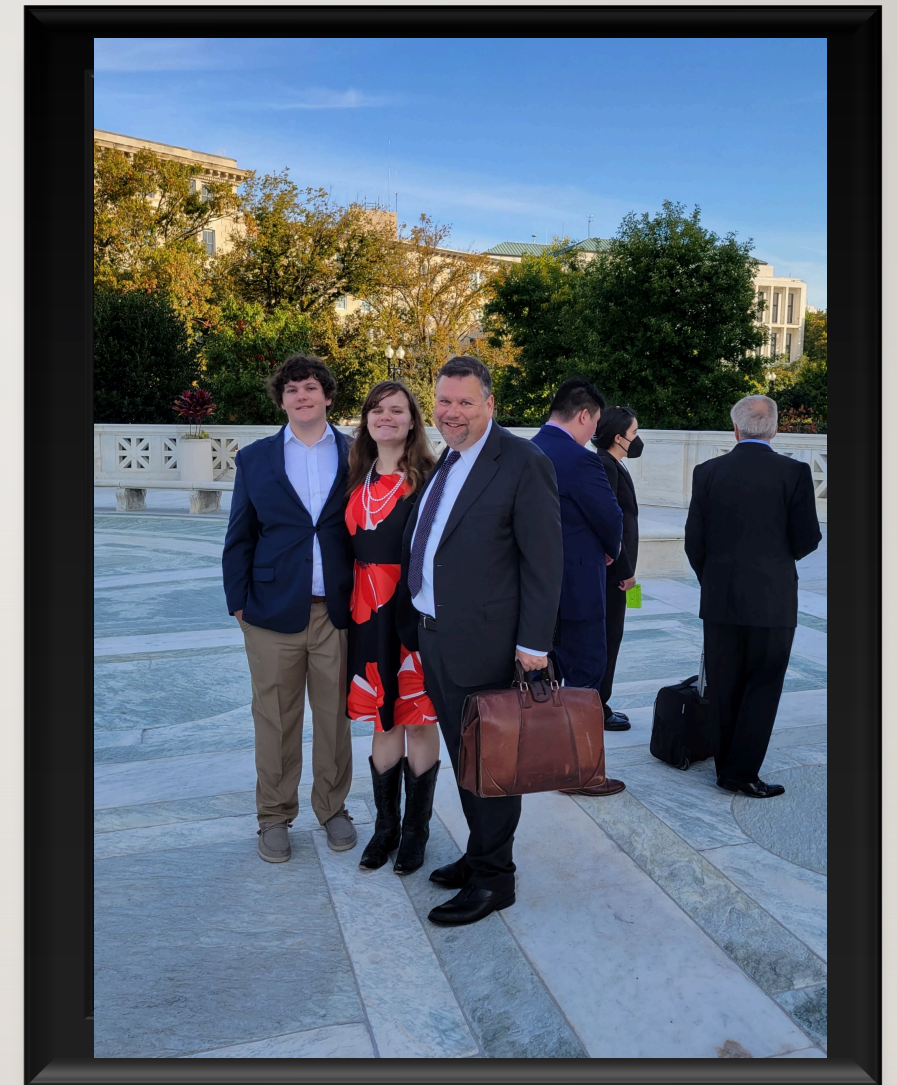


SUPREME SURPRISE

*HOW A TEXAS EMPLOYMENT LAWYER FOUND
HIMSELF BEFORE THE U.S. SUPREME COURT*

Ed Sullivan
Oberti Sullivan LLP
712 Main Street, Suite 900
Houston, TX 77002
(713) 401-3557
ed@osattorneys.com



MICHAEL “MIK” HEWITT

- Called about his termination from Helix Energy Solutions, an offshore oil company
- “How were you paid?”

I spoke to Mr. Ed Sullivan ... I told him what happened and he said well, you've got that employment at will rule that you can basically be fired for wearing odd colored socks and Hawaiian shirts.

Then he asked me the big question that changed everything. He said to me, how were you paid?

“Worker Who Defied OT Views Talks Wage Rights, Legal Row” *Law360*, Dec. 1, 2021

FLSA – WHAT'S A DAY RATE?

§ 778.112 Day rates and job rates.

If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

FAIR LABOR STANDARDS ACT (“FLSA”) BASICS

- Unless exempt, employees are entitled to overtime. The most familiar exemptions are the Executive, Administrative, or Professional Exemptions (“EAP” Exemptions).
- The EAP Exemptions generally require three things:
 - The employee have the **duties** of an exempt executive, administrative, or professional employee. There is a relaxed duties test for high earners (then \$100,000 per/yr, now \$107,432 per/yr)
 - The employee is paid on a **salary** basis (the “salary basis” test)
 - The salary is over a certain **level** (then \$455 a week, now \$684 a week)

EAP SALARY BASIS TEST EXCLUSIONS

- Some EAP exemptions do not require payment on a salary basis.
- For example, these employees may still be exempt even if they aren't paid a salary:
 - Lawyers, doctors, teachers, outside sales employees, motion picture industry employees, certain business owners
- Mr. Hewitt worked in none of those jobs. He had to be paid a salary to be exempt.

FLSA – WHAT’S A SALARY?

§ 541.602 Salary basis.

(a) **General rule.** An employee will be considered to be paid on a “salary basis” within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

(1) Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work.

SO THIS IS EASY, RIGHT?

- Filed suit August 2017 and I kept it simple:

SUMMARY

1. Mr. Hewitt worked as a Tool Pusher for Helix. Helix paid him and similarly situated Tool Pushers a day rate for their work, and did not pay them overtime, even though Mr. Hewitt and similarly situated Tool Pushers routinely worked 84 hours per week and sometimes more when working on a rig. Thus, Mr. Hewitt is suing for damages under the FLSA on his behalf, and seeks to represent a class of similarly situated individuals.

DEPOSITIONS HELPED

- From Company's HR Director:

Q. If he worked one day a week, he would just receive one pay rate—he would receive one day rate, correct?

A. Correct.

Q. If he worked two days a week, he would get two day rates?

A. Correct.

Q. Three is three day rates, four is four day rates, five is five day rates, all the way up to seven, which is seven day rates?

A. Yes.

DEPOSITIONS HELPED (CONT'D)

- From the same HR Director:

Q. All right. To your knowledge, why are toolpushers not eligible for overtime at Helix?

A. Because they are in a supervisory role.

Q. Okay. Anything else?

A. No sir.

DISASTER NO. 1: IN A DIFFERENT CASE, JUDGE LAKE DISAGREES

- Jeff Faludi sued for overtime because he was paid a day rate of \$1,000 a day. The day rate was over the FLSA's salary level test of \$455 a day.

... \$1,000 per day was guaranteed if he showed up for work and performed the agreed upon services. This satisfies the minimum guaranteed amount required to be paid on a salary basis. Because the court concludes that Faludi was paid on a salary basis and performed the duties of a learned professional, Defendant's Motion for Summary Judgment will be granted as to this exemption.

Faludi v. US Shale Sols. LLC, No. CV H-16-3467, 2017 WL 5969261, at *10 (S.D. Tex. Nov. 30, 2017).

DISASTER NO. 2: WE LOSE

The defendants argue that the plaintiff's pay satisfies the salary basis test because the summary judgment evidence shows that the plaintiff always received more than \$455 a week, and that he was paid on a bi-weekly basis. The Court finds the plaintiff's argument unavailing. The regulation does not require that the plaintiff be guaranteed to work a prescribed number of days, but instead demands that the plaintiff be paid a predetermined amount, not to fall below \$455 during any week in which he works.

Hewitt v. Helix Energy Sols. Group, Inc., No. 4:17-CV-2545, 2018 WL 6725267, at *3 (S.D. Tex. Dec. 21, 2018)

APPEAL TO FIFTH CIRCUIT TIME

The issue is not whether Hewitt's day rate exceeded \$455 per day. This is irrelevant under the law. The critical question is: "Did Helix prove that it paid Hewitt on a salary basis?" ... If not—and the evidence conclusively demonstrates that Helix did not pay Hewitt on a "salary basis"—then he was not exempt from the FLSA and is entitled to worked but unpaid overtime compensation.

Hewitt v. Helix, Case No. 19-20023 (5th Cir.) (opening brief filed Apr. 24, 2019 at 4-5)

DISASTER NO. 3: FALUDI LOSES IN FIFTH CIRCUIT

Faludi contends that his day rate of \$1,000 (or \$1,350 for work outside of Houston) did not satisfy the salary basis requirement because it was not calculated “on a weekly, or less frequent basis.” [29 C.F.R. § 541.602\(a\)](#). U.S. Shale responds that Faludi was nonetheless compensated on a salary basis because his day rate guaranteed him \$1,000 for every day that he worked, so he would receive more than the minimum of \$455 per week for any week in which he performed work. The text of the regulation favors U.S. Shale.

Faludi v. U.S. Shale Sols., L.L.C., 936 F.3d 215, 219 (5th Cir. 2019), as revised (Aug. 22, 2019).

I WON THE DISSENT

JAMES C. HO, Circuit Judge, dissenting:

If we were limited to the statutes enacted by Congress, as our Founders understood the Constitution to require, I would have voted with the majority. But we are also bound by regulations issued by the Department of Labor, and because I read those differently from the majority, I respectfully dissent.

Faludi v. U.S. Shale Sols., L.L.C., 936 F.3d 215, 222 (5th Cir. 2019), as revised (Aug. 22, 2019) (Ho, J. Dissenting)

HE GETS IT

U.S. Shale creatively argues that Faludi's daily rate of \$1,000 can be recharacterized as a *weekly* rate of *at least* \$1,000, so long as he works at least one day a week. But that does not alter the fact that Faludi receives a “predetermined amount” on a daily basis, and not “on a weekly, or less frequent basis.” Nor can I reconcile U.S. Shale's theory with the requirement that “an exempt employee must receive the *full salary* for any week in which the employee performs any work *without regard to the number of days or hours worked.*” *Id.* (emphases added).

Faludi v. U.S. Shale Sols., L.L.C., 936 F.3d 215, 222 (5th Cir. 2019), as revised (Aug. 22, 2019) (Ho, J., Dissenting)

DISASTER NO. 4:

THE FRAP 28J LETTER (SEPT. 24, 2019)

Dear Mr. Cayce:

Pursuant to Rule 28(j), Appellant Michael Hewitt respectfully submits *Faludi v. U.S. Shale Solutions, LLC*, No. 17-20808, 2019 WL 3940878 (5th Cir. Aug. 22, 2019). (Exhibit A).

The 2-1 decision is mostly unfavorable to Hewitt. For example, the panel determined that:

- Faludi's day rate of \$1,000 satisfied the FLSA's "salary basis requirement" because it "constituted 'a rate of not less than \$455 per week.'" *Id.* at *3.
- The FLSA only requires that pay be "*regularly receive[d]* each pay period on a weekly, or less frequent basis," and does not require calculation on a weekly or less frequent basis. *Id.* (emphasis in original).
- 29 C.F.R. § 541.604(b) "does not apply to employees who meet the requirements of the highly compensated employee exemption ..." *Id.* at *4.
- Faludi, who earned over \$100,000 per year due to a day rate of more than \$455 for every day he worked, met the FLSA's "highly compensated employee" exemption. *Id.* at *2.

For each point above, Hewitt argues similarly to Faludi.

THE FRAP 28J LETTER (SEPT. 24, 2019)

The news is not all bad. First, on September 18, 2019, Faludi moved for rehearing *en banc* for three reasons: (1) Judge Ho's dissent in *Faludi*; (2) the decision created a Circuit split; and (3) it upended "DOL official policy in implementation of the 'highly compensated employee' exemption to the FLSA."

Should this Court wish to delay oral argument until the conclusion of Faludi's *en banc* review, Hewitt has no objections. Otherwise, he will argue that *Faludi* is nevertheless distinguishable on law and facts applicable to his situation.

TRIUMPH (FEB. 14, 2020) (OPINION WITHDRAWN)

Opinion

JENNIFER WALKER ELROD, Circuit Judge:

We WITHDRAW the court's prior opinion of August 21, 2019, and substitute the following opinion.

Although we think U.S. Shale's arguments are well-taken as to why Faludi fits within the highly compensated employee exemption to the FLSA, we need not reach that issue given that Faludi is an independent contractor not covered by the FLSA's requirements. For that reason, we also need not determine whether he would fit within the practice of law exemption.

Faludi v. U.S. Shale Sols., L.L.C., 950 F.3d 269, 271, 275 (5th Cir. 2020)

TRIUMPH (CONT'D)

JAMES C. HO, Circuit Judge, concurring in the judgment:

The majority reaches the same conclusion today, correctly noting that “we need not reach” the issue of whether Faludi “fits within the highly compensated employee exemption to the FLSA ... given that Faludi is an independent contractor not covered by the FLSA's requirements.” In doing so, the majority expressly leaves it to a future panel to decide whether an employee like Faludi does or does not qualify as a highly compensated employee under the relevant regulations.

Faludi v. U.S. Shale Sols., L.L.C., 950 F.3d 269, 277 (5th Cir. 2020) (Ho, J., Concurring)

FIRST WIN: 3-0 (NO ORAL ARGUMENT) (APRIL 20, 2020)

Before WIENER, HIGGINSON, and HO, Circuit Judges.

JAMES C. HO, Circuit Judge:

A panel of this court recently divided over the proper interpretation of a Labor Department regulation issued under the Fair Labor Standards Act (FLSA). *See Faludi v. U.S. Shale Sols.*, 936 F.3d 215 (5th Cir. 2019), *opinion withdrawn*, 950 F.3d 269 (5th Cir. 2020). Today we revisit the issue initially raised, but ultimately left undecided, in *Faludi*.

Hewitt v. Helix Energy Sols. Group, Inc., 956 F.3d 341, 342 (5th Cir. 2020).

FIRST WIN: 3-0 (CONT'D)

The case we decide today presents the same interpretive question that divided our court in *Faludi*. We hold, consistent with the dissent in *Faludi*, that an employee who is paid a daily rate is not paid on a “salary basis” under 29 C.F.R. § 541.602(a). Accordingly, we reverse the district court and remand for further proceedings.

Hewitt v. Helix Energy Sols. Group, Inc., 956 F.3d 341, 342 (5th Cir. Apr. 20, 2020).

HELIX FILES PETITION FOR REHEARING WITH *AMICI*

**PETITION FOR REHEARING EN BANC OF APPELLEES HELIX
ENERGY SOLUTIONS GROUP, INC. AND HELIX WELL OPS INC.**

**BRIEF OF *AMICI CURIAE*
INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA AND
OFFSHORE OPERATORS COMMITTEE IN SUPPORT OF
APPELLEE'S AND REHEARING *EN BANC***

**AMICUS CURIAE BRIEF OF TEXAS OIL & GAS ASSOCIATION, INC.
IN SUPPORT OF APPELLEES HELIX ENERGY SOLUTIONS GROUP,
INCORPORATED AND HELIX WELL OPS, INCORPORATED AND
REVERSAL OF THE DISTRICT COURT DECISION**

DISASTER NO. 5: PANEL RECONSIDERATION (AUGUST 12, 2020)

NEW ORLEANS, LA

EAST COURTROOM – VIDEO CONFERENCE

Wednesday, September 09, 2020

10:00 A.M.

No. 19-20023 – Michael Hewitt v. Helix Energy Solutions Group

DEPARTMENT OF LABOR WEIGHS IN

U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210



FLSA2020-13

August 31, 2020

B. The company's payments for delivery work do not satisfy the salary basis test.

The Fifth Circuit recently addressed a similar question, holding that an employee paid a daily rate, with no minimum weekly guarantee, is not paid on a salary basis.²¹ The *Hewitt* plaintiff, like the employees here, was paid per day of work.²² The court summarized the plain language

29 C.F.R. § 541.709. That is, WHD knows how to include in the exemption certain employees whose pay is calculated on a daily basis; it has chosen not to do so broadly. Compare 29 C.F.R. § 541.602(a) with 29 C.F.R. § 541.709. "The familiar 'easy-to-say-so-if-that-is-what-was-meant' rule of [] interpretation has full force here."

Department of Labor, Wage & Hour Division Op. Letter FLSA 2020-13 (Aug. 31, 2020)

ORAL ARGUMENT I (SEPT. 9, 2020) (ABRIDGED & EDITED)



Wikipedia

Stephen A. Higginson - Wikipedia

SECOND WIN: 2-1 (DECEMBER 21, 2020)

Before WIENER, HIGGINSON, and HO, *Circuit Judges*.

JAMES C. HO, *Circuit Judge*:

... those regulations exempt daily rate employees from overtime—but only “if” that employee's compensation meets certain conditions. Helix asks us to ignore those conditions. But we are not at liberty to do so. And certainly not on the ground that the oil and gas industry warrants special treatment not supported by the text, or because Hewitt already makes enough money and thus doesn't deserve FLSA protection. Our duty is to follow the law, not to vindicate anyone's policy preferences.

Hewitt v. Helix Energy Sols. Group, Inc., 983 F.3d 789, 797 (5th Cir. 2020)

SECOND WIN: 2-1 (CONT'D) - DISSENT

Dissent



Jacques L. Wiener, Jr., Circuit Judge, dissenting:

With due respect for my esteemed colleagues in the majority, who in good faith attempt to apply the regulatory text as written, I am compelled to dissent.

Those of us who were born, bred, and educated in the “oil patch,” and who practiced mineral law for decades, are quite familiar with the levels of personnel who work the various on-shore and off-shore oil rigs and platforms. First come the

Finally, with utmost respect for my friend and colleague who authored the special concurrence, my only response is to quote Macbeth: “full of sound and fury, signifying nothing.” ³⁹

Hewitt v. Helix Energy Sols. Group, Inc., 983 F.3d 789, 802-09 (5th Cir. Dec. 21, 2020) (Wiener, J., Dissenting)

SECOND WIN: 2-1 (CONT'D) - DISSENT

WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5, lines 15–17. To be sure, the harshness of the full quotation is unwarranted, and, thus, I only quote what is appropriate.

Speech: “Tomorrow, and tomorrow, and tomorrow”

BY WILLIAM SHAKESPEARE

... Told by an **idiot**, full of sound and fury,
Signifying nothing.

SECOND WIN: 2-1 (CONT'D) - CONCURRENCE

The dissent begins by expressing “due respect” to the majority—and then ends with a well-known literary quote about idiots. *Post*, at 802–03, 809 & n.39. It concludes that my opinion in this case is worth “nothing.” *Id.* at 809. To some, statements like these may be reminiscent of the wisdom of Ricky Bobby. See TALLADEGA NIGHTS: THE BALLAD OF RICKY BOBBY (2006) (“What? I said ‘with all due respect!’”). ... “More often than not, any writing's persuasive value is inversely proportional to its use of hyperbole and invective.” ... As the adage goes, the loudest voice in the room is usually the weakest.

But now the dissent calls for rehearing en banc. So what's changed?

The only change I'm aware of is that an armada of oil industry amici now urges us to take this case en banc.

Hewitt v. Helix Energy Sols. Group, Inc., 983 F.3d 789, 797-802 (5th Cir. Dec. 21, 2020) (Ho, J., Concurring)

ANOTHER *EN BANC* PETITION WITH *AMICI*

**PETITION FOR REHEARING *EN BANC* OF APPELLEES HELIX
ENERGY SOLUTIONS GROUP, INC. AND HELIX WELL OPS INC.**

**BRIEF OF *AMICI CURIAE* THE STATES OF
MISSISSIPPI, ALABAMA, LOUISIANA, MONTANA, AND UTAH
IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE**

**AMICUS CURIAE BRIEF OF TEXAS OIL & GAS ASSOCIATION, INC.
IN SUPPORT OF APPELLEES' SUPPLEMENTAL *EN BANC* BRIEF**

**BRIEF OF *AMICI CURIAE* THE STATES OF
MISSISSIPPI, ALABAMA, LOUISIANA, MONTANA, AND UTAH
IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE**

DISASTER NO. 6; *EN BANC* REVIEW GRANTED (MARCH 9, 2021)

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs. Pursuant to 5th Circuit Rule 41.3, the panel opinion in this case dated December 21, 2020, is VACATED.

ORAL ARGUMENT 2 (MAY 25, 2021) (ABRIDGED & EDITED)



THIRD WIN: 12-6 (SEPT. 9, 2021)

JAMES C. HO, *Circuit Judge*, joined by SMITH, STEWART, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, DUNCAN, ENGELHARDT, OLDHAM, and WILSON, *Circuit Judges*:

Our job is to follow the text—not to bend the text to avoid perceived negative consequences for the business community. That is not because industry concerns are unimportant. It is because those concerns belong in the political branches, not the courts. “We will not alter the text in order to satisfy the policy preferences” of any person or industry.

Hewitt v. Helix Energy Sols. Group, Inc., 15 F.4th 289, 298 (5th Cir. 2021)

THIRD WIN: 12-6 (CONT'D) (FIRST DISSENT)

Edith H. Jones, Circuit Judge, joined by Owen, Chief Judge, and Wiener, Elrod, and Southwick, Circuit Judges, dissenting:

Textualism “is not always easy,” it “can be hard work and involve significant research,” and it “is not glamorous,” but done properly it is both “straightforward” and “fair.” Diarmuid O'Scannlain, *“We Are All Textualists Now”: The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 312 (2017). Doing the hard work here refutes the view that § 541.601's exemption for highly compensated employees must be read in light of § 541.604.

Hewitt v. Helix Energy Sols. Group, Inc., 15 F.4th 289, 304-17 (5th Cir. 2021)

THIRD WIN: 12-6 (CONT'D) (SECOND DISSENT)

Wiener, Circuit Judge, Joined By Owen, Chief Judge, and Jones, Dennis, and Elrod, Circuit Judges, Dissenting:

I imagine that the original proponents of the FLSA—including President Franklin D. Roosevelt,⁵ during whose term the FLSA and other “Great Depression” measures were enacted—are turning over in their respective graves in reaction to the en banc majority's interpretation of the regulatory text to undermine how the FLSA is supposed to operate. It

Hewitt v. Helix Energy Sols. Group, Inc., 15 F.4th 289, 317-323 (5th Cir. 2021)

THIRD WIN: 12-6 (CONT'D) (CONCURRENCE BY JUDGE HO)

Bottom line: If our goal is to follow the text, we should follow the text—not penumbras formed by emanations divined by a calculator. *Cf. Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

Amici may be disappointed, but they should not be surprised that the court today rejects their atextualist theories.

There's no such thing as a part-time textualist. If we're not textualists in every case, then we're not really textualists at all. See, e.g., [Cole v. Carson](#), 935 F.3d 444, 479 (5th Cir. 2019) (Ho & Oldham, JJ., dissenting) (“Originalism for me, but not for thee, is not originalism at all.”). We're not binding ourselves to the text if we follow it only when we like the result. Textualism is either a matter of principle or a talking point.

Hewitt v. Helix Energy Sols. Group, Inc., 15 F.4th 289, 298-304 (5th Cir. 2021)

PETITION FOR CERTIORARI -- WITH A SURPRISE (JAN. 7, 2022)

PETITION FOR WRIT OF CERTIORARI

M. CARTER CROW
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KIMBERLY F. CHEESEMAN
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paul.clement@kirkland.com

Counsel for Petitioners

January 7, 2022

WHO IS PAUL CLEMENT?

Paul Clement



Official portrait, 2005

Paul Drew Clement (born June 24, 1966) is an American lawyer who served as [U.S. Solicitor General](#) from 2004 to 2008 and is known for his advocacy before the [U.S. Supreme Court](#). He established his own law firm, Clement & Murphy, in 2022 after leaving [Kirkland & Ellis](#), following that firm's decision to end its [Second Amendment](#) work.^{[1][2]} He is also a Distinguished Lecturer in Law at [Georgetown University](#) and an adjunct professor at [New York University School of Law](#). He was nominated by President [George W.](#)

Legal career [\[edit \]](#)

After law school, Clement was a [law clerk](#) to judge [Laurence Silberman](#) of the [U.S. Court of Appeals for the District of Columbia Circuit](#) from 1992 to 1993 and then for justice [Antonin Scalia](#) of the [U.S. Supreme Court](#) from 1993 to 1994.

Cases before the Supreme Court [\[edit \]](#)

He has argued over 100 cases^[6] before the United States Supreme Court,^[7] and as of November 2011 he had argued more cases before the Supreme Court since 2000 than any other lawyer.^[8]

I DECIDE TO PLAY IT STRONG (FEB. 3, 2022)

W A I V E R

SUPREME COURT OF THE UNITED STATES

No.

I DO NOT INTEND TO FILE A RESPONSE to the petition for a writ of certiorari unless one is requested by the Court.

Please check the appropriate box:

- ☒ I am filing this waiver on behalf of all respondents.
- ☐ I only represent some respondents. I am filing this waiver on behalf of the following respondent(s):

INCOMING AMICUS BRIEFS (A/K/A GREEN BRIEFS)

Dear Mr. Harris:

On February 3, 2022, this Court docketed respondent's waiver of his right to respond to the petition for writ of certiorari in the above-captioned case. On behalf of petitioners, I write to inform the Court that, unless the Court calls for a response to the petition before February 10, 2022 (thereby extending the deadline for briefs *amici curiae*), petitioners expect multiple briefs *amici curiae* to be filed in support of the petition on or before that date, including from the American Petroleum Institute, the Independent Petroleum Association of Americas, and several States. Petitioners respectfully request that this letter be distributed with the petition for writ of certiorari.

Sincerely,



Paul D. Clement
Counsel of Record
paul.clement@kirkland.com

DISASTER NO. 7: RESPONSE REQUESTED

Supreme Court Electronic Filing System



○ no-reply@sc-us.gov <no-reply@sc-us.gov>

Friday, February 18, 2022 at 5:07 PM

To: (x) Ed Sullivan ^

A new docket entry, "Response Requested. (Due March 21, 2022)" has been added for [Helix Energy Solutions Group, Inc., et al., Petitioners v. Michael J. Hewitt](#).

DISASTER NO. 8: I HIRE A PRINTER AND TRY TO DO IT MYSELF

All Hewitt asks is for this Court to refuse to shoehorn the plain text of the law to Helix's desire because someone at the company failed to check the

29

FLSA's requirements before classifying Hewitt's position as exempt from overtime.

Respectfully submitted,

EDWIN SULLIVAN

Counsel of Record

OBERTI SULLIVAN LLP

712 Main Street, Suite 900

Houston, TX 77002

(713) 401-3557

ed@osattorneys.com

Counsel for Respondent

DISASTER NO. 9: CERT. GRANTED

WHAT DO I DO NOW?

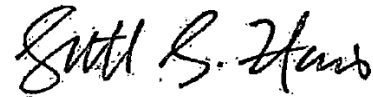
Re: Helix Energy Solutions Group, Inc., et al.
v. Michael J. Hewitt
No. 21-984
(Your No. 19-20023)
4:17-CV-2545

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted.

Sincerely,

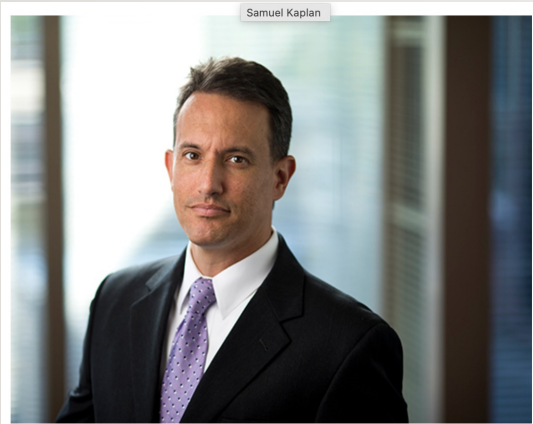
A handwritten signature in black ink, appearing to read "Scott S. Harris".

Scott S. Harris, Clerk

IMMEDIATE ISSUES

- Do I bring on a prominent law firm?
- How do I get the Department of Labor involved?
- Can I come up with some so-called Green Briefs?

THE LAW FIRM ISSUE



BSF

BOIES
SCHILLER
FLEXNER

[About Us](#) [Practices](#) [Lawyers](#) [Diversity](#) [Careers](#)

PARTNER

Samuel C. Kaplan



ASSOCIATE

Gina A. Rossman

THE DOL ISSUE

- I learn you don't go to the DOL. You have to meet with the Solicitor General's Office.
- Lots of discussion about how to arrange a meeting.
- Then, out of the blue, Tony Yang calls me. I had no idea who he was.

SO WHO IS TONY YANG?

Anthony A. Yang



- Assistant to the Solicitor General
- Hired by Paul Clement
- 30+ oral arguments before SCOTUS
- Super intelligent

WHAT ABOUT *AMICI*?

- Many ideas kicked around.
- We landed on asking nurses group to consider filing.
- Nurses could lose pay by an adverse ruling

DO I ARGUE THIS CASE?

THE 23-PAGE SUPREME COURT STYLE GUIDE

GUIDE FOR COUNSEL

IN CASES TO BE ARGUED

BEFORE THE

**SUPREME COURT OF
THE UNITED STATES**

It has been said that preparing for oral argument at the Supreme Court is like packing your clothes for an ocean cruise. You should lay out all the clothes you think you will need, and then return half of them to the closet. When preparing for oral argument, eliminate half of what you initially planned to cover. Your allotted time passes quickly, especially when numerous questions come from the Court. Be prepared to skip over much of your planned argument and stress your strongest points.

ELSA ARCANA

HISTORICAL REGULATIONS

2518

FEDERAL REGISTER, Thursday, October 29, 1938

TITLE 23—LABOR

WAGE AND HOUR DIVISION

Part 541. Regulations defining and delimiting the terms "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY, OR IN THE CAPACITY OF OUTSIDE SALESMAN" pursuant to Section 13 (a) (1) of the Fair Labor Standards Act.

The following regulations—Part 541—regulations defining and delimiting the terms "any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman" pursuant to Section 13 (a) (1) of the Fair Labor Standards Act are hereby issued. Said Regulations—Part 541—shall become effective on my signing the original and after the publication thereof in the Federal Register and shall be in force and effect until repealed by regulations hereafter made and published by me.

Signed at Washington, D. C., this nineteenth day of October, 1938.

ELLEN P. ANDREWS,
Administrator.

Section 541.1 Executive and Administrative. The term "employee employed in a bona fide executive (and administrative) capacity" in Section 13 (a) (1) of the Act shall mean any employee whose primary duty is the management of the establishment, or a customarily recognized department thereof, in which he is employed, and who customarily and regularly directs the work of other employees therein, and who has the authority to hire and fire other employees or whose suggestions and recommendations as to the hiring and firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and who customarily and regularly exercises discretionary powers, and who does no substantial amount of work of the same nature as that performed by non-exempt employees of the employer, and who is compensated for his services at not less than \$10 (inclusive of board, lodging, or other facilities) for a workweek.

Section 541.2 Professional. The term "employee employed in a bona fide professional capacity" in Section 13 (a) (1) of the Act shall mean any employee

(a) who is customarily and regularly engaged in work

(1) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work, and

(2) requiring the consistent exercise of discretion and judgment both as to the manner and time of performance, as

* Sections 541 through 541.6 issued under the authority contained in Section 13 (a) (1), 29 Stat. 1000.

Notices

CIVIL AERONAUTICS AUTHORITY.

(Special Order 401-A-6)

RESOLUTION NUMBER 401-A-6. INCORPORATION RELATIVE TO THE AIR TRANSPORTATION SERVICE TO BE ESTABLISHED BY SAID AIR CARRIER OVER A ROUTE FROM JACKSONVILLE, FLORIDA, TO NEW ORLEANS, LOUISIANA, VIA TAMPA, FLORIDA.

At a session of the Civil Aeronautics Authority, held at its office in Washington, D. C., on the 19th day of October, 1938.

Upon consideration by the Authority of the application of National Airlines, Incorporated, for exemption from the provisions of section 401 (a) of the Civil Aeronautics Act of 1938, in so far as the provisions of said section are applicable to the air transportation service to be rendered by said air carrier from Jacksonville, Florida, to New Orleans, Louisiana, via Tallahassee, Marianna, and Pensacola, Florida, Mobile, Alabama, and Gulfport, Mississippi, the Authority is of the opinion and finds that:

(1) The applicant was, prior to May 14, 1938, and is now an air carrier engaged in the rendition of an interstate air transportation service, and as such air carrier is subject to the provisions of the Civil Aeronautics Act of 1938 and the jurisdiction of the Civil Aeronautics Authority.

(2) Said air carrier, prior to, on and since May 14, 1938, was and has been continuously engaged in the rendition of a scheduled air transportation service between Miami, Florida, and Daytona Beach, Florida, via Fort Myers, Sarasota, St. Petersburg, Tampa, Lakeland and Orlando, Florida.

(3) On or about the 12th day of April, 1938, the United States Post Office Department caused to be issued an advertisement for bidders for an air mail service over a route from Jacksonville, Florida, to New Orleans, Louisiana, via Tallahassee, Marianna, and Pensacola, Florida, Mobile, Alabama, and Gulfport, Mississippi, said route being known as route A-13.

(4) On or about the 18th day of June, 1938, a contract for air mail service over the route described in Finding (3) was awarded by the United States Post Office Department to National Airlines, Incorporated, said air carrier being the lowest bidder therefor. By the terms of said contract, said air carrier was authorized by the Postmaster General to engage in the transportation of mail over said route and to render passenger service thereon.

AND 28. Air mail service over said route was provided for by the Act of Congress making appropriations for the Treasury Department and the Post Office Department, approved March 28, 1938. Said route is specifically set forth in section

THE NATIONAL ARCHIVES

LITTERA SCRIPTA MANET

FEDERAL REGISTER

VOLUME 14

1934

NUMBER 249

Washington, Wednesday, December 28, 1949

THE NATIONAL ARCHIVES

LITTERA SCRIPTA MANET

FEDERAL REGISTER

VOLUME 18

1934

NUMBER 131

Washington, Tuesday, July 7, 1953

11390

RULES AND REGULATIONS

Title 29—Labor

EMPLOYEE EMPLOYED IN A BONA FIDE
EXECUTIVE CAPACITY

Sec.

541.503 Trainees, outside salesmen.

CHAPTER V—WAGE AND HOUR DIVISION,
DEPARTMENT OF LABOR

PART 541—DEFINING, AND DELIMITING THE TERMS "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY (INCLUDING ANY EMPLOYEE EMPLOYED IN THE CAPACITY OF ACADEMIC ADMINISTRATIVE PERSONNEL OR TEACHER IN ELEMENTARY OR SECONDARY SCHOOLS), OR IN THE CAPACITY OF OUTSIDE SALESMAN"

Section 13(a) of the Fair Labor Stan-

Sec.

541.101

General.

541.102

Management.

541.103

Primary duty.

541.104

Department or subdivision.

541.105

Two or more other employees.

541.106

Authority to hire or fire.

541.107

Discretionary powers.

541.108

Work directly and closely related.

541.109

Emergencies.

541.110

Occasional tasks.

541.111

Nonexempt work generally.

541.112

Percentage limitations on nonex-

empt work.

541.113

Sole-charge exception.

Sec.

541.600

Combination exemptions.

541.601

Special provision for motion pic-

ture producing industry.

541.602

Special proviso concerning execu-

tive and administrative employees in

multi-store retailing operations.

AUTHORITY.—

Sec. 13, 52 Stat. 1007, as

amended; 29 U.S.C. 213.

Subpart A—General Regulations

§ 541.0 Terms used in regulations.

THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

1985

Register

Friday,
April 23, 2004

FLSA ARCANA (CONT'D)

DOL REPORTS & RECOMMENDATIONS

UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
WASHINGTON, D. C.

+

“Executive, Administrative, Professional . . . Outside Salesman” Redefined

+

Effective October 24, 1940

Report and Recommendations of the
Presiding Officer
at Hearings Preliminary to Redefinition

Part I Chap. 10 EFFECT OF DEDUCTIONS FROM SALARY 719

Effect of Disciplinary Deductions from Salary—

Wage and Hour Division Release No. A-9, Issued Aug. 24, 1944

An employee will be considered to be paid on a “salary basis” within the meaning of sections 541.1, 541.2 or 541.3 of Regulations, Part 541 if under his employment agreement he regularly receives each pay period, on a weekly, biweekly, semi-monthly, monthly or annual basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the number of hours worked or in the quantity or quality of the work performed during the pay period. However, the fact that less than this amount is paid for a particular pay period because disciplinary deductions are made for unreasonable absences would not in itself prove that

the employee is not employed on a salary basis. On the other hand, since it is well recognized that bona fide executive, administrative, and professional employees are normally allowed some latitude with respect to the time spent at work, an employee will not be regarded as being paid on a salary basis if deductions are made for those types of absences ordinarily allowed such employees. For example, an employee is not being paid on a salary basis if the employer makes deductions from his salary for an afternoon when he goes home early or when he occasionally takes a day off, unless, under the circumstances of a particular case, such absences must be considered unreasonable.

REPORT AND RECOMMENDATIONS ON PROPOSED REVISIONS OF REGULATIONS, PART 541

Defining the Terms

“Executive” “Administrative”
“Professional”
“Local Retailing Capacity”
“Outside Salesman”

..... as contained in Section 13 (a) (1) of the Fair Labor Standards Act of 1938, providing exemptions from the wage and hour provisions of the act.

June 1949



FLSA ARCANA (CONT'D)

DOL AGENCY OPINIONS

February 8, 1956

MEMORANDUM

To: Mr. Stuart Rothman, Solicitor
From: Newell Brown, Administrator
Subject: "On a Salary Basis" - Section 541.118
Explanatory Bulletin, Regulations, Part 541

In the past the Divisions have held that even though an employee meets all other requirements of Regulations, Part 541.1, 541.2, or 541.3 and is guaranteed a weekly salary in an amount equal to in excess of the amounts specified, the requirement that he be paid "on a salary basis" will not be met if he is paid on an hourly rate basis.

The Policy Committee has reviewed this position and has recommended a change. On the basis of that recommendation, I propose to change this position so that such an employee will meet the "salary basis" test if there is a reasonable relationship between the hourly rate, the regular or normal weekly hours, and the amount of the weekly guarantee. Thus, the test will be met only if the weekly guarantee is roughly equivalent to the employee's earnings for his regular or normal workweek.

Will you please advise me whether there are any legal barriers to the adoption of such a position?

FO:EMA:PAM

1/4/56

FLSA 1202

July 17, 1987

This is in response to your letter of May 26 enclosing correspondence from *** Secretary of the State of *** Department of Employment Relations. *** is specifically concerned with the application of the minimum wage and overtime pay exemption contained in section 13(a)(1) of the Fair Labor Standards Act (FLSA) to bona fide administrative and professional employee employed by the State of .

[WAGES-HOURS 61-66 CCH-WH ¶30,996.23] Opinion Letter of the Wage-Hour Administrator.

No. 395, September 22, 1965

Fair Labor Standards Act

Exemption for Executive, Administrative and Professional Employees--Salary Requirement--Employees Compensated at Hourly or Daily Rates--Weekly Guarantee Agreement.--Highly-paid administrative and professional employees employed by consulting firms on an irregular project-by-project basis do not qualify for the

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210



MAR 15 1988

MEMORANDUM FOR ANTHONY J. PONTURIERO
Regional Director for Wage Hour
New York Region
FROM: PAULA V. SMITH
Administrator
SUBJECT: Harrah's Marina Hotel Casino
Atlanta City, New Jersey
Case Number: 8621402334

We have reviewed the attached investigation file concerning the salary basis of payment under Regulations, 29 CFR Part 541 for individuals employed as boxpersons, floorpersons and pit bosses.

Beginning in 1984, Harrah's Marina Hotel Casino (Harrah's) required all casino supervisory employees to sign a statement which guarantees them a minimum salary of \$250 per week, in any week when the employee reports to work. Where deductions are made from this guaranteed salary, they are made in accordance with sections 541.118(a)(1) through (6) of the Regulations. Actual compensation, however, paid to boxpersons, floorpersons and pit bosses is determined by a daily rate of pay except in those instances when the \$250 per week guarantee is paid. The daily rate of pay ranges from \$120 to \$200 a day depending on the position regardless of the number of hours worked in the day.

FLSA ARACANA (CONT'D)

DOL FIELD OPERATION HANDBOOKS

SUPERSEDES ADVANCE
INSERT #5 OF
APRIL 10, 1956

FIELD OPERATIONS HANDBOOK

22b07 • Computation of a salary on an hourly-rate basis.

FIELD OPERATIONS HANDBOOK

(For Official Use Only)

22b03 Computation of a salary on an hourly rate basis. An employee whose salary is computed on an hourly rate basis 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 Reg 541 and if there is a reasonable relationship between the hourly rate, the regular or normal working hours and the amount of the weekly guarantee. The "reasonable relationship" test will be met if the weekly guarantee is roughly equivalent to the employee's earnings at the assigned hourly rate for his normal w/v.

FLSA ARCANIA (2004 REGULATIONS)

Section 541.604 Minimum Guarantee Plus Extras

Under proposed section 541.604, an exempt employee may receive additional compensation beyond the minimum amount that is paid as a guaranteed salary. For example, an employee may receive, in addition to the guaranteed minimum paid on a salary basis, extra compensation from commissions on sales or a percentage of the profits. An exempt employee may also receive additional compensation for extra hours worked beyond the regular workweek, such as half-time pay, straight time pay, or a flat sum. Proposed section 541.604(b) provided that an exempt employee's salary may be computed on an hourly, daily or shift basis. If the employee is given 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 is satisfied where the weekly guarantee is "roughly equivalent" to the employee's actual usual earnings. Thus, for example, the proposal stated that where an employee is guaranteed at least \$600 per week, and the employee normally works four or five shifts per week and is paid \$150 per shift, the reasonable relationship requirement is satisfied.

The final rule does not make any substantive changes to the proposed rule, but does make a number of clarifying changes. 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. The courts also have upheld the reasonable relationship requirement. See, e.g., *Brock v. Claridge Hotel & Casino*, 546 F.2d 180, 182-83 (3rd Cir. 1976) (salary basis requirement not met where employees are paid by the hour and the guarantee is "nothing more than an illusion"). *cert. denied*, 438 U.S. 925 (1978). Some commenters, although not a significant number, object to the reasonable relationship requirement or question the clarity of the regulatory text, while others ask for additional specificity about the various types of additional compensation that may be paid above and beyond the guaranteed salary. The Department has made minor wording changes in response to the comments to clarify this provision. The National Association of Manufacturers (NAM) suggests that the

Department list the range of compensation options, such as cash overtime in any increment, compensatory time off, and shift or holiday differentials, that employers may provide in addition to the guaranteed salary without violating the salary basis requirement. NAM gave the specific example of an employer who allows an exempt worker to take a day off as a reward for hours worked on a weekend outside the employee's normal schedule. The proposed regulation provided some examples and stated that additional compensation "may be paid on any basis." We agree that the examples described above would not violate the salary basis test. However, we have not and could not include in the regulations every method employers might use to provide employees with extra compensation for work beyond their regular workweek. Thus, we have added only one of the examples NAM suggests regarding compensatory time off.

The National Technical Services Association states that it was unclear whether the reasonable relationship requirement applies in all cases to employees who receive a salary and additional compensation. We have clarified that this requirement applies only when an employee's actual pay is computed on an hourly, daily or shift basis. Thus, for example, if an employee receives a guaranteed salary plus a commission on each sale or a percentage of the employer's profits, the reasonable relationship requirement does not apply. Such an employee's pay will understandably vary widely from one week to the next, and the employee's actual compensation is not computed based upon the employee's hours, days or shifts of work.

A few commenters, including the National Association of Convenience Stores, the Fisher & Phillips law firm and the American Council of Engineering Companies, advocate the elimination of the reasonable relationship test. They question whether it was appropriate for the Department to require a reasonable relationship between the guaranteed salary and the employee's actual usual compensation when the payments are based on the employee's quantity of work, when the Department does not have such a requirement for salaries plus commissions or other similar compensation. They state that, so long as the employee also is guaranteed compensation of not less than the minimum required amount, it ought to be irrelevant how an employee's pay is computed. Moreover, they state that the terms "reasonable relationship" and

§ 541.601 Highly compensated employees.

(a) An employee with total annual compensation of at least \$100,000 is deemed exempt under section 13(a)(1) of the Act if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in subparts B, C or D of this part.

(b) (1) "Total annual compensation" must include at least \$455 per week paid on a salary or fee basis. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. Total annual compensation does not include board, lodging and other facilities as defined in § 541.606, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other fringe benefits.

§ 541.602 Salary basis.

(a) **General rule.** An employee will be considered to be paid on a "salary basis" within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

(1) Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work.

§ 778.112 Day rates and job rates.

If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

FLSA ARCANA (CASE LAW – A LOT OF CASE LAW)

62 S.Ct. 1216

Supreme Court of the United States

OVERNIGHT MOTOR TRANSP. CO., Inc.,

v.

MISSEL.

No. 939.

|

Argued April 6, 7, 1942.

|

Decided June 8, 1942.

126 F.2d 98

Circuit Court of Appeals, Fourth Circuit.

MISSEL

v.

OVERNIGHT MOTOR TRANSP. CO., Inc.

No. 4867.

|

Jan. 5, 1942.

825 F.2d 1173

United States Court of Appeals,
Seventh Circuit.

Kostas MECHMET, et al., Plaintiffs-Appellants,

v.

FOUR SEASONS HOTELS,
LIMITED, et al., Defendants-Appellees.

No. 86-2151.

|

Argued April, 15, 1987.

|

Decided Aug. 4, 1987.

DECISION REACHED

- I will argue. Sam will be Counsel of Record.
- Two tips in the style guide are ever present on my mind:

Attempts at humor usually fall flat.

Avoid emotional oration and loud, impassioned pleas. A well-reasoned and logical presentation without resort to histrionics is easier for listeners to comprehend.

PETITIONERS' BRIEF (JULY 15, 2022)

If a statute designed to ensure a minimal standard of fair treatment for blue-collar workers really required windfalls for supervisors already making well over six figures, it would be an issue that cried out for congressional attention. And if a regulation meant to implement the FLSA has strayed so far from the statutory design that it mandates such a result, it would call the entire regulatory regime into doubt. Fortunately, those counterintuitive results are not compelled by the statute or the regulations. This Court should reverse the decision below.

MORE *AMICI*

**BRIEF OF *AMICUS CURIAE* INDEPENDENT
PETROLEUM ASSOCIATION OF AMERICA ON
BEHALF OF HELIX ENERGY SOL. GRP., INC.**

**BRIEF OF THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONERS**

**BRIEF FOR THE STATES OF MISSISSIPPI,
ALABAMA, LOUISIANA, MONTANA, UTAH, AND
WEST VIRGINIA AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

**BRIEF OF THE TEXAS OIL AND
GAS ASSOCIATION, INC. AND THE
AMERICAN PETROLEUM INSTITUTE AS
AMICI CURIAE IN SUPPORT OF PETITIONERS**

GOOD NEWS / BAD NEWS

- Good news: Nurses are on board.
- Bad news: No news from Tony and SG's office.

AUGUST 22, 2022: SG ON BOARD

- Good news: SG is in!
- Bad news: Brief is due in 9 days. What if there are disagreements?
- Good/Bad News: My oral argument time is reduced from 35 to 20 minutes.

RESPONDENT'S BRIEF (AUG. 31, 2022)

LOTS OF DRAFTS, BUT SAM AND GINA BRING IT HOME

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 WE HAD SUPORT (SEPT. 7, 2022)

**BRIEF FOR *AMICUS CURIAE*
MASSACHUSETTS NURSES ASSOCIATION
IN SUPPORT OF RESPONDENT**

**BRIEF OF THE AMERICAN FEDERATION OF
LABOR AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENT**

**BRIEF OF THE NATIONAL NURSES UNITED
AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENT**

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT**

PETITIONERS' REPLY (SEPT. 30, 2022)

- Aggressive as far as these things go.

Respondent and the government seek to defend the judgment below by running away from the question presented. Indeed, they both literally rewrite it and insist that the dispositive issue is whether Respondent was paid on a salary basis consistent with §541.602. But Respondent pressed that same argument in his brief in opposition to no avail. For good reason: Not only does Helix satisfy §541.602, but the decision below expressly *assumed* as much. While Respondent and the government claim that Helix has “misread” the decision below, they ignore that the Fifth Circuit withdrew an earlier decision relying on §541.602 and replaced it with one that created a circuit split on the question presented: *i.e.*, whether

ORAL ARGUMENT ON OCTOBER 12

- I fly to D.C. on October 2.
- First moot court is October 3.

IT'S ALL ABOUT THE FIRST TWO MINUTES



MOOT COURTS – A HORRIBLE EXPERIENCE

- I failed to have one good moot court
- At my first moot court, a lawyer told me I wasn't going to get there.
- Everyone talked about how much they loved Paul Clement.
- I receive a lot of conflicting advice.
- I was into a routine, wake up, fail, work at what I got wrong, repeat.

OH YEAH, AND OPPOSING COUNSEL GIVES AN INTERVIEW

Original Jurisdiction



OCT 5, 2022 • 43M

Supreme Advocate: An Interview With Paul Clement

The former solicitor general shares advice about oral argument and details about his departure from Kirkland.

 Oct 5, 2022

 17

 4



HOW SCOTUS IS DIFFERENT

- Nothing is set in stone: Law or Procedure.
- It doesn't matter how many Circuits agree with you, or that you have every case in the country on your side.
- It doesn't matter if there is no Circuit split.
- Only first principles matter. I have to be ready on the statute. I have to be ready on *Auer*. I have to be ready on everything.
- It's not about who is right on the regulations. You have to know the Constitution, the statute, its purpose, the regulations, administrative law, waiver, etc.

AND THEN ALL THE ATTENDANT ISSUES

- Constant requests for tickets.
- Paying clients who knew what I was doing but just had “5 minute” questions.
- Sketch artist?

MY SANCTUARY, THE ROOF



LAST MOOT COURT (OCTOBER 10)

- Debates ensue over challenging points of law.
- Rex and I then talk for hours about concepts behind the law.
Why do we do this? Why does it say this? If it means this, why wasn't it written this way?

OCTOBER 11, 2022: ONE-DAY REMAINING

- I forced myself to have a good night's sleep.
- My kids flew in with my paralegal but I didn't see them.
- Spent day rewriting my 2 minute into endlessly and about 6-8 hours of moot courting with Rex and Gina.

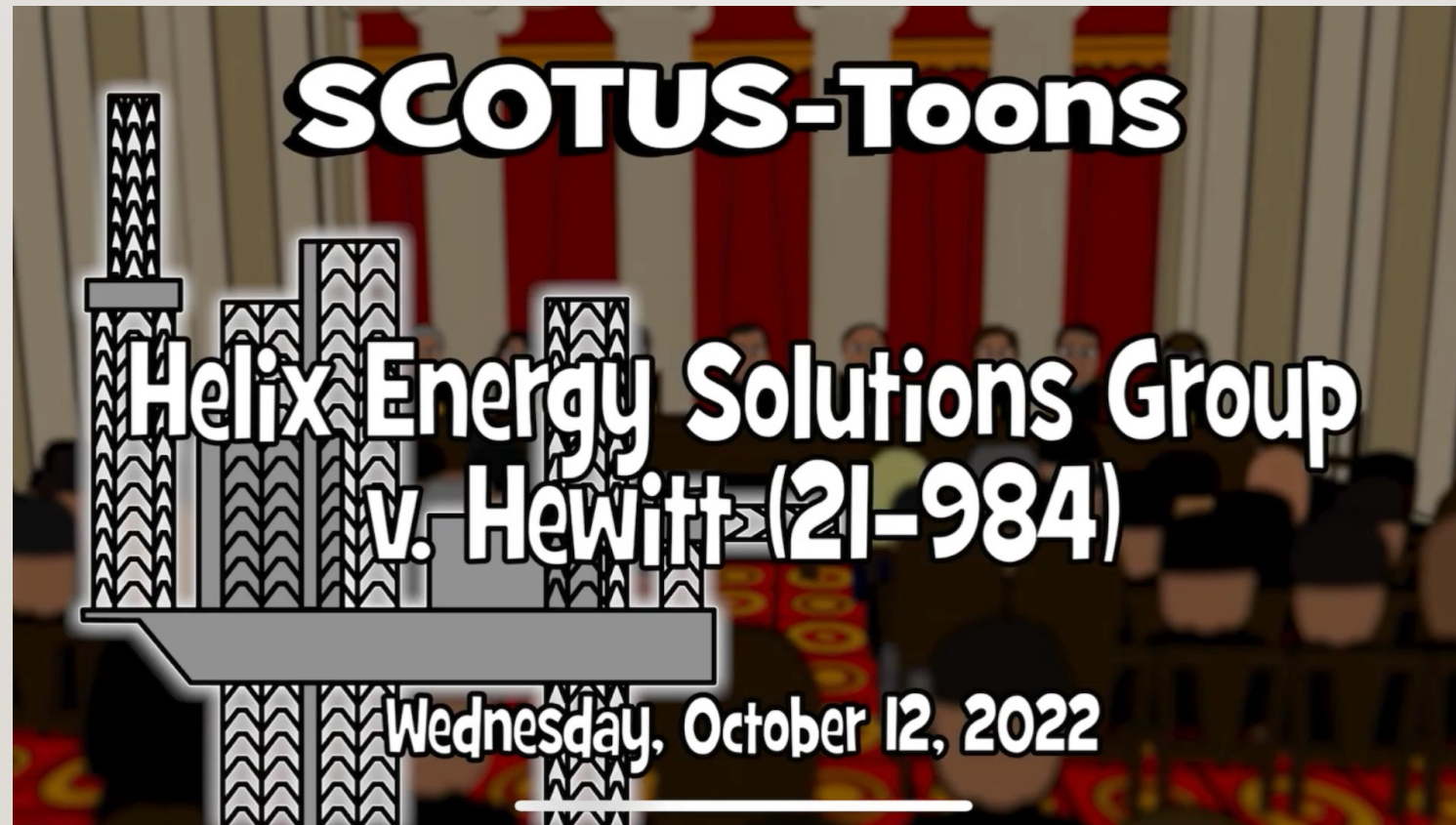
ORAL ARGUMENT (OCTOBER 12, 2022) (CONT'D)

- Check in and sent to ante-room. No phones.
- Lots of important busts and paintings.
- Sam and I enter the ante-room for attorneys. All the lawyers there are multiple SCOTUS advocates.
- I get in line to shake Mr. Clement's hand.
- I am walked into the Court, wait for the other argument to go, and wait for my case to be called.

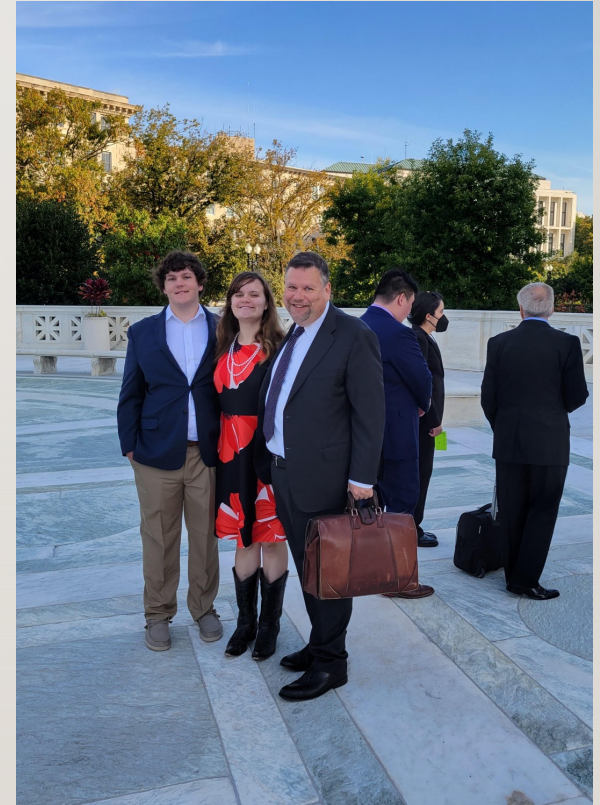
ORAL ARGUMENT (OCTOBER 12, 2022) (CONT'D)

- First case goes 2 hours.
- After our case, Paul Clement starts. No notes.
- Sam passes me a note telling me I'm ready.

OCTOBER 12, 2022: THE ARGUMENT
(EDITED & ABRIDGED)



PICTURES



FOURTH WIN (FEB. 22, 2023) (6-2-1 OR 7-2 DEPENDING ON HOW YOU COUNT)

(Slip Opinion)

OCTOBER TERM, 2022

1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HELIX ENERGY SOLUTIONS GROUP, INC., ET AL. *v.*
HEWITT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

No. 21–984. Argued October 12, 2022—Decided February 22, 2023

FOURTH WIN (FEB. 22, 2023) (6-2-1 OR 7-2 DEPENDING ON HOW YOU COUNT)

JUSTICE KAGAN delivered the opinion of the Court.

The question here is whether a high-earning employee is compensated on a “salary basis” when his paycheck is based solely on a daily rate—so that he receives a certain amount if he works one day in a week, twice as much for two days, three times as much for three, and so on. We hold that such an employee is not paid on a salary basis, and thus is entitled to overtime pay.

Helix Energy Sols. Group, Inc. v. Hewitt, 598 U.S. ___, ___, 143 S. Ct. 677, 682 (2023).

The Texas Lawbook

Free Speech, Due Process and Trial by Jury

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Behind the Scenes: How a Pair of Texas Friends Prepped for a SCOTUS Argument

Ed Sullivan and Sam Kaplan (pictured center) have been friends for 30 years, beginning when they

GRAVELY
Commercial Contingency

[LEARN MORE](#)

Insurance Recovery

Construction Defects

FEATURES

P.S.
b2

P.S. — Death Row Removal, Melsheimer's Fellowship, Debt Collection Jargon Simplified

In this week's edition of P.S., Texas Access for Justice resumes in-person legal clinics for veterans with multiple June clinic dates, Winston & Strawn's Tom Melsheimer

WALL STREET JOURNAL! (FEB. 23, 2023)

THE WALL STREET JOURNAL.

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Supreme Court Sides With Employee in Overtime Case

Oil-rig supervisor wins case on compensation for working extra-long hours

“Someone paid by the day is not paid a weekly salary. Helix violated a law on the books for 82 years,” said Ed Sullivan, who argued Mr. Hewitt’s case. “We are gratified the Supreme Court declined to legislate on the company’s behalf.”

THE SKETCH



SUPREME SURPRISE

*HOW A TEXAS EMPLOYMENT LAWYER FOUND
HIMSELF BEFORE THE U.S. SUPREME COURT*

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