conclusion, a 12-judge *en banc* Fifth Circuit majority held that Hewitt's day-rate compensation failed both the general "salary basis" rule, 29 C.F.R. § 541.602(a), and § 541.604(b). The latter "incorporates in the regulation the Department of Labor's long-standing interpretation of the existing salary basis regulation" and accommodates employers who wish to compute employees' pay by the hour, day, or shift. 69 Fed. Reg. 22,122, 22,183 (Apr. 23, 2004). It requires a minimum salary guarantee at the required salary level and, to ensure that the guarantee is a bona fide salary, a "reasonable relationship" to the employee's earnings for the normal scheduled workweek.

Petitioners admit they did not satisfy § 541.604(b) but claim they did not have to do so because of § 541.601. That section streamlines the *duties* test for employees who make more than $100,000 per year but expressly applies the same *salary-basis* test that applies to all other employees. The question presented is whether Petitioners' compensation of

Hewitt satisfied the regulations' applicable salary-basis requirements as set forth in 29 C.F.R. §§ 541.602 and 541.604(b).

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INTRODUCTION

The Fair Labor Standards Act ("FLSA") requires employers to pay overtime to nonexempt employees who work more than 40 hours a week. Section 213(a)(1) of the FLSA exempts employees who work "in a bona fide executive capacity" as "defined and delimited" by duly promulgated Department of Labor regulations pursuant to authority delegated by Congress. Those regulations require employees to meet three tests to qualify for the exemption: (i) the salary-basis test; (ii) the salary-level test; and (iii) the duties test.

This case is about the salary-basis test. The requirement that executives be paid "on a salary basis" dates back 80 years and reflects the Secretary's repeatedly reaffirmed determination that executives are "nearly universally paid on a salary basis" and that a salary is a "hallmark of exempt status" and an important indicator of the status, prestige, and autonomy that such positions entail.

As set forth in the regulations, and consistent with the common understanding of a salary, payment by the hour, day, or shift is not payment "on a salary basis." Under the general rule (set forth in 29 C.F.R. § 541.602(a)), employers must pay workers a "predetermined amount" at the required salary level on a weekly or less frequent basis and must pay the "full salary" "without regard to the number of days and hours worked." Section 541.604(b) of the regulations allows employers to compute employees' pay by the hour, day, or shift but only where the "employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary

basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned." The reasonable relationship test thus ensures that the minimum guarantee is actually payment for the workweek rather than a disguised (or here, entirely undisguised) day rate that leaves most of the workweek subject to deductions prohibited for salaried compensation.

As a 12-judge *en banc* majority of the Fifth Circuit held, Petitioners failed to pay Respondent Michael Hewitt "on a salary basis." Instead, Petitioners exclusively paid Hewitt by the day for "hitches" he worked as a toolpusher on an offshore oil rig where he alternated 12-hour shifts with another toolpusher for 28 consecutive days per hitch. As a day-rate employee, his compensation did not meet the general rule because he was paid "with"—not "without"—"regard to" the amount of days he worked and because he did not receive an amount that was "predetermined" for any week. Because it is undisputed that Petitioners did not satisfy the requirements in § 541.604(b) for employers who wish to pay their employees by the hour, day, or shift, Hewitt was not exempt, and Petitioners violated the law by not paying him overtime.

Petitioners first argue (cursorily) that they met § 541.602(a)'s general rule because Hewitt's day rate exceeded the required weekly salary level. This argument wrongly conflates the salary-basis and salary-level tests, and disregards the text, structure, and history of the regulations. For this reason alone, the decision must be affirmed.

Petitioners also assert that they did not have to comply with § 541.604(b) if they meet the duties and compensation level requirements of § 541.601 for "highly compensated employees" or "HCEs." That section does not help Petitioners. It expressly incorporates the same salary-basis test that applies to all employees. Section 541.604(b) merely reflects the Secretary's understanding of how to meet the salary-basis test while still paying employees by the hour, day, or shift. *See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,183 (Apr. 23, 2004) ("2004 Final Rule") (the reasonable-relationship requirement "incorporates" the Department's "long-standing interpretation of the existing salary basis regulation, which is set forth in agency's Field Operations Handbook and in opinion letters").

Petitioners seek to manufacture conflict by characterizing §§ 541.601 and 541.604(b) in vague and deliberately imprecise terms that ignore what they actually say and do. Once their respective requirements and functions are appreciated, however, the conflict disappears. Section 541.604(b) elucidates the Secretary's understanding of the salary-basis test as applied to hourly, daily, and shift-based employees. Section 541.601 streamlines the duties test and imposes new compensation level requirements while incorporating the requirements of the salary-basis test which, as the Department states in the preamble, are "easily applied" and "clear." There is no conflict and not the barest indication that the Secretary applied different salary-basis requirements to HCEs

and non-HCEs either generally or as applied to hourly, daily, or shift-based employees.

Petitioners also halfheartedly assert that the correct interpretation would create "tension" with the statute. This argument is waived (because it was not raised below) and is otherwise unserious. Petitioners offer no analysis of the statutory text, ignore the regulations' purpose and text, and do not even mention the deference owed to the Secretary's judgment under both *Chevron* and the broad authority that Congress delegated to the Secretary to "define" and "delimit" the executive exemption.

Petitioners are left to repeat their view that Hewitt received excessively "handsome pay" to receive overtime under the FLSA which they say was meant to protect against substandard wages. But even putting aside that the duly promulgated regulations and statutory authority are clear, the well-understood purpose of the FLSA's *overtime* provisions is to increase incentives to spread work and financially penalize employers for working employees more than 40 hours a week. That goal is amply served by requiring employers to ensure that employers pay a bona fide weekly salary to hourly, daily, and shift-based employees they wish to exempt as executives. And it is amply served by requiring overtime for a day-rate toolpusher who worked 84-hour weeks on an offshore oil rig.

At the same time, Helix's atextual interpretation would undermine worker protections across all industries to accommodate the preference of Petitioners and petroleum industry *amici* to avoid paying their day-rate employees overtime and a bona

fide salary. We show in Part I.C that Petitioners' interpretation of the regulations could not be confined to HCEs, and regardless, adoption of their position would enable employers to reduce the salaries of nurses and countless hourly, daily, and shift-based workers across the economy to the minimum (now $684 per week), subject most of their weekly pay to deductions that are prohibited for salaried compensation, and pay them no overtime no matter how long they work. The salary-basis regulations are designed to avoid that precise result.

The judgment of the Fifth Circuit must therefore be affirmed.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The FLSA, the EAP Exemption, and Its Three Tests

The FLSA requires employers to pay employees overtime compensation for all hours worked over 40 in a workweek. The requirement of "a premium rate of pay for all hours worked over 40 in a workweek is a cornerstone of the Act, grounded in two policy objectives." *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 81 Fed. Reg. 32,391, 32,449 (May 23, 2016) ("2016 Final Rule"). The "first is to spread employment . . . by incentivizing employers to hire more employees rather than requiring existing employees to work longer hours." *Id.* at 32,394 (citing *Davis v. J.P. Morgan Chase*, 587 F.3d 529, 535 (2d Cir.

2009)). The "second policy objective is to reduce overwork and its detrimental effect on the health and well-being of workers." *Id.* at 38,519.

The FLSA exempts certain employees from its overtime provisions, including workers "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a). This statutory exemption is often called the "EAP" or "white-collar" exemption.

The FLSA does not define the terms "executive, administrative, or professional" but "grants the Secretary broad authority to 'defin[e] and delimi[t]' the scope of the exemption." *Auer v. Robbins*, 519 U.S. 452, 456 (1997). Regulations promulgated pursuant to that authority are entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Auer*, 519 U.S. at 457.

Employers may only claim the EAP exemption if they can prove that their employees satisfy three tests: (i) the "salary basis" test; (ii) the "salary level" test; and (iii) the "duties" test. 2016 Final Rule at 32,394. The employer bears the burden of proving that an employee falls within an exemption. *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 206 (1966).

2. The "Salary Basis" Test and Its Historical Application to Employees Paid By the Hour, Day, or Shift

This case involves the "salary basis" test. Since October 1940, a "hallmark of exempt status" has been payment on a "salary basis." 2004 Final Rule at 22,175; *see also* App.2, 5 Fed. Reg. 4,071, 4,077 (Oct. 15, 1940). The DOL has "determined over the course

of many years that executive, administrative and professional employees are nearly universally paid on a salary basis." *Id*. at 22,177; *see also* App.37, U.S. Dep't of Lab., Wage & Hour Div., *Report and Recommendations on Proposed Revisions of Regulations*, Part 541 24 (1949) ("Weiss Report"). Such employees are "not paid by the hour or task, but for the general value of services performed." 2004 Final Rule at 22,177 (detailing the historical factual findings supporting the Department's conclusion).[1] Employers may not make exempt employees' salaries subject to deductions except under circumstances prescribed in the regulations. 29 C.F.R. § 541.602(b).[2] Section 541.603 explains what happens when impermissible deductions are made.

The definition of payment on a "salary basis" has remained substantially the same since the Secretary first defined it in December 1949. Under the definition in place during Hewitt's tenure with Helix, the employee must "regularly receive[] each pay period on a weekly, or less frequent basis, a predetermined amount constituting all of part of the employee's compensation, which amount is not subject to reduction

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[1] From 1949 until 2004, the "salary basis" regulations were located in § 541.118 under the requirements for the "executive" exemption. Other exemptions that required payment on a salary basis incorporated that section by reference. The regulations governing salary were consolidated in 2004 in Subpart G. The salary level historically varied over time until 2004 when the DOL established a level of $455 per week paid "on a salary basis" for the EAP exemptions. After Hewitt stopped working for Helix, the Department raised the salary level to $684 per week.

[2] Except where otherwise noted, citations to the regulations refer to the 2004 regulations in place when Hewitt worked for Helix.

because of variation in the quality or quantity of the work performed." 29 C.F.R. § 541.602(a). Subject to exceptions specified in the regulation, an "exempt employee must receive the full salary for any week . . . without regard to the number of days or hour worked." *Id*.

As the definition of this "general rule" reflects, payment by the hour, day, or shift is not payment "on a salary basis," even where the employee is guaranteed an amount more than the required weekly minimum. The 1949 regulations (which first defined what it meant to be paid on a "salary basis") provided the example of a "salary of $100 a week" that could not "arbitrarily be divided into a guaranteed minimum of $55 paid in each week in which any work is performed and an additional $45 which is made subject to deductions." *See* App.11, 29 C.F.R. § 541.118(b) (1949). Fifty-five dollars was the guaranteed minimum for the executive exemption at the time. App.3, 49 Fed. Reg. 7,730, 7,735 (Dec. 28, 1949).

Moreover, since 1956, the Department Field Operations Handbook provided that payment by the hour could only constitute payment "on a salary basis" where there was a "reasonable relationship between the hourly rate, the regular or normal working hours and the amount of the weekly guarantee." App.43, 1956 DOL Field Operations Handbook; *see also* App.44, 1970 DOL Field Operations Handbook (same).

3. Section 541.604(b) Incorporates the Department's Understanding of How the Salary-Basis Test Applies to Workers Who Are Paid By the Hour, Day, or Shift

In 2004, the Secretary consolidated this understanding at 29 C.F.R. § 541.604. Section 541.604(a) provides that "[a]n employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement." Section 541.604(b) explains how employers may meet the salary-basis test for hourly, daily, and shift-based employees:

> An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days, or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned.

The "reasonable relationship requirement incorporates in the regulation Wage and Hour's long-standing interpretation of the existing salary basis regulation, which is set forth in the agency's Field Operations Handbook and in opinion letters." 2004 Final Rule at 22,183.

4. The HCE Regulation Relaxes the Duties Test While Incorporating the Salary-Basis Test Required for All Exempt EAP Employees

The regulations have long provided for a streamlined duties test for executive employees paid at higher salary levels. The 1949 regulation, for example, included separate sections with a "special proviso" for high salaried executives, professionals, and administrative employees. App.4, 14 Fed. Reg. 7,730, 7,735 (Dec. 28, 1949).

In 2004, as part of a reorganization of the regulations, the Secretary created a single regulation for the various HCE tests. Employees with a total annual compensation of at least $100,000 could obtain the benefits of the exemption if "the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee" defined elsewhere in the regulations. *See* 29 C.F.R. § 541.601(b)(1). The HCE regulation thus "adopt[s] a more streamlined duties test for employees paid at a higher salary level" and explains how each can meet the modified duties test. 2004 Final Rule at 22,173.

The regulation, however, applies the same "salary basis" test that applies to lower paid employees. Specifically, to qualify as a highly compensated employee and obtain the benefits of the streamlined duties test, the "'total annual compensation' must include at least $455 per week paid on a salary or fee basis." 29 C.F.R. § 541.601(b)(1); *cf.* 29 C.F.R. § 541.600(a) (stating that to qualify as an exempt executive employee, "an employee must be compensated on a salary basis at a rate

of not less than $455 per week").[3] The remainder of the total annual compensation may include "commissions, nondiscretionary bonuses and other nondiscretionary compensation." 29 C.F.R. § 541.601(b)(1).

B. Factual and Procedural History

From December 2014 to August 2017, Respondent Hewitt worked every other month approximately 12 hours a day for 28 consecutive days on an offshore oil rig. JA49, JA53, JA62, JA82-83. Hewitt reported to the rig's superintendent and worked as a toolpusher, which consists of supervising and assisting twelve to fourteen employees in operating the rig's machinery. JA55-56. A toolpusher does not need a college degree. JA110.

Hewitt was paid a daily rate and received no weekly salary. Pet.App.4, Pet.App.7. Hewitt's biweekly paycheck thus varied depending on the number of days Hewitt worked during the pay period. JA67, JA81, JA97. If Hewitt worked only one day in a workweek, he would receive just one day of pay. JA66, JA81, JA97.

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[3] Employers of lower paid employees may count nondiscretionary bonuses and incentive payments in satisfying up to 10% of the salary-basis requirement, whereas employers of HCE employees cannot. 29 C.F.R. § 541.602(a)(3) (2019). Initially promulgated in 2016, the rule did not go into effect until 2019 because of an injunction against the 2016 rule related to other issues. *See Nevada v. U.S. Dep't of Lab.*, 218 F. Supp. 3d 520 (E.D. Tex. 2016).

Hewitt left Helix in 2017. Pet.App.35 n.3. [4] Hewitt filed this action on August 18, 2017, seeking unpaid overtime that he had worked and earned. Pet.App.78. The district court dismissed Hewitt's suit, Pet.App.84, but the Fifth Circuit unanimously reversed. Resp.App.1a-8a. The Panel determined that Petitioners paid Hewitt: (1) "an amount contingent on the number of days he worked each week," meaning that Hewitt "was not paid on a 'salary basis' under the Labor Department regulations;" and (2) "'*with*' (not 'without') 'regard to the number of days worked,' in direct conflict with the plain language of 29 C.F.R. § 541.602(a)(1)." Resp.App.6a, 7a (emphasis in original).

The Fifth Circuit agreed to rehear the appeal after the filing of *amicus* briefs by oil and gas industry groups. Resp.App.34a. Helix lost again. Resp.App.9a.

In its petition for review and principal brief, Petitioners claim that the majority opinion "abandoned" the previous opinion's salary-basis reasoning. Cert.Pet.11; Pet.Br.17. That is misleading. The Panel still held that Petitioners failed to pay Hewitt on a "salary basis" under § 541.602. Resp.App.14a-15a (again recognizing that a daily rate employee was not paid "on a weekly basis" or "without regard to the number of days worked" under the general rule). It merely recognized that a daily rate could constitute payment "on a salary basis" under § 541.604(b) if the

[4] Petitioners twice assert without citation that Helix fired Hewitt for performance-based reasons. Pet.Br.1, 16. The assertion should be disregarded as irrelevant and unsupported.

employer met the section's reasonable-relationship requirement. Resp.App.11a, 17a. But Petitioners also failed to satisfy § 541.604(b), and thus Hewitt was not exempt. Resp.App.17a.

Helix filed another *en banc* petition and lost for the third time in a 12-6 decision. The *en banc* majority stated that this "appeal requires us to do nothing more than apply the plain text of the regulations." Pet.App.8. It emphasized that to satisfy § 541.602(a), an employee must receive "each pay period *on a weekly, or less frequent basis*, a predetermined amount constituting all or part of the employee's compensation" and must receive the full salary "*without regard to the number of hours or days worked*." Pet.App.8-9 (emphasis in original). It further found that the Secretary "accommodated" employers by promulgating § 541.604 which prescribes "what conditions must be satisfied before an hourly or daily rate will be regarded as a 'salary.'" Pet.App.9. Because Petitioners did not claim to meet these requirements, it did not comply with the salary-basis test.

The *en banc* majority also rejected Petitioners' claim that they were not required to comply with § 541.604(b) based on § 541.601's requirements for HCEs. It held that § 541.601 "expressly imposes a salary-basis test," and "the same 'salary basis' language that appears in the highly compensated employee regulation also appears in the regulations governing more modestly paid executive, administrative, and professional employees." Pet.App.15-16.

The *en banc* majority explained that its "textualist approach is also shared by the Sixth and Eighth Circuits and the Secretary of Labor—not to mention the

overwhelming majority of district courts that have confronted these issues." Pet.App.11. And in addressing the same policy arguments advanced here, it stated: "Our job is to follow the text—not to bend the text to avoid perceived negative consequences of the business community. That is not because industry concerns are unimportant. It is because those concerns belong in the political branches, not the courts." Pet.App.20.

SUMMARY OF ARGUMENT

Petitioners did not pay Hewitt "on a salary basis" because they exclusively paid him by the day. They therefore violated the general rule in § 541.602(a). That rule requires payment each "pay period on a weekly, or less frequent basis" of a "predetermined amount" that is not "subject to reduction because of variations in the quality or quantity of the work performed" but rather is paid "without regard to the number of days and hours worked."

Petitioners incorrectly argue that they satisfied § 541.602(a) because Hewitt's daily rate constituted a "predetermined amount" in excess of the minimum salary level. But they paid Hewitt "with"—rather than "without"—regard for the number of days he worked. Further, the amount was not "predetermined" for any week, and a week is the shortest period that may constitute payment on a salary basis under the regulations.

The history of the salary-basis test confirms this understanding. The regulations long prohibited improper division of an employee's salary into an amount that meets the minimum guarantee and an

amount that would be subject to deductions for salaried compensation. This prohibition cannot be reconciled with Petitioners' claim that a minimum guarantee of the required amount is all that is required. Further, well prior to incorporation of the reasonable-relationship requirement into § 541.604(b), the regulations and opinion letters interpreted the salary-basis test to require both a guarantee of the minimum amount per pay period and a "reasonable relationship" between the guarantee and the actual pay for hourly employees.

Section 541.604(b) and the regulatory preamble further confirm that Petitioners did not pay Hewitt "on a salary basis" within the meaning of § 541.602(a). That provision reflects the Department's understanding of how to meet the "salary basis" requirements for employees whose "earnings may be computed on an hourly, a daily or a shift basis." It is therefore not a separate requirement from the "salary-basis" requirements but rather "incorporates in the regulation Wage and Hour's long-standing interpretation of the existing salary basis regulation, which is set forth in the agency's Field Operations Handbook and in opinion letters." *See* 2004 Final Rule at 22,183. The preamble also explains that payment of a minimum guarantee without a reasonable relationship to total hourly, daily, or shift-based pay for a week is "inconsistent with the salary basis concept." *Id*. at 22,184.

Nothing in the HCE regulation exempts Petitioners from the Department's "salary basis" requirements. The HCE regulation expressly requires payment "on a salary basis," and § 541.604(b) merely

codifies the Department's longstanding interpretation of that test. *See* 2004 Final Rule at 22,183. Further, § 541.604(b) applies the reasonable-relationship requirement to all employees whose pay is "computed on an hourly, a daily or a shift basis." It contains no carve-out for employees who make above a certain amount of money per year, and the structure and history of the regulations both make clear that § 541.604(b) was intended to elucidate the requirements of the salary-basis test, as incorporated under the HCE regulation.

Petitioners' arguments are uniformly unsound and at odds with the regulations' text, structure, purpose, and preamble. They never even quote § 541.604(b) accurately. Instead, they assert that it applies only to "those with an hourly, daily, or per-shift wage *below* the weekly minimum" while pointing to nothing in the text or structure supporting the assertion. Further, their interpretation of the two regulations would deprive § 541.604(b) of any purpose.

Petitioners also repeatedly insist that § 541.601 is "self-contained" and "standalone" but cite only the absence of a cross-reference and what they refer to as "self-contained deeming language." Both ignore that § 541.601 expressly incorporates the requirement of payment "on a salary basis" and that § 541.604(b) reflects the Department's interpretation of the salary-basis test. They further ignore that § 541.601 does not cross-reference other salary-basis provisions that indisputably apply to HCEs, including § 541.603's explanation of the impact of improper deductions.

Petitioners attempt to manufacture conflict between §§ 541.601 and 541.604(b) by ignoring what

both say and do. They portray the latter as a general limitation on payment of "extras" when it applies only to employees whose pay is computed by the hour, day, or shift. It does not apply to employees who receive all manner of salaried compensation and extras. And Petitioners point to nothing suggesting that § 541.601 was designed to ease the requirements of the salary-basis test either generally or as applied to employees paid by the hour, day, or shift.

There also is no conflict between the supposed "simplicity" and "streamlining" Helix claims the Department intended for § 541.601 and what Helix claims are the "complications" of the "reasonable relationship" requirement. Section 541.601 relaxed the duties standard for employees who meet higher compensation levels while expressly incorporating the salary-basis test, which the Department viewed as "easily applied," 2004 Final Rule at 22,175, and "clear," *id.* at 22,184.

Adoption of Helix's position would undermine settled employment practices throughout all industries. As discussed in the preamble to the 2004 regulations, without a reasonable-relationship test, employers could reduce the weekly guarantee to the minimum, not pay overtime, and subject most of the employee's workweek to the deductions that are prohibited for salaried compensation.

Helix also suggests that construing the regulations according to their terms would cause tension with the statute. That argument is waived and not seriously advanced. The Department was well within its broad authority to conclude that a bona fide salary is a required element of employment in an

executive capacity and that an hourly, daily, or shift-based employee is not earning a bona fide salary where there is no reasonable relationship between their pay for the workweek and the guarantee. Helix addresses neither the broad authority delegated to the Secretary to define and delimit the exemption nor the deference owed to the Secretary under *Chevron*. Nor do they engage with the statutory text, much less offer a definition of the statutory terms that would condemn the salary-basis regulations in light of the deference owed to the Secretary's duly promulgated regulations.

Petitioners conclude with irrelevant policy arguments (echoed by industry *amici*) that reduce to conclusory assertions of purported "practical problems" that could be addressed with any number of compensation structures and that would have to be addressed for their non-HCEs under any circumstances. Such arguments are for Congress, not this Court.

Because the text, structure, preamble, history, and purpose of the regulations show that Helix violated the regulations, the Fifth Circuit's judgment must be affirmed.

ARGUMENT

I. Helix Did Not Pay Hewitt "On a Salary Basis"

A. The Text and Structure of § 541.602 Foreclose Helix's Claim to Exemption

Petitioners did not satisfy § 541.602's general salary-basis rule. Section 541.602 requires that exempt employees "regularly receive[] each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation." Further, that amount cannot be "subject to reduction because of variation in the quality or quantity of the work performed;" rather, the employee must receive his "full salary for any week in which the employee performs any work without regard to the number of days or hours worked."

Petitioners claim that they met those requirements because Hewitt received a paycheck less frequently than once a week and because his rate for a day's work exceeded the minimum amount ($455) that the regulations require to be paid "on a salary basis." Petitioners are wrong. Because it was directly tied to how much he worked, Hewitt was paid "with" not "without regard to the number of days and hours worked." Helix ignores this language even though the Fifth Circuit expressly relied on it. *See* Pet.App.9 (emphasizing this language).

Further, because he was paid by the day and received no weekly minimum, Hewitt did not receive, "on a weekly, or less frequent basis," a "predetermined amount." *See Hughes v. Gulf Interstate Field Servs.*

Inc., 878 F.3d 183, 189 (6th Cir. 2017) (holding that a day rate is "calculated *more* frequently than weekly"). Helix claims that the "predetermined" amount was his daily rate, but the text and structure of the regulations foreclose that assertion. The word "predetermined" necessarily requires a reference point with which the payment must be predetermined, and the regulations make clear that the reference point must be a period of a week or more.[5] *See also In re Wal-Mart Stores, Inc.*, 395 F.3d 1177, 1184 (10th Cir. 2005) ("[T]he natural reading of ['predetermined amount'] is that it refers to the amount previously agreed on for the period for which the salary is to be paid."); App.34, U.S. Dep't of Lab., Wage & Hour Div., *"Executive, Administrative, Professional . . . Outside Salesman" Redefined* 23 (1940) ("Stein Report") ("The shortest pay period which can properly be understood to be appropriate for a person employed in an executive capacity is obviously a weekly pay period . . .").

Because Hewitt's pay at best was predetermined for a day, Petitioners did not pay him a "predetermined amount." This made his compensation for 6/7 of the week tied to the amount he worked and subject to the deductions that are prohibited for payments made on a salary basis. *See*, *e.g.*, U.S. Dep't. of Lab.,

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[5] *See* 29 C.F.R. § 541.602(a) (requiring receipt "each pay period *on a weekly, or less frequent basis*, a predetermined amount . . .") (emphasis added); *id*. (requiring payment of "full salary *for any week* in which the employee performs any work") (emphasis added); *see also* 29 C.F.R. § 541.601 (annual compensation "must include at least $455 *per week* paid on a salary or fee basis") (emphasis added); 29 C.F.R. § 541.600 ("an employee must be compensated *at a rate of* not less than $455 *per week*") (emphasis added).

Wage & Hour Div., Opinion Letter FLSA2020-2, at 5 (Jan. 7, 2020) (day-rate payments were not a "predetermined amount" because they could be as low as $1,500 for one day of work and over $10,000 for the week).

Nor are Petitioners correct that the words "receives each pay period on a weekly, or less frequent basis" refer to frequency of paycheck receipt. There is no reason to believe the salary-basis test viewed excessively frequent paychecks as a vice that merited regulation. Instead, the words refer to the period with reference to which the predetermined amount is to be set. This is shown by the use of the word "basis" which the Secretary consistently uses to refer to the method of setting the compensation—not frequency of paychecks. *See* 29 C.F.R. § 541.602(a) ("salary basis"), § 604(b) ("hourly basis"); § 541.605 ("fee basis").

Other sections likewise foreclose Petitioners' interpretation. Section 541.602(b)(6), for example, provides that an employer may compensate the employee at an "hourly or daily equivalent" of the "full salary" for the time actually worked during a partial first or last week of employment. This provision also confirms that the Secretary did not contemplate that a day rate could itself be the "full salary."

Further, § 541.604(a) provides that "the exemption is not lost if an exempt employee who is guaranteed at least $455 each week paid on a salary basis also receives additional compensation based on hours worked for work *beyond* the normal workweek." This limitation confirms that time worked *during* the normal workweek is understood to be part of the salary, not "extra compensation."

Finally, as the *en banc* majority observed, Petitioners' understanding contradicts "common parlance" because "we do not ordinarily think of daily or hourly wage earners—whose pay is subject to the vicissitudes of business needs and market conditions—as 'salaried' employees." *See* Pet.App.4. Petitioners criticize the *en banc* majority for purportedly ignoring that "common parlance" cannot trump a regulatory definition. They ignore the *en banc* majority's statement that the regulations "*reflect this dichotomy*—defining salary as compensated paid 'on a weekly, or less frequent basis,' 'without regard to the number of days or hours worked.'" Pet.App.4 (quoting § 541.602(a)) (emphasis added). This is one of several instances where Petitioners train their fire at caricatures of the opinion while ignoring the opinion's discussion of the text of the regulations.

B. Helix's Position Contradicts the Department of Labor's Longstanding Interpretation of the Salary-Basis Requirement

Helix's understanding of § 541.602 also contradicts the Department's decades-old understanding of the salary-basis requirement. First, Helix's understanding cannot be reconciled with the regulation's consistent prohibitions for more than half a century on dividing employee salaries into two parts—one that met the weekly minimum and another subject to deductions. The 1949 regulation stated as an example that "a salary of $100 a week may not arbitrarily be divided into a guaranteed minimum of $55 paid in each week in which any work is performed, and an additional $45 which is made subject to deduction."

App.11, 29 C.F.R. § 541.118(b) (1949). Fifty-five dollars was the minimum weekly salary level for exemption as an executive at the time. App.3, 49 Fed. Reg. 7,730, 7,735 (Dec. 28, 1949). Versions of this prohibition appeared in every update until the Department's 2004 incorporation of the reasonable-relationship requirement into 541.604(b).[6]

This prohibition would have been pointless if payment "on a salary basis" meant only securing the employee a minimum amount per week. In Petitioners' view, there could be no improper division of a salary that guarantees the minimum amount because the employer would satisfy the salary-basis requirement by guaranteeing the minimum amount. The requirement demonstrates that the Department has long understood that guaranteed compensation that covers only part of the workweek is not payment "on a salary basis."

Second, the "reasonable relationship" requirement appeared in the Department handbook

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[6] *See, e.g.*, App.13, App.17, 29 C.F.R. §§ 541.117(a), 541.118(b) (1963) (prohibiting division of $125 weekly "salary" into a guaranteed minimum of $80 and an additional $45 when the required salary level was $80); App.19, App.23–24, 29 C.F.R. §§ 541.117(a), 541.118(b) (1970) (prohibiting division of $145 weekly "salary" into a guaranteed minimum of $100 and an additional $45 when the required salary level was $100); App.25, App.29–30, 29 C.F.R. §§ 541.117(a), 541.118(b) (1975) (prohibiting division of $250 weekly "salary" into a guaranteed minimum of $200 and an additional $50 when the required salary level was $155); *see also* App.46–47, 46 Fed. Reg. 2,969, 3,014 (Jan. 13, 1981) (proposed regulation prohibiting division of $355 weekly "salary" into a guaranteed minimum of $300 and an additional $55 when proposed salary level was $225).

decades before the Department first incorporated it into the regulations. *See* App.43, 1956 DOL Field Operations Handbook (employee will be considered as employed "on a salary basis" "if he is guaranteed a salary which is at least equal to the salary prescribed by Regulation, Part 541 and there is a reasonable relationship between the hourly rate, the regular or normal working hours and the amount of the weekly guarantee"). Prior to that date the Department's policy had long been that employees who were paid on an hourly basis were not paid on a salary basis even where they received a weekly guarantee. *See* App.39, 1956 Memorandum and Response. Again, this interpretation would make no sense if the salary basis regulation only required a minimum guarantee. *See also* App.44, 1970 DOL Field Operations Handbook (containing the same provision).

Department opinion letters also reflect this position. In 1993, for example, the Department explained that a pay system did not meet the requirements of payment on a salary basis where a guarantee of $300 per week (which was higher than the minimum amount that the regulation required to be paid on a salary basis) was 50% or less of the hourly compensation for a 40-hour workweek. App.41, Dep't of Lab., Opinion Letter FLSA-437 (May 7, 1993). The reason is that there was no "'reasonable relationship' between the guaranteed salary and the hourly wage paid to the supervisors on a weekly basis." *See also* Dep't of Labor, Opinion Letter FLSA2018-25, at 2 (Nov. 8, 2018) (employees who usually work 53 hours a week are not paid on a "salary basis" if their alleged "weekly guarantee" is only 30 hours of pay).

Third, in the 2004 preamble, the Department justified incorporation of the reasonable-relationship requirement into the regulations by explaining that absent the requirement, an employer could establish a weekly pay system under which a nurse regularly receives weekly pay of $1,500 or more and was "guaranteed only the minimum required $455." Such a system, the Department explained, "would be *inconsistent with the salary basis concept and the salary guarantee nothing more than an illusion*." 2004 Final Rule at 22,184 (emphasis added). This explanation confirms that the salary-basis test ensures more than payment at the required salary level. Instead, it ensures that an employee is actually paid on a "salary basis" rather than based on the amount of time worked.

C. The Preamble to the 2004 Regulations and § 541.604(b) Confirm That Helix Did Not Pay Helix "On a Salary Basis" Within the Meaning of Section 541.602(a)

The preamble to the regulations and § 541.604(b) further foreclose Helix's interpretation of § 541.602(a). Section 541.604(b) identifies the circumstances under which "[a]n exempt employee's earnings may be computed on an hourly, a daily or a shift basis without losing the exemption *or violating the salary basis requirement*"—specifically, a "guarantee of at least the weekly minimum required amount paid on a salary basis" and a "reasonable relationship" between the "guaranteed amount and the amount actually earned" in the employees' "normal scheduled workweek." It therefore is not an additional requirement on top of the salary-basis test. Rather, it reflects the Department's understanding of how compensation of

an hourly, daily, or shift-based worker can constitute payment on a salary basis.

The 2004 regulatory preamble confirms the point:

> *The reasonable relationship requirement incorporates in the regulation Wage and Hour's long-standing interpretation of the existing salary basis regulation* which is set forth in the agency's Field Operations Handbook and in opinion letters.

2004 Final Rule at 22,183 (emphasis added). Helix ignores this language which forecloses its position that § 541.604(b) is a separate provision that applies only to employees who make a certain amount of money. *See* Pet.App.47; *see also* 2004 Final Rule at 22,184 (minimum guarantee with no reasonable relationship would be "inconsistent with the salary basis concept").

This Court regularly relies on preambles in construing agency intent, including as to the 2004 regulations at issue here. *See*, *e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 149 (2012); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 287-89 (2009); *City of Chicago v. Envt'l Def. Fund*, 511 U.S. 328, 330, 332-33 (1994); *Fid. Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 158 (1982). Thus, while Petitioners declare it "untenable" that § 541.604(b) could be a "proviso" to the salary basis requirement, the preamble alone shows otherwise. Petitioners do not address the preamble, much less provide any basis for questioning the

Department's contemporaneously stated understanding of the purpose of its regulation and relationship to the "salary basis" requirement.

Further, and while the regulation's text and structure make it unnecessary to address the issue, the agency's understanding of § 541.604(b) is entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997) and *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416-18 (2019). It appears in an "authoritative" source—the preamble to the regulations when first codified. *Kisor*, 139 S. Ct. at 2416. It is the product of the agency's expertise rooted in its decades of elucidating the salary-basis test and implementing its congressionally delegated authority to define and delimit the exemptions. *Id.* at 2417. It is consistent with longstanding Department opinions and historical interpretations as discussed in Part II.B. And it reflects the agency's "fair and considered judgment" as an official and contemporaneous statement of the intended meaning of the regulation it was promulgating. *Id.* at 2418.

Helix's interpretation of § 541.602(a) also cannot be reconciled with its understanding that § 541.604(b) "expands the group of employees to whom the statutory exemption applies." Pet.Br.37. If § 541.604(b) expands the group of exempt employees, it can only be because § 541.602(a) would otherwise prohibit hourly, daily, and shift-based compensation that does not satisfy the requirements of § 541.604(b).

Helix argues that § 541.604(b) only expands the group as to a particular group of employees—*i.e.*, those whose hourly, daily, or shift-based rates do not exceed the minimum guarantee. Pet.Br.37. In other words, Helix argues it does not need the help, but others

do. Nothing supports this argument. Section 541.604(b) applies without qualification to all employees whose pay is "computed on an hourly, a daily, or a shift basis" without qualification. There is no criterion based on how much money the employee makes or the size of the hourly, daily, or shift-based rate.

Further, nothing in § 541.602(a) distinguishes between a daily rate that exceeds the minimum guaranteed amount and any other form of weekly guarantee. Thus, if it were true as Helix claims that § 541.602(a) could be satisfied by a day rate that exceeds the weekly requirement, then there is no principled reason why § 541.602(a) could not be satisfied for all hourly, daily, or shift-based employees who receive a guarantee of the minimum amount including in the example from the preamble discussed in Part I.B *supra*. As a result, under Helix's interpretation of § 541.602(a), § 541.604(b) would expand the number of exempt employees by 0 and render the requirement surplusage. *See* Pet.App.25 (Ho, J., concurring) (recognizing that Helix's position would render § 541.604(b) "surplusage").

Further, and for the same reason, Helix's combined interpretation of §§ 541.602(a) and 604(b) could not be limited to HCEs. Instead, if § 541.604(b) only expands the number of exempt employees and receiving a weekly guarantee of the required amount is enough to meet the salary-basis test of § 541.602(a) then Helix's position would undermine the salary-basis test for all hourly, daily, and shift-based workers who are paid a guarantee of the minimum amount regardless of their annual compensation level.

II. The HCE Regulation Did Not Exempt Helix From the Salary-Basis Test But Rather Expressly Required It To Meet It

A. The Text and Structure of the Regulations Foreclose Helix's Position

The parties agree that Petitioners' compensation of Hewitt failed the reasonable-relationship test of § 541.604(b). Helix is left to argue that § 541.604(b) does not apply to employees who meet the compensation level tests and duties requirements under § 541.601.

This argument is unavailing. Helix did not meet § 541.602, and even Helix does not claim that the HCE regulation exempts it from that regulation. Instead, and as the Fifth Circuit recognized, both the HCE regulation and the non-HCE regulation require payment "on a salary basis." *Compare* 29 C.F.R. § 541.601(b)(1) (HCE regulation requiring payment of "total annual compensation" that "must include at least $455 per week paid on a salary or fee basis") *with* 29 C.F.R. § 541.600(a) (to qualify as exempt, "an employee must be compensated on a salary basis at a rate of not less than $455 per week"); s*ee also* Pet.App.15 ("§541.601 expressly imposes a salary-basis test.'"). As the *en banc* majority held, "nothing in the text of either § 541.602 or § 541.604(b) indicates that those provisions apply differently based on how much the employee is paid. To the contrary, the same 'salary basis' language that appears in the highly compensated em-

ployee regulation also appears in the" standard regulations.[7] This analysis is both correct and a second example of Petitioners disregard for the *en banc* majority's textual analysis. Pet.Br.44-47; *see also* Part I.C *supra*.

Petitioners' argument also misstates the relationship between §§ 541.602 and 541.604(b). As discussed in Part I.C *supra* and reflected in the preamble, § 541.604(b) does not impose "separate requirements" from the salary-basis test as Petitioners claim. Pet.Br.28, 47. Rather, it explains how to meet the salary-basis test for employees paid on an hourly, daily or shift basis. *See also* 2004 Final Rule at 22,183 (stating that § 541.604(b) "incorporates in the regulation Wage and Hour's long-standing interpretation of the existing salary basis regulation"). As the *en banc* majority explains, the regulation thus "accommodates" a practice not permitted by the general rule with a "special rule dictating what conditions must be satisfied before an hourly or daily rate will be regarded as a 'salary.'" Pet.App.9.[8] Because § 541.604(b) accommodates a practice that would not otherwise be permitted,

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[7] This is a second aspect of the *en banc* majority's textual analysis that Helix ignores in its incomplete discussion of that opinion. Pet.Br.44-47. *See also* Part I.C *supra*.

[8] Petitioners misquote the *en banc* majority opinion as having "accept[ed] Helix's premise that Respondent was paid on a salary basis." Pet.Br.18 (alteration in original). It did not. Instead, it emphasized language from § 541.602 that made clear it did not view day rate pay as consistent with the general rule absent § 541.604. Further, it described § 541.604(b) as the Secretary's *accommodation* of employers who wanted to pay employees by the day while still complying with the salary-basis requirement.

it makes no sense to say that § 541.604(b) does not "apply" to the HCE regulation.

The text of § 541.604(b) also makes clear that its requirements apply to all employees whose pay is "computed on an hourly, a daily, or a shift basis" without qualification. There is no exception for HCE employees. Nor again would that make any sense given that it explains how employers can pay employees by the hour, day, or shift consistent with the salary-basis test.

Helix nowhere accounts for the plain language of § 541.604(b) and never once even quotes it accurately. Instead, it proffers its own atextual version of the regulation where the "*office*"[9] of § 541.604(b)" is "to address employees making less than the HCE threshold and whose hourly, daily, or per-shift rate is less than the weekly minimum. . . ." Pet.Br.34. But Petitioners' claim to have divined an "office" is no substitute for what the regulations say, and there is no support for it in the regulatory text and structure. *See* Part I.C, *supra*.

There also is no conflict between § 541.601 and recognizing that an hourly, daily, or shift-based employee is not paid on a salary basis absent a minimum weekly guarantee that is reasonably related to its total hourly, daily, or shift-based pay. To the

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Pet.App.8-9. That description would make no sense if it viewed § 541.602(a) as allowing day rates. Petitioners' claim that the *en banc* majority accepted the premise refers to an alternative argument that the opinion introduces with the words "*But even accepting* Helix's premise about § 541.602…"

[9] Helix cannot bring itself to use the word "text."

contrary, the purpose of § 541.601 was to ease the *duties* test for employees and to set the compensation level required for application of the relaxed duties test. 29 C.F.R. § 541.601 (stating that a high level of compensation "eliminate[s] the need for a detailed analysis of the employee's job *duties*") (emphasis added); *see also* 2004 Final Rule at 22,173 ("The Department has the authority to adopt a more streamlined duties test for employees paid at a higher salary level"); *id*. at 22,174 (describing the balance as a much higher salary level "with a more flexible duties standard").

By contrast, it did not eliminate or weaken *the salary-basis* test but rather expressly incorporated it. Indeed, the only difference between the salary-basis test for HCE and non-HCE employees was not enacted until later, and it made it *more* difficult for HCE employers to meet the salary-basis test. *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. 51,230, 51,307 (Sept. 27, 2019) ("2019 Final Rule"). *See* note 3, *supra*.

Further, §§ 541.603 and 541.604 explain the salary-basis test in ways that are not addressed elsewhere and that apply to all employees including HCEs. Consistent with their subject matter, they follow § 541.602 (which sets forth the general rule for payment on a salary basis) and come before § 541.605 (which addresses payment on a fee basis). This ordering, grouping, and subject matter confirm what the text and preamble make clear—that these sections explain and provide the Department's interpretation

of the salary-basis test that is a requirement of EAP exemption for all employees, including HCEs.

In particular, § 541.603 explains the impact of improper deductions from salary and indisputably applies to all employees. Section 541.604(a) identifies the extras that may be paid beyond the minimum guarantee consistent with the salary-basis requirement. Section 541.604(a) applies to all employees including HCEs and allows for a broader range of compensation to count as extras than may be used to meet the HCE annual compensation requirement. *Compare* § 541.601(b) (restricting annual compensation requirement to nondiscretionary compensation); 2004 Final Rule at 22,175 ("We have not adopted comments suggesting that discretionary bonuses should be included in 'total annual compensation'") *with* § 541.604(a) (containing no such restriction for extras outside the context of the annual-compensation requirement). Additionally, § 541.604(a) complements the basic understanding of the salary-basis test that is reflected in both §§ 541.602 and 541.604(b). *See* Part I.A, *supra*. And as discussed throughout this brief, § 541.604(b) provides for when employers may pay employees by the hour, day, or shift consistent with the salary-basis requirement.

B. Petitioners' Textual and Structural Arguments Are Unsound

Petitioners fail to account for the text, structure, and preamble of the regulations. They repeat 14 times that § 541.601 is "self-contained" or has a "stand-alone nature." As discussed in the prior subsection, employees are only deemed exempt if they meet the

same salary-basis test that applies to non-HCEs.[10] The only text they rely on, however, is the statement that HCEs are "deemed exempt" if they meet the requirements of § 541.601. This does nothing for Helix because a condition for being deemed exempt is compliance with the salary basis requirement.

Petitioners otherwise rely on the absence of text—specifically the *absence* of a cross-reference to § 541.604 in § 541.601. Petitioners claim this absence is "powerful *textual* evidence," but for the same and additional reasons, it yields them nothing. As already discussed, § 541.601 expressly imposes the same salary basis test for HCEs that applies to non-HCEs. Section 541.604(b) merely provides for how employers can meet the "salary basis" test for employees paid by the hour, day, or shift. There was no need for an additional cross-reference to § 541.604(b) when it expressly referenced the very salary basis test that it elucidates.

Further, § 541.601 also does not cross-reference § 541.603 and did not even expressly reference § 541.602 until 2019 and after the events of this case. Yet no one would doubt that both apply. Section 541.603 governs improper deductions from employee salaries and necessarily applies to all employers who make improper deductions from employee

[10] The word "deemed" is used because the employees who meet the salary requirements need not meet all of the otherwise applicable duties requirements. *See, e.g.,* App.31, 29 C.F.R. § 541.119(a) (2003) ("special proviso for high salaried executives" providing that "a highly paid employee is deemed to meet" all of the duties requirements if they meet a modified test set forth in the regulations).

compensation. Like § 541.603, the text, structure, history, and preamble of the reasonable-relationship requirement make clear that it elucidates the salary basis requirement that § 541.601 incorporates.

Further, as detailed in Part I, § 541.602 (which Petitioners acknowledge is incorporated) already prohibits paying employees by the hour, day, or shift. Like the 1956 memorandum discussed in Part I.B, § 541.604 explains how employers may do so and thus "accommodates" employers by opening a door that otherwise would be closed. Pet.App.9.

Helix also cannot explain why the agency would have chosen the lack of a cross-reference to communicate an intent to exempt HCEs rather than simply saying "Section 541.604(b) does not apply to HCEs." The Department has been exercising its authority to define and delimit the EAP exemptions for over 80 years. It knows how to create an exemption, including exemptions to the salary basis test. *See*, *e.g.*, 29 C.F.R. §§ 541.101, 541.304(d), 541.709. If the Department desired to exempt HCEs from a key part of the salary-basis requirement while expressly incorporating it, there is no reason why it would not just have stated: "Section 541.604(b) does not apply to HCEs."[11]; *see* Pet.App.12 (quoting U.S. Dep't of Lab., Wage & Hour Div., Opinion Letter FLSA2020-13, 2020 WL 5367070, *1 (Aug. 31, 2020) (applying the "familiar 'easy-to-say-so-if-that-is-what-was-meant'

[11] *See also Biden v. Texas*, 142 S. Ct. 2528, 2541 (2022); *Rotkiske v. Kelmm*, 140 S. Ct. 355, 361 (2019); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1617 (2018); *Nichols v. United States*, 578 U.S. 104, 109 (2016); *Kimbrough v. United States*, 552 U.S. 85, 103 (2007) (citations omitted) (all applying similar reasoning).

rule of interpretation" in concluding that daily rate workers would not qualify for HCE status absent a special rule because their day rate does not constitute payment on a daily basis")) (cleaned up).

Lastly, Petitioners offer structural arguments that contradict the text, structure, and history of the regulations. Each is incorrect.

Petitioners first claim to find support of § 541.601's "standalone nature" in § 541.601(d)'s explanation as to how the HCE regulations apply to blue-collar workers. According to Petitioners, that provision "duplicates, almost word-for-word" § 541.3's statement as to the EAP exemption's applicability to "the exact same list of examples" of blue-collar jobs. This shows, Petitioners say, that the Department understood that § 541.601 does not "automatically" apply non-cross-referenced provisions.

This argument misfires at every level. For one, it is irrelevant. Petitioners purport to be refuting a rule that non-cross-referenced provisions in the regulations "automatically" apply to § 541.604(b). But § 541.604(b)'s relevance does not depend on a rule of "automatic" application of all non-cross-referenced provisions. Rather, § 541.604(b) applies because the regulation's text, structure, preamble, history, and purpose make clear that it applies. *See Coates v. Dassault Falcon Jet Corp.*, 961 F.3d 1039, 1042-43 (8th Cir. 2020) (holding that § 541.604(b) is an "interpretative rule[]" of the general "salary basis" rule).

In addition, Petitioners' premise is factually wrong. Sections 541.3 and 541.601(d) do not

"duplicate" one another but rather address different issues. Section 541.601(d) explains how § 541.601 and its modified duties test apply to jobs involving manual labor.[12] A cross-reference (implied or express) would not have served its purpose. The Department included the provision because it wanted to clarify the implications of the provision. Its inclusion thus says nothing about the Department's view of an "automatic" cross-reference rule.

The regulations also appear in different subparts. Thus, even if this point were relevant and even if a cross-reference would have equally served its purpose (neither of which is true), its inclusion of a belt-and-suspenders provision would say nothing about its understanding of how a section that appears in the same subpart two subsections later would be read.

Petitioners next point to the fact that the salary-basis regulation had historically included a provision captioned "minimum guarantee plus extras." By contrast, Petitioners say, the 2004 regulations broke out § 541.604(a) alongside the reasonable-relationship requirement set forth in § 541.604(b). Petitioners say that the "only sensible reason" for doing so was to allow the "minimum guarantee plus extras"

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[12] Specifically, § 541.3 states a general rule that the 13(a)(1) exemptions "do not apply to manual laborers or other 'blue collar' workers who perform work involving repetitive operations with their hands, physical skill and energy." By contrast, § 541.601(d) addresses the streamlined duties test applicable to HCEs to make clear how performance of manual labor impacts application of the HCE tests. *See id*. ("This section applies only to employees whose primary duty includes performing office or non-manual work").

prohibition to incorporate the salary-basis regulation without the limitations in § 541.604(b). Pet.Br.32.

This too is wrong. It first cannot account for § 541.603 which governs the impact of improper deductions from salary and which from 1954 forward had been part of the salary-basis regulation. *See* App.6–8, 19 Fed. Reg. 4,397, 4,406 (July 17, 1954). It too was broken out as part of the 2004 reorganization and indisputably applies to HCEs. This alone shows that breaking out provisions was not intended to convey that they had no application to the HCE rule.

Instead, reorganization explains the placement. *See* 2004 Final Rule at 22,126 (describing the various ways that the EAP regulations were "streamlined, reorganized, and updated"). The regulations moved what had been § 542.118 into a new Subpart G and separated what previously had been consecutively numbered subsections into consecutively numbered regulatory sections, both of which it significantly expanded. The topics that had been addressed in § 541.118(a)(1)-(5) became § 541.602. The Department significantly expanded what had been § 541.118(a)(6) (the impact of improper deductions from salary), and it became § 541.603. And the minimum guarantee plus extras provision that had followed that provision as § 541.118(b) became § 541.604(a). It was paired with the newly incorporated reasonable-relationship requirement that became § 541.604(b). Petitioners are therefore wrong that there was "no sensible reason" to break the regulations out for reasons that had nothing to do with § 541.601. Nothing about changing consecutively numbered subsections to consecutively numbered

sections reflected an intent to exempt HCEs from the newly codified but longstanding reasonable-relationship requirement. And again, it is implausible that the Department would have signaled its intent in such a cryptic manner.

Finally, Petitioners try but fail to establish conflict between the compensation requirements of §§ 541.601 and 541.604. They assert, for example, that the reasonable-relationship requirement would "plainly" be violated by an employer's reliance on 541.601(b)(2) to reach the annual compensation threshold by making a large end-of-year "catch-up" payment. They also assert that applying the reasonable-relationship requirement effectively imposes a higher than intended weekly guarantee requirement on employers of HCEs and alters intended ratios of salary to annual compensation.

None of this is right. Petitioners fail to address what § 541.604(b) actually does, instead repeatedly relying on vague and deliberately imprecise descriptions ("detailed and restrictive rules") and mischaracterizing it as a general limitation on payment of "extras." *See* Pet.App.33.[13] They ignore that the reasonable relationship-requirement "applies only if the employee's pay is computed on an hourly,

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[13] *See* Pet.Br.33 ("Section 541.604(b) reflects a concern that employers could characterize a disproportionate share of their employees' compensation as non-guaranteed 'extras.'"); Pet.Br.33 ("Section 541.604(b) accordingly grants only *qualified* permission for employers to pay employees such 'extras'") (emphasis in original); Pet.Br.34 ("[W]hereas § 541.604(b) applies to lower-earning employees and requires that more than two-thirds of their overall earnings come from a weekly guarantee . . .").

daily or shift basis." 29 C.F.R. § 541.604(b). *See also* 2004 Final Rule at 22,183 ("We have clarified that the reasonable relationship requirement applies only when an employee's actual pay is computed on an hourly, daily, or shift basis."). It does not apply to employees who earn a weekly salary at whatever level and who then receive all manner of extras. Further, for hourly, daily, and shift-based employees, it does not impact payment of extras including bonuses, profit percentages, commissions, and hourly, daily, or shift-based payments beyond the employee's "normal scheduled workweek." Instead, it just ensures that the guarantee paid to hourly, daily, or shift-based employees is a bona fide salary for the time worked in their "normal scheduled workweek."

For the same reason, this provision does not apply to employees who receive a weekly salary and a lump-sum catch-up payment. As the preamble explains, the catch-up payment is "necessary because according to some commenters, many highly compensated employees receive commissions, profit sharing, and other incentive pay that may not be calculated or paid by the end of the year." *See* 2004 Final Rule at 22,175; *see also* 29 C.F.R. § 541.602(b) (providing the example of an employee who earns $80,000 in base salary but who falls short of the $20,000 in commissions that the employer expected). The "reasonable relationship" requirement would not apply because it applies only to pay computed on an hourly, daily, or shift basis.

C. Petitioners' Position Conflicts With the Purpose of the Salary-Basis and HCE Regulations

Petitioners' position disregards the purpose and requirements of the salary-basis test and HCE regulation and would undermine the salary-basis test if adopted. Employers could pay employees by the hour, day, or shift while reducing their weekly guarantee to a minimum that is a fraction of their pay for their normal workweek. *See, e.g.*, *Gardner v. G.D. Barri & Assocs., Inc.*, No. 20-01518, 2022 WL 3042857, at *2 (D. Ariz. Aug. 2, 2022) (employer guaranteed a salary of $455/week together with a "bonus" of $75.00 per hour for each hour worked above 6.06 hours). In this way, they could obtain the benefits of the executive exemption without affording the position the prestige, status, and flexibility associated with salaried employment that the Department has long determined is a hallmark of executive status. This understanding is the precise scenario that the prohibition is meant to prevent. *See* Part I.B, *supra* (discussing example provided in the 2004 Final Rule at 22,184). Even the average hourly rates for nurses in many cities and states would result in annual compensation over the HCE threshold for a normal workweek.[14] *See also* Part I.C, *supra* (explaining why

[14] U.S. Bureau of Lab. Stat., *Nurse Practitioners*, Occupational Employment and Wages, May 2021, https://www.bls.gov/Oes/current/oes291171.htm (reporting that on average nurse practitioners in 41 states exceed the HCE threshold); U.S. Bureau of Lab. Stat., *Registered Nurses*, Occupational Employment and Wages, May 2021, https://www.bls.gov/oes/current/oes291141.htm#nat (reporting that on average registered nurses in California and

Petitioners' combined interpretation of §§ 541.602(a), 541.604 could not be confined to HCEs).

At the same time, the reasonable relationship requirement for employees paid by the hour, day, or shift is fully consistent with § 541.601's goal of making it easier to meet the duties test in exchange for a higher salary level. As with its attempt to manufacture conflict between the regulations, Petitioners use vague generalizations to avoid addressing the requirements and purpose of both. Petitioners assert that the "kind of detailed scrutiny inherent in the reasonable-relationship test" would contradict what it describes as a "focus on simplicity" and creation of a "bright-line" and "streamlined" test. Pet.Br.39. Again, Petitioners are incorrect.

First, and as discussed, Petitioners again ignore that § 541.604(b) applies only to employees paid by the hour, day, or shift. Thus, far from "undermin[ing] the core policy goals the HCE regulation was meant to achieve," the requirement does not apply to employees paid a bona fide salary and all manner of extras.

Second, the agency did not view the reasonable-relationship requirement as difficult to apply. To the contrary, it described the "salary basis requirement" as a "valuable and *easily applied* criterion that is a hallmark of exempt status." 2004 Final Rule at 22,175 (emphasis added). The Department also emphasized in response to comments that it "believe[d] the

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metropolitan areas such as New York, Boston, Chicago, Dallas, Houston, Philadelphia, and Atlanta exceed the HCE threshold).

proposed rule provided clear guidance about the reasonable relationship requirement." *Id.* at 22,184. It also noted that "the issue has rarely arisen in litigation over the years" despite having been "a Wage and Hour Division policy for at least 30 years." *Id.* There also is little difference between the later guidance that even Petitioners acknowledge as clear and the example provided in the regulation. *Compare* Pet.Br.40 (citing DOL Opinion Letter FLSA2018-25 stating that "a 1.5-to-1 ratio of actual earning to guaranteed weekly salary is a 'reasonable relationship' under the regulations") *with* 2004 Final Rule at 22,271 (finding a "reasonable relationship" where employee usually earns up to $750 a week and is guaranteed at least $500, *i.e.,* a 1.5-to-1 ratio). Far from creating complexity, the regulation is readily applied by reference to payroll records. Petitioners cannot use purported complexity as a sign of agency intent when the agency did not view the regulation as difficult to apply.

Third, Petitioners' imprecise formulations ("streamlined requirement" "focus on simplicity") avoid addressing the trade-off that the agency intended with the HCE regulation. That trade-off was not simplicity above all else. *See, e.g.,* 2004 Final Rule at 22,173 (rejecting the U.S. Chamber of Commerce's request for a "bright-line" salary only test). Nor was it avoiding the supposed complexity of requirements that the agency expressly stated were not complicated.

Instead, the regulation implemented "a much higher salary level associated with a more flexible *duties* standard." 2004 Final Rule at 22,174 (emphasis added). The modification of the duties standard was

significant. But for the HCE regulation, Helix would have had to show that Hewitt's "primary duty was the management of the enterprise or a customarily recognized department," that he "customarily and regularly direct[ed] the work of two or more other employees," and that he had "the authority to hire or fire other employees" or that his suggestions to do so were given "particular weight." With the HCE regulation, he only needed to show he customarily performed "one or more of the exempt duties or responsibilities" of an executive outlined in the regulations. The Department did not, however, weaken the salary-basis test or create different salary basis rules for HCEs and non-HCEs who are paid by the hour, day, or shift. Instead, it incorporated the same salary-basis test that applies to all employees.

III. The Fifth Circuit's Interpretation of § 541.604(b) Is Consistent With the Statute

Petitioners also argue that their interpretation should be adopted because the Fifth Circuit's interpretation would "divorce the regulations from the statutory text." Pet.Br.41. This argument is waived because Petitioners never argued to the Fifth Circuit that applying the reasonable-relationship requirement to HCEs is inconsistent with the Department's statutory authority. *See Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173 (2016) ("The Department failed to raise this argument in the courts below, and we normally decline to entertain such forfeited arguments"); *OBB Personenverkher AG v. Sachs*, 577 U.S. 27, 37 (2015) ("That argument was never presented to any lower court and is therefore forefeited").

Further, the argument is wrong because (i) the Secretary has broad authority to define and delimit the scope of the executive exemption, *Auer v. Robbins*, 519 U.S. 452, 456 (1997); (ii) the regulations are entitled to *Chevron* deference and carry the force of law, *see Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 153 (2012); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977); and (iii) the Secretary acted well within this broad authority.

Petitioners offer no serious statutory analysis. They do not address the *Chevron* standard at all. They also point to nothing in the statute that even arguably (much less unambiguously) prohibits the Secretary from applying the same salary basis test to HCEs that it applies to non-HCEs. Instead, their lone reference to statutory text is an inaccurate reference to the Court's discussion of the word "capacity" in *Christopher*. [15] Further, *Christopher* involved a demonstrably erroneous interpretation that was based on shifting rationales found in an *amicus* brief. This case involves a reasonable interpretation promulgated through notice-and-comment rulemaking pursuant to broad statutory authority and rooted in a test that has been in place for decades.

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[15] Petitioners assert that this Court concluded in *Christopher* that the statute's use of the word "capacity" means "that the applicability of an exemption turns, above all, on the employee's job duties and responsibilities." Pet.Br.42. To the contrary the Court stated in *Christopher* that the question of what responsibilities made someone a salesman should be viewed "in the context of the particular industry in which the employee works." *Christopher*, 567 U.S. at 161.

Petitioners also ignore the definition of "capacity" that the Court relied on in *Christopher* which includes words like "position" and "outward condition and circumstances." Such terms readily encompass the requirement that executives be paid "on a bona fide basis" and the recognition that hourly, daily, and shift-based employees are not paid a salary where the purported salary compensates them for only part of the workweek.

Petitioners also misstate the FLSA's purpose in plucking two sentence fragments from a Senate Report and presidential address to inaccurately portray the Act's purpose as limited to addressing substandard wages. As the *en banc* majority recognized, it "should go without saying that" courts "are guided by the text of the FLSA and not some unenumerated purpose." Pet.App.19.

Moreover, Helix is wrong. It is "widely recognized that" the FLSA's "cornerstone" *overtime* pay requirements are "grounded in two policy objectives. The first is to spread employment (or, in other words, reduce involuntary unemployment) by incentivizing employers to hire more employees rather than requiring existing employees to work longer hours." 2016 Final Rule at 32,449. The second is "to reduce overwork and its detrimental effect on the health and well-being of workers." *Id.*[16] It therefore has never

[16] Petitioners and *amici* both cite *Christopher* for the proposition that the Act was not meant to protect workers who make $70,000 per year. They ignore that the case involved a different exemption where the salary-basis test does not apply. Further, what the Court actually said was that the Petitioners in the case

been true that employees are "'to be deprived the benefits of the Act simply because they are well paid.'" 2004 Final Rule at 22,173 (quoting *Jewell Ridge Coal Corp. v. United Mine Workers of America, Local No. 167*, 325 U.S. 161, 167 (1949)); *see also* Pet.App.30 (Ho., J., concurring) ("The 50 percent overtime penalty incentivizes employers to hire two workers to work 40 hours rather than one worker to work 80 hours") (citing *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987)). This purpose applies to Helix's choice to have two toolpushers paid a daily rate as they alternate 12-hour shifts for 28 consecutive days assisting and supervising workers in operating an offshore oil rig. *See Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577-78 (1942) (holding that Congress intended for the FLSA's overtime provisions to place financial pressure on employers "to spread employment"). And it applies to a rule that ensures hourly, daily, and shift-based employees are paid a bona fide salary to treat them as exempt executives.

Helix's argument thus reduces to a policy disagreement with the Secretary's choice not to exempt HCEs from the requirements of the salary-basis test. And even here, Helix persists in inapt characterizations that fail to acknowledge § 501.604(b)'s limited scope. It is not "flyspecking" to recognize that employees who are paid by the day are not paid a bona fide weekly salary absent a weekly guarantee that bears a reasonable relationship to

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"earned an average of more than $70,000 per year and spent between 10 and 20 hours outside normal business hours each week performing work related to his assigned portfolio of drugs in his assigned territory." *Christopher*, 567 U.S. at 166.

their total day-rate pay for their normal workweek. Regardless, Congress delegated broad power to the Secretary to define and delimit the scope of the executive exemption, and the Secretary duly promulgated regulations through notice-and-comment rulemaking that foreclose the exemption that Petitioners seek. Nothing in the FLSA precluded that choice.

IV. Helix and *Amici*'s Policy Arguments Are Irrelevant and Unsound

Helix concludes its filing with policy arguments that the oil industry has "traditionally enjoyed flexibility" when it comes to "their highest-paid workers," and the Fifth Circuit's decision would impose "retroactive liability" and impose "tremendous practical problems" on the industry.

These arguments are irrelevant. As reflected in the prior parts, the text, structure, preamble, history, and purpose of the regulations makes clear that hourly, daily, and shift-based workers (HCE or otherwise) are not paid on a salary basis under the regulations absent a reasonable relationship between a minimum guarantee and their total pay for their normal scheduled workweek. *See* Pet.App.11 ("The plain text of the regulations is decisive of this appeal"). Helix therefore violated the FLSA and its implementing regulations. There is no basis for rewriting the regulations to protect Helix or any other oil industry participant from their violations. *See* Pet.App.20 (refusing to "'alter the text in order to satisfy the policy preferences' of any person or industry" and declining to entertain the amici's "atextualist" theories). Instead, Petitioners' "[p]olicy

arguments are properly addressed to Congress, not this Court." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1357-58 (2018); *see also* Pet.App.20 (the job of courts is "to follow the text—not to bend the text to avoid perceived negative consequences for the business community.").

Second, Petitioners do not face "retroactive liability." Rather, they face liability for violating overtime requirements and regulations in place when Helix employed Hewitt. Their liability is no more "retroactive" than any liability for any violation of law in place at the time of the violation. *Contrast Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (recognizing presumption against construing laws to impose or increase liability for conduct that occurred before enactment). The salary-basis test has been a part of the EAP regulations for over 80 years, and as reflected in the 2004 preamble, the reasonable-relationship requirement was the Department of Labor's longstanding interpretation of the salary-basis test that the HCE regulation incorporated twelve years before the events of this case.[17] Further,

[17] Helix also attempts to spin prior cases as frowning upon "novel theories" and upsetting settled practice. None of those cases turned on the novelty of the theory or whether the practice was "settled." Rather, the Court applied standard interpretative techniques to construe the statutory and regulatory terms at issue. *See Christopher*, 567 U.S. at 162 (rejecting Department interpretation of its regulations as "unpersuasive" and contrary to the FLSA's definition of the word "sale"); *Parker Drilling Mgmt. Servs., Inc. v. Newton*, 139 S. Ct. 1881, 1886 (2019) (construing the text of the Outer Continental Shelf Lands Act as to the applicability of state law); *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) (construing the FLSA's text to determine

various lower court opinions notified the oil industry of the flaws of its position leading the 12-judge *en banc* majority to comment that its decision was "hardly novel—and can hardly come as a surprise to the oil and gas industry." Pet.App.15. *See also* U.S. Dep't of Lab., *U.S. Department of Labor Investigation Results In Federal Court Ordering West Virginia Company To Pay $3.7 Million In Back Wages And Damages*, News Release (Mar. 13, 2019), https://www.dol.gov/newsroom/releases/whd/whd20190313-0 (government enforcement action filed during Hewitt's employment addressing payment of day-rate compensation of natural gas pipeline inspectors without payment of overtime); *Stout v. Universal Ensco, Inc.*, No. 4:10-CV-1942, 2012 WL 13124740, at *1 (S.D. Tex. Sept. 18, 2012) (private lawsuit based on day-rate pay of pipeline inspectors where employer asserted the HCE rule as a defense).

Indeed, Helix did not even rely on Hewitt's annual compensation in claiming him as exempt. Instead, according to its Director of Human Resources, it relied solely on his supervisory responsibilities. JA96. Helix thus did not innocently rely on the HCE regulations as a perceived but ultimately unavailable safe harbor from the requirements of the salary-basis test. Instead, Helix's disregard for the salary-basis requirements prompted an ex-post scramble by

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that service advisors were salesmen "primarily engaged in selling or servicing automobiles"); *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 33 (2014) (construing congressional exemption for activities taking place after the "principal activity" the employee was engaged to perform).

litigation counsel to find a hook to justify their obvious noncompliance.

There likewise is no basis for asserting that whatever liability the petroleum industry faces more broadly has rested on the assumption that § 541.604 did not apply to HCEs. Instead, as reflected in cases listed by petroleum industry *amici*, it derives from a broader practice of paying day rates without overtime to all manner of employees, regardless of their duties and level of compensation. *See* Br. of the Texas Oil and Gas Association, Inc. and the American Petroleum Institute as *Amici Curiae* in Support of Petitioners at 9-13 n.15 (and cited dockets). Additionally, the discussion of *amicus* the U.S. Chamber of Commerce if anything shows how few cases in other industries have raised the issue. *See* Br. of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Pets. at 14-15 (identifying two non-petroleum cases that have addressed the interaction between §§ 541.601 and 541.604, neither of which involved a day rate).[18]

Granting Helix the relief it seeks thus would allow one employer in a recalcitrant industry to undermine settled employment practices and worker protections across *all* industries and allow and encourage the

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[18] These are the two cases Petitioners incorrectly portrayed as the other side of a circuit split with the Fifth and Sixth Circuits. *See Anani v. CVS Servs, Inc.*, 730 F.3d 146, 150 (2d Cir. 2013) (employee received a salary based on a 44-hour workweek); *Litz v. Saint Consulting Grp, Inc.*, 772 F.3d 1, 5 (1st Cir. 2014) (relying on *Anani* without elaboration); *see also* Pet.App.17-18. *Anani*'s inapt discussion of the regulation does not account for the various points discussed in this brief.

practice that the Department of Labor identified as prohibited—*i.e.*, reducing the salaries of employees to the weekly minimum, paying them by the hour, day or shift, evading overtime requirements, and subjecting most of their paychecks to deductions that are not permitted when applied to salaried compensation. 2004 Final Rule at 22,183.

Finally, Helix fails to justify its claim of "tremendous practical problems" from applying § 541.604 to HCEs. These turn out to be the fact that hitches can start on different days or straddle weeks—neither baffling conundrums when Helix could start the workweek when the employee starts the hitch and could pay a weekly salary that accounts for the fact that a hitch might go long. As the concurrence observed below, a day rate could be converted into an economically equivalent weekly guarantee. Pet.App.29. It also could include a weekly guarantee amounting to two-thirds of that amount with extra hours paid on a straight time hourly basis. [19] Petitioners could convert the day rate into a straight time hourly rate plus overtime or reduced hours and increased employment by hiring one or more additional toolpushers per the ultimate goal of the FLSA's overtime provisions. *See* Part III, *supra*.

Regardless of Petitioners' and *amici*'s preference to pay day rates without overtime or salary guarantees, the overtime regulations are not designed for maximum employer convenience or to protect violators of applicable requirements that have been in

[19] The option would spread an economically equivalent sum over a greater number of weeks.

place for decades. Here, Petitioners paid Hewitt a day rate with no overtime or weekly salary while working him 84 hours a week on an offshore oil rig. Under duly promulgated regulations, Petitioners therefore did not employ Hewitt in an "executive capacity" as the Secretary has defined and delimited that term. Petitioners therefore violated the law.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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