No. _____

In the
Supreme Court of the United States

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

Petitioners,

v.

MICHAEL J. HEWITT,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent was a supervisor on Helix's offshore vessels and was compensated commensurate with his high-ranking position. Every two weeks, Helix paid Respondent at least $963 for each day that he worked. In all, Respondent earned $248,053 in 2015, $218,863 in 2016, and $143,680 in the eight months he worked for Helix in 2017. After his performance-related release, Respondent sued Helix under the Fair Labor Standards Act ("FLSA"), claiming that he was also entitled to substantially more in retroactive overtime pay.

The FLSA sensibly exempts many highly compensated supervisors from the Act's overtime requirements. Specifically, employees who perform executive duties, earn at least $100,000 per year, and receive at least $455 per week paid on a salary basis are "deemed exempt." 29 C.F.R. §541.601(a). It is undisputed that Respondent performed executive duties and met the annual earnings threshold. Nevertheless, a sharply divided *en banc* Fifth Circuit ruled that Respondent was non-exempt and entitled to retroactive overtime pay because he was paid based on a daily rate, not a weekly rate, even though his daily rate was more than twice the weekly minimum. The majority reached that counterintuitive conclusion only by applying a separate provision, 29 C.F.R. §541.604, that the First and Second Circuits have both held inapplicable when determining whether highly compensated employees are exempt.

The question presented is:

Whether a supervisor making over $200,000 each year is entitled to overtime pay because the standalone regulatory exemption set forth in 29

C.F.R. §541.601 remains subject to the detailed requirements of 29 C.F.R. §541.604 when determining whether highly compensated supervisors are exempt from the FLSA's overtime-pay requirements.

CORPORATE DISCLOSURE STATEMENT

Petitioner Helix Well Ops, Inc. is wholly owned by Petitioner Helix Energy Solutions Group, Inc. Helix Energy Solutions Group, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Southern District of Texas:

- *Hewitt v. Helix Energy Solutions Grp., Inc.*, No. 17-cv-02545 (S.D. Tex.), judgment issued Dec. 21, 2018
- *Hewitt v. Helix Energy Solutions Grp., Inc.*, No. 19-20023 (5th Cir.), judgment entered Sept. 9, 2021

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Respondent is a highly skilled supervisor who earned over $200,000 annually while managing operations and supervising employees on Helix's offshore well-intervention vessels. He emphatically is not, and does not claim to be, the type of blue-collar laborer whom the FLSA's overtime provisions were designed to protect. Indeed, the FLSA exempts from its overtime-pay requirements anyone "employed in a bona fide executive, administrative, or professional capacity," 29 U.S.C. §213(a)(1), and the Secretary of Labor has interpreted this exemption to include employees who earn at least $100,000 per year—considered "highly compensated employees"—whose total compensation includes at least $455 per week paid on a "salary basis," and who perform any of several enumerated supervisory executive duties. 29 C.F.R. §541.601 (the "HCE regulation"). Such employees are "deemed exempt" from the Act's overtime requirements. *Id.*

Respondent falls squarely within that exemption: he concedes that he performed executive duties; he concedes that he earned at least $100,000 per year; and he concedes that he received at least $455 in every week in which he performed any work without regard to how many hours he actually worked. Indeed, his annual compensation dwarfed the annual threshold and his daily rate more-than-doubled the weekly salary minimum. Nevertheless, after Helix fired him for performance issues, Respondent filed this action, alleging for the first time that he was entitled to time-and-a-half compensation under the FLSA whenever he worked more than 40 hours in a week. Respondent

claimed, *inter alia*, that because his substantial pay was calculated based on a daily, not weekly, minimum, he could not be deemed exempt without satisfying a separate provision, 29 C.F.R. §541.604. The District Court rejected that claim.

That decision was ultimately reversed by a sharply divided *en banc* Fifth Circuit. The *en banc* majority rejected the holdings of the First and Second Circuits that 29 C.F.R. §541.604 is inapplicable to "highly compensated employees" while embracing contrary dicta from the Sixth and Eighth Circuits. The majority acknowledged the implausibility of treating a supervisor making over $200,000 a year, and nearly $1,000 a day, as overtime-eligible, but believed that the text compelled that counterintuitive result. But Judge Jones, writing for an equally textually committed minority, begged to differ, viewing the majority's result as not just "counterintuitive" and "counter to two other circuits' analysis," but "incorrect." App.36. Judge Wiener put matters more colorfully: "I imagine that the original proponents of the FLSA … are turning over in their respective graves." App.66-67.

As the dissenting judges forcefully demonstrated, and as the First and Second Circuits have held, the decision below is wrong as a matter of text, context, and common sense. The HCE regulation is a self-contained provision that *deems* highly compensated employees exempt if they perform any of several listed duties and earn more than $455 in salary each week they work. Even setting aside the absurdity of mandating overtime pay for executives paid over $200,000 annually, the text, structure, and history of

the HCE regulation make crystal clear that §541.604 does not enter the picture: The HCE regulation uses self-contained deeming language, is structurally separate, expressly incorporates other provisions without mentioning §541.604, and contains provisions that conflict with those in §541.604.

Certiorari is warranted to resolve this clear circuit split. The split implicates an important question regarding whether highly compensated white-collar employees making over $200,000 a year and nearly $1,000 a day are entitled to substantially more. High day-rates like Respondent's are routine in a wide variety of industries and have long been the industry standard in resource exploration. If allowed to stand, the decision below would give rise to massive retroactive liability, especially given the ability to file nationwide collective actions in the Fifth Circuit. This Court has repeatedly rejected plaintiffs' attempts to impose significant FLSA liability on employers who have done nothing more than pay well-compensated workers in conformity with long-settled industry practice. *See, e.g., Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134 (2018); *Christopher v. SmithKline Beecham*, 567 U.S. 142 (2012). The same result should follow here. This Court should grant certiorari to correct the Fifth Circuit's deeply flawed interpretation, eliminate unjustified windfalls, and restore uniformity to this significant area of the law.

OPINIONS BELOW

The *en banc* Fifth Circuit's opinion is reported at 15 F.4th 289 and reproduced at App.1-76. The district court's opinion is available at 2018 WL 6725267 and reproduced at App.77-87.

JURISDICTION

The Fifth Circuit entered its judgment on September 9, 2021. On November 1, 2021, Justice Alito granted an application to extend the certiorari deadline to January 7, 2022. This Court has jurisdiction under 28 U.S.C. §1254(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the appendix.

STATEMENT OF THE CASE

A. Statutory Background

1. Congress enacted the FLSA in 1938, during the Great Depression, to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). The FLSA was designed to "ensure that each employee covered by the Act would receive a fair day's pay for a fair day's work and would be protected from the evil of overwork as well as underpay." *Id.* at 739 (alterations and emphasis omitted). To that end, the FLSA establishes a standard 40-hour workweek and requires employers to pay covered employees "one and one-half times the regular rate" for any additional time worked. 29 U.S.C. §207(a).

Because Congress' aim was to improve working conditions for blue-collar laborers, not to enrich white-collar professionals, the FLSA has always provided that its time-and-a-half requirement "shall not apply with respect to any employee employed in a bona fide

executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1).

Congress authorized the Labor Secretary to promulgate regulations implementing this exemption. *Id.* The Secretary initially did so in separate provisions defining executive employees, 29 C.F.R. §541.100, administrative employees, *id.* §541.200, and professional employees, *id.* §541.300 (collectively, the "EAP regulations"). The "[g]eneral rule" of those provisions is that an employee qualifies as an "executive," "administrative," or "professional" employee if three tests are satisfied. First, the "duties test" requires that the employee perform certain delineated duties. *See id.* §541.100(a)(2)-(4); *id.* §541.200(a)(2)-(3); *id.* §541.300(a)(2). Second, the "salary-basis test" requires that the employee be paid "on a salary basis," meaning that he or she "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation," and that this amount is not "subject to reduction because of variations in the quality or quantity of the work performed." *Id.* §541.602(a).[1] The salary-basis test does not require employers to pay employees for periods in which they perform no work. *Id.* §541.602(a). Third, the "salary-level test" requires that the predetermined salary be at least $455 per week (equivalent to $23,660 annually). *See, e.g.*, *id.* §541.100(a)(1).[2] As that low

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[1] Administrative and professional employees compensated on a "fee basis" instead of a "salary basis" may also be exempt, *see* 29 C.F.R. §541.605.

[2] Unless otherwise noted, the regulations cited, including the weekly and annual salaries listed throughout this petition,

threshold reflects, the EAP regulations apply even to white-collar employees who are not particularly well-compensated.

In a separate provision expressly applicable to each of the EAP regulations, 29 C.F.R. §541.604, the Secretary addressed whether and how employers may provide their salaried executive, administrative, and professional employees with extra compensation on top of their predetermined salaries without jeopardizing the exemption. This "[m]inimum guarantee plus extras" provision states that such "extras" will not convert the employee from salaried to non-salaried as long as (1) the employee continues to be guaranteed "at least the minimum weekly-required amount paid on a salary basis," 29 C.F.R. §541.604(a); *id.* §541.604(b), and (2) for covered employees whose extra pay is calculated on an hourly, daily, or per-shift basis, there must be "a reasonable relationship … between the guaranteed amount and the amount actually earned," *id.* §541.604(b). In other words, if an employee earns extras on an hourly, daily, or per-shift basis, he will be exempt under the EAP regulations only if his guaranteed salary makes up the bulk of his total compensation.

This "reasonable relationship" requirement ensures that the salary guarantee is meaningful and not a mere "illusion" for low-earning white-collar employees. App.10 (emphasis omitted). Without the requirement, "employees could routinely receive

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are those applicable during the period in dispute. The regulations were revised and the amounts increased in September 2019, effective January 1, 2020. No substantive changes are relevant to this petition.

weekly pay of $1,500 or more and yet be guaranteed only the minimum required $455," which would "effectively allow the employer to dock the employee for partial day absences, … inconsistent with the salary basis concept." *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,184 (Apr. 23, 2004) (codified at 29 C.F.R. §541) ("2004 Final Rule"). The "reasonable relationship" requirement thus protects employees who are forced to work long hours to earn significant compensation from being misclassified as exempt.

2. In 2004, the Secretary created a new, streamlined, and self-contained test for exempting "highly compensated employees" from the FLSA's overtime requirements. *Id.* at 22172-76. Because white-collar employees with a "high level of compensation" are almost invariably "employed in a bona fide executive, administrative, or professional capacity," 29 U.S.C. §213(a)(1), the Secretary dispensed with the EAP regulations' "detailed analysis" in favor of a simpler analysis for highly compensated employees. 29 C.F.R. §541.601(c).

Under the HCE regulation, an employee "with total annual compensation of at least $100,000 is deemed exempt" as long as her compensation includes "at least $455 per week paid on a salary or fee basis" and she customarily and regularly performs *any one* of the duties in the traditional duties tests for executive, administrative, or professional employees. 29 C.F.R. §541.601(a)-(b).[3] The regulation itself makes clear

[3] The HCE regulation carves out from its coverage all employees whose primary duties involve manual labor, "no

that this HCE pathway is distinct from the analysis required by the traditional EAP regulations: An employee who satisfies the HCE regulation's requirements is "deemed exempt" without regard to the various other provisions in Chapter 541 applicable to the EAP regulations. 29 C.F.R. §541.601(a); *accord* 29 C.F.R. §541.601(b)(2) (noting that if "the employee does not qualify as a highly compensated employee, [he] may still qualify as exempt under [the EAP regulations].").

Like the EAP regulations, the HCE regulation recognizes that an employee's compensation might combine a predetermined amount paid at regular intervals with additional amounts for commission, bonuses, extra hours worked, or the like, but expresses less concern about such details for workers clearing over $100,000 annually. Instead of cross-referencing the "[m]inimum guarantee plus extras" provision at 29 C.F.R. §541.604, the HCE regulation itself addresses and unqualifiedly approves of extras: As long as a minimum of $455 per week is paid on a salary or fee basis and the employee makes at least $100,000, "[t]otal annual compensation may … include commissions, nondiscretionary bonuses and other nondiscretionary compensation." 29 C.F.R. §541.601(b)(1). The HCE regulation does not impose any "reasonable relationship" requirement or other restrictions on the ratio between salary and extras for highly compensated employees. *See id.* The HCE regulation provides employers with flexibility and

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matter how highly paid they might be." 29 C.F.R. §541.601(d). It is undisputed that Respondent's primary duties did not involve manual labor.

certainty with respect to highly compensated workers in other respects as well. For example, a catch-up provision allows employers, "during the last pay period or within one month after the end of the 52-week period, [to] make one final payment sufficient to achieve the required [salary] level." *Id.* §541.604(b)(2). These provisions underscore that employers need certainty when it comes to highly compensated workers, lest the employees least in need of overtime receive the largest windfalls.

B. Factual and Procedural History

Respondent Michael Hewitt worked from 2015-17 as a supervisor in support of Helix's offshore oil and gas operations, earning over $200,000 annually for supervising twelve to fourteen workers. App.35. His job title was "toolpusher," which is a position typically filled by a senior, experienced individual who has worked his way up through the various drilling crew positions over the course of his career. App.35 n.1; App.36 n.4. The toolpusher's job "is largely administrative, including ensuring that the rig has sufficient materials, spare parts and skilled personnel to continue efficient operations." App.35 n.1. The toolpusher is typically second-in-command on the entire vessel, reporting directly to the superintendent and overseeing the drill crew, the deck crew, and the subsea crew. App.36.

Consistent with industry standard, Respondent worked 28-day "hitches," living on the vessel for 28 days at a time and being on-duty for 12 hours each day during the hitch. Helix paid Respondent, on a bi-weekly basis (*i.e.*, every two weeks), based on a daily rate that ranged from $963 to $1,341 over the course

of his employment. Helix paid Respondent at his predetermined daily rate regardless of how many hours he actually spent working each day, and Helix never deducted any amounts from Respondent's pay based on the quantity or quality of his work on any given day. ROA.668.[4] Thus, in any week in which he worked, Hewitt received at least $963, regardless of the exact hours worked, and in most weeks he made far more. For example, because each hitch lasted 28 days, a day rate of $963 would guarantee Respondent approximately $27,000 for a single hitch. In all, Respondent earned $248,053 in 2015, $218,863 in 2016, and $143,680 ($215,520 annualized) for the eight months he worked in 2017. ROA.499-501.

After Helix fired Respondent for performance-related reasons, Respondent filed a putative class-action complaint alleging that the FLSA entitled him and similarly situated employees to overtime. After discovery, both parties moved for summary judgment. Helix argued that Respondent was exempt from overtime pay as a "bona fide executive, administrative, or professional employee" under 29 U.S.C. §213(a)(1). The district court agreed, ruling that Respondent was exempt under both the test for executive employees and the streamlined test for highly compensated employees. *Hewitt v. Helix Energy Sols. Grp., Inc*, No. 17-CV-2545, 2018 WL 6725267 (S.D. Tex. Dec. 21, 2018). The district court explained that Respondent was paid on a "salary basis" because Respondent was paid a predetermined amount, not subject to reduction, in excess of $455 in

[4] "ROA" refers to the electronic record on appeal in the Fifth Circuit.

any week in which he worked regardless of how long he worked (namely, his day rate of at least $963). App.84. The district court noted that Respondent conceded every other part of both tests—*i.e.*, that he earned at least $100,000 each year and that he performed all of the duties in the "executive" regulation, 29 C.F.R. §541.100(a)(2)-(4). App.85-86. Accordingly, the district court ruled that Respondent was exempt twice over. App.85-86.

Respondent appealed to the Fifth Circuit. In an opinion by Judge Ho, the panel found Respondent not exempt under either the EAP regulation or the HCE regulation because he was not paid on a "salary basis." *Hewitt v. Helix Energy Sols. Grp., Inc.*, 956 F.3d 341, 343 (5th Cir. 2020), *opinion withdrawn and superseded*.

Helix petitioned for rehearing *en banc* on the question of whether Respondent was exempt under the HCE regulation. In response, the panel withdrew its prior opinion and issued a new one with new reasoning and a dissent from Judge Wiener. The new majority opinion, again authored by Judge Ho, abandoned the previous opinion's reasoning but still found Respondent non-exempt. This time, it held that the "[m]inimum guarantee plus extras" provision at 29 C.F.R. §541.604 applies when determining whether a highly compensated individual is exempt and that Helix had not satisfied §541.604. *Hewitt v. Helix Energy Sols. Grp., Inc.*, 983 F.3d 789, 789-97 (5th Cir. 2020), *opinion vacated*. Judge Ho also wrote a separate concurrence to his own opinion. *Id.* at 797-802. Judge Wiener's dissent called on his colleagues to take the case *en banc*, because the majority's

reasoning conflicted "with two other circuits" and portended "devastating effects on all employers, especially in the oil and gas arena." *Id.* at 802-09.

The full court granted *en banc* review and vacated the panel opinion. The court then split 12-6. Judge Ho wrote the majority opinion (and another separate concurrence to his own opinion). Relying on the same reasoning as the second panel opinion, the *en banc* majority held that Respondent was non-exempt. Critically, the majority opinion concluded that the "[m]inimum guarantee plus extras" provision at 29 C.F.R. §541.604 applies not just to the traditional EAP regulations, but also when determining whether a highly compensated employee is exempt under the HCE regulation. The *en banc* majority justified its conclusion by characterizing §541.604 as an "exception[] or proviso[]" to the salary-basis test of §541.602, App.8, even though the latter does not list the former among its many enumerated exceptions. Helix did not contend that it satisfied §541.604, arguing instead that §541.604 was inapplicable to the HCE regulation. Accordingly, after holding that §541.604 applied, the majority found Respondent non-exempt. App.11. The majority claimed that its reasoning was "shared by the Sixth and Eighth Circuits and the Secretary of Labor," App.11, and attempted to distinguish First and Second Circuit decisions holding that §541.604 does not apply to highly compensated employees, App.17.

Judge Jones dissented in an opinion joined by Chief Judge Owen and Judges Wiener, Elrod, and Southwick. Judge Jones explained that Respondent "satisfies the regulations' HCE provision, §541.601,"

and that "the HCE provision, taken together with the regulatory text, structure, and history, plainly does not incorporate the separate provision, §541.604, that is the textual sine qua non of the majority's analysis." App.37-38. Judge Jones further explained that her "construction of the regulations harmonizes with the statute, while the majority's reasoning creates discord" by making "fundamental textual errors [that] were not committed by two sister circuits." App.38, 42.

Judge Wiener also wrote a dissenting opinion, which was joined by Chief Judge Owen and Judges Jones, Dennis, and Elrod. Judge Wiener agreed with Judge Jones that Respondent "is excluded from overtime by §601 for his high salary alone, so we should both start and stop there, never reaching §604." App.64; *see also* App.73 ("[T]here is an easy and logical way to read §601 and §604(b) in harmony: *Each section applies to an entirely different subset of employees!*"). Judge Wiener emphasized: "I cannot fathom how a majority of the active judges of this court can vote to require Helix to pay overtime to [Respondent], the supervisor of 12 to 13 hourly, hands-on workers, when he was already paid more than twice the cap of $100,000 per annum for overtime eligibility." App.63 (emphasis omitted).

REASONS FOR GRANTING THE PETITION

This case presents a clear circuit split on an important and recurring question concerning whether supervisors making over $200,000 a year are entitled to significant additional overtime pay under the FLSA. The entitlement of Respondent and other high earners to overtime turns on whether the streamlined

exemption for highly compensated employees set forth in 29 C.F.R. §541.601 operates as a stand-alone basis for exemption, or whether such high-earners' pay must also comply with the detailed requirements set forth in 29 C.F.R. §541.604. Three circuits have now squarely addressed that question and provided contradictory answers. The First and Second Circuits have held that §541.601 provides a stand-alone exemption for high earners, correctly holding that §541.604 applies only to the traditional EAP regulations, which could potentially exempt employees earning less than a quarter of the HCE regulation's annual compensation threshold. In the decision below, a fractured *en banc* Fifth Circuit held the opposite, concluding that §541.604 applies even to highly compensated employees earning over $100,000 per year, thus making Respondent eligible for significant retroactive overtime pay. The Fifth Circuit's decision is consistent with Sixth and Eighth Circuit dicta. However one tallies the score, the courts of appeals are plainly divided on how these two regulatory provisions interact, warranting this Court's intervention.

The *en banc* majority's decision is wrong as a matter of text, context, and common sense. The FLSA was enacted to protect low-wage, blue-collar laborers from workplace exploitation, not to give supervisors making six figures unanticipated windfalls based on the details of whether their handsome pay is calculated daily or weekly or based on small or large bonuses. The text and structure of the HCE regulation reinforce this conclusion. Rather than subject high earners to the details of pre-existing regulations that potentially apply to workers making

a quarter as much, the HCE regulation promises that workers making at least $100,000 per year and $455 in salary each week shall be *deemed* exempt as long as they perform some executive tasks. The HCE regulation expressly cross-references other regulatory provisions, but not 29 C.F.R. §541.604, and the HCE regulation itself addresses some of the same subjects as §541.604, such as bonuses, but only to say that their details do not matter. And all of that comports with common sense: the details of how compensation is calculated—how much is discretionary and how much turns on working longer hours—may matter for workers making $23,660, but are beside the point for supervisors making at least four times that amount. In short, there is no basis in text, structure, history, or logic to look beyond the HCE regulation's deeming provision and also require the employee to satisfy 29 C.F.R. §541.604. Because Respondent satisfies the requirements of the HCE regulation, and because 29 C.F.R. §541.604 does not apply to alter or supersede those requirements, Respondent is exempt.

Whether §541.604 and its "reasonable relationship" requirement apply when determining whether highly compensated employees are exempt is an immensely important and recurring question. As the variety of contexts and courts in which the issue has arisen makes clear, employers in countless industries across the country compensate their highly paid white-collar employees based on day rates or other formula that do not comport with the details of 29 C.F.R. §541.604, but nonetheless yield annual and weekly compensation in excess (often well in excess) of the HCE regulation's thresholds. The HCE regulation was meant to provide those employers with certainty

that those employees are exempt without regard to such details. The Fifth Circuit's interpretation would not only deprive employers of the certainty that the deeming regulation promises, but would expose employers to massive retroactive liability for doing nothing more than paying workers in conformity with long-settled industry practice.

Finally, this is an ideal vehicle for resolving the split and restoring uniformity to this area of the law. Helix did not argue below that §541.604 was satisfied or that Respondent was an independent contractor rather than an employee, so this Court can answer the question presented without any of the complications that have arisen in other cases raising this issue. And there is no reason to await further percolation. The circuits are plainly split, and as the divided and passionate decisions below illustrate, not even textualists can agree on the correct answer. Yet now that the *en banc* Fifth Circuit has spoken, there is no reason for lawyers seeking windfalls on behalf of well-heeled supervisors to file suit anywhere else, given the FLSA provisions allowing nationwide collective actions. The splintered decision below should not be the final word on this question. This Court should resolve the circuit split on this important question by granting plenary review and reversing.

I. The Fifth Circuit's Decision Squarely Conflicts With Decisions From the First And Second Circuits.

The Fifth Circuit held that an employee is not rendered exempt by the HCE regulation's deeming provision unless the employer also satisfies 29 C.F.R. §541.604, the "[m]inimum guarantee plus extras"

provision. As both dissents below correctly observed, that determination starkly departs from the decisions of the two other courts of appeals to squarely address the question, both of which concluded that the HCE regulation is a streamlined and self-contained provision such that §541.604 plays no role in determining whether a highly compensated employee is exempt. *See* App.42 (Jones, J., dissenting) (noting that majority opinion conflicts with decisions from "two sister circuits, whose decisions the majority unconvincingly tries to distinguish"); App.73 (Wiener, J., dissenting) (noting that majority opinion is "[i]n stark contrast to those other circuits' indisputably correct analyses").

In *Anani v. CVS RX Services, Inc.*, 730 F.3d 146 (2d Cir. 2013), the Second Circuit held that §541.604 does not apply when determining whether a highly compensated employee is exempt. The plaintiff in *Anani* was a pharmacist who was paid a guaranteed base weekly amount and then received extra hourly compensation for hours worked each week in excess of forty-four hours. *Id.* at 147. The plaintiff argued that he was entitled to time-and-a-half pay for those excess hours rather than the lower contractual rate to which he agreed. *Id.* There was no doubt that the HCE regulation was satisfied, as the plaintiff "received an 'annual base salary' in excess of $455 per week throughout the relevant period, earned over $100,000 annually, and no improper deductions were made." *Id.* at 148. The plaintiff argued that he was nevertheless non-exempt because his compensation did not satisfy §541.604(b)'s "reasonable relationship" test; the employer argued that §541.604 does not apply to highly compensated employees. *Id.* at 148-49.

The Second Circuit sided with the employer, stating clearly: "We perceive no cogent reason why the requirements of [29] C.F.R. §541.604 must be met by an employee meeting the requirements of [29] C.F.R. §541.601." *Id.* at 149. Rather, each of those provisions "deals with different groups of employees." *Id.* Section 541.604, the court explained, applies only to "employees whose guarantee with extras totals less than $100,000 annually." *Id.* Employees above that threshold could be deemed exempt simply by satisfying the more streamlined requirements of §541.601. The plaintiff's contrary reading was "unsustainable" in light of the "structure and express language of [29] C.F.R. §541.601," which "indicate that its purpose was to relax the duties requirement in order to exempt employees from the time-and-a-half requirement because they earn over $100,000 annually." *Id.* at 150.

Similarly, in *Litz v. Saint Consulting Group, Inc.*, 772 F.3d 1 (1st Cir. 2014), the First Circuit held that the HCE regulation stands alone, such that highly compensated supervisors can be deemed exempt without satisfying the requirements of §541.604. The plaintiffs in *Litz* were project managers for a consulting firm. Their compensation was based on the number of hours they billed to clients, but they were guaranteed a minimum weekly floor of $1,000 regardless of whether they billed any hours. *Id.* at 2. Both plaintiffs earned "well over $100,000 per year," yet argued that they were entitled to time-and-a-half pay for hours worked each week in excess of forty because their weekly guarantee was not "reasonably related" to their actual pay, which they claimed was required by §541.604(b). *Id.* at 5. The First Circuit

rejected the argument, holding that highly compensated employees who satisfy the explicit requirements of the HCE regulation need not also satisfy the more detailed provisions in §541.604(b): "[W]e see no reason why [§541.604(b)'s] requirements should be grafted onto the materially different exemption on which [the employer] relies," namely, the exemption for highly compensated employees, §541.601. *Id.* at 5.

The *en banc* majority below conceded "tension" between its holding and those of *Anani* and *Litz*, but downplayed the conflict by calling *Anani*'s reasoning "stray language" and implying that the issue was not squarely presented in *Litz*. App.17. Neither characterization is accurate. Starting with *Anani*, there was nothing "stray" about the Second Circuit's "language" in deciding this issue. The *only* issue in *Anani* was whether §541.604 applies when determining whether highly compensated employees are exempt. The plaintiff made no other argument, and the court addressed no other question. *See Anani*, 730 F.3d at 146-150. As for *Litz*, while the First Circuit did note that the plaintiffs backed away from the §541.604 argument *in their reply brief*, the court squarely addressed the issue as it was presented in the opening brief, and squarely held that §541.604 does not apply to highly compensated employees. 772 F.3d at 5.

The majority opinion's attempt to distinguish those cases is no more convincing. It claimed that "there is no actual conflict" because "*Litz* and *Anani* involve pay calculated 'on a weekly, or less frequent basis' (29 C.F.R. §541.602(a))—and not pay 'computed

on a daily basis' (§541.604(b))." App.17 (alterations omitted). Neither cited provision serves to distinguish the cases. The first cited provision, §541.602(a)—despite the majority's use of the word "calculated"—addresses only how often the employee *receives* payment. 29 C.F.R. §541.602(a) ("if the employee regularly *receives* each pay period on a weekly, or less frequent basis" (emphasis added)); *see also* App.42 (Jones, J., dissenting) ("[The majority] deceptively misstates the regulation."). The plaintiffs in all three cases—*Anani*, *Litz*, and this one—*received* their salaries weekly or bi-weekly, so the cases cannot be distinguished on that ground. The second cited provision, §541.604(b), does address how compensation is calculated, but it treats "hourly" and "daily" calculations the same, *see* 29 C.F.R. §541.604(b) ("may be computed on an hourly, a daily or a shift basis"). Because the employees in *Anani*, *Litz*, and here all earned "extras" on an hourly or daily basis, the cases cannot be distinguished on that ground either. The decision below conflicts with *Anani* and *Litz*, plain and simple.

The *en banc* majority claimed that its reading of the HCE regulation "is also shared by the Sixth and Eighth Circuits." App.11-12 (discussing *Hughes v. Gulf Interstate Field Servs. Inc.*, 878 F.3d 183 (6th Cir. 2017), and *Coates v. Dassault Falcon Jet Corp.*, 961 F.3d 1039 (8th Cir. 2020)). That is an overstatement—neither the Sixth nor Eighth Circuit has squarely answered the question presented here—but the cited decisions do suggest that those courts would apply §541.604 to determine whether highly compensated employees are exempt. The decisions of the Sixth and

Eighth Circuits thus only heighten the need for this Court's intervention.

In *Hughes*, the Sixth Circuit considered whether two highly compensated welding inspectors on a pipeline project were exempt. Although the court declined to formally hold that §541.604 applied to highly compensated employees, 878 F.3d at 190, it squarely rejected the employer's argument that "we should pay no attention to §541.604(b)" because the case involved highly compensated employees, *id.* at 189. Instead, it discussed that provision at length and relied on it in holding that "it is legally significant whether [the employees'] weekly salary was a matter of right or a matter of grace." *Id.* at 191. The court ultimately ruled that there were factual disputes about whether the weekly salary was guaranteed and reversed the district court's grant of summary judgment. *Id.* at 193.

In *Coates*, the Eighth Circuit considered whether certain highly compensated team leaders and production liaisons were exempt. 961 F.3d at 1041. The Eighth Circuit did not discuss §541.604 at length, but it did characterize §541.604 as an "interpretive rule[]" and stated that it "largely agree[d]" with the Sixth Circuit's *Hughes* decision, *id.* at 1048. The court ultimately reversed the district court's grant of summary judgment because of a factual dispute over whether the employees' purported guarantee was "subject to impermissible reductions" for purposes of 29 C.F.R. §541.602(a), *id.* at 1046, a provision which in contrast to §541.604 is expressly incorporated into the HCE regulation. *See* 29 C.F.R. §541.601(b)(1); 29 C.F.R. §541.602(a) (salary-basis test satisfied only if

salary "is not subject to reduction because of variations in the quality or quantity of the work performed").

In sum, depending on how one counts *Hughes* and *Coates*, there is either a 2-1 circuit split, with the Fifth Circuit in the minority and dicta from two courts shoring up its side, or a 3-2 circuit split, with the Fifth Circuit in the majority. In either case, the courts of appeals are plainly divided on how these two regulatory provisions interact. Certiorari is warranted to resolve that clear circuit split.

II. The Fifth Circuit's Decision Is Wrong On The Merits.

Certiorari is all the more necessary because the Fifth Circuit's decision is clearly wrong. The text, structure, and history of the regulations—not to mention the FLSA itself—make clear that 29 C.F.R. §541.604 applies only to the traditional EAP regulations, not to the HCE regulation, which provides a self-contained and streamlined route for particularly well-paid managers to be "deem[ed] exempt" without satisfying more detailed provisions applicable to employees making one-fourth as much. Because Respondent satisfies all the requirements of the HCE regulation, Respondent is exempt without regard to §541.604.

A. Respondent Satisfies the HCE Regulation and is Therefore Deemed Exempt.

The FLSA exempts from its overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1). The traditional EAP regulations

implemented this exemption by adopting a functional, duties-based test to determine whether an employee was "a bona fide executive, administrative, or professional" employee, with consideration of salary only at the low end to "screen[] out obviously nonexempt employees." *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. 51,230, 51,238 (Sept. 27, 2019) (codified at 29 C.F.R. 541).

The HCE regulation was designed to provide employers with certainty by considering compensation on the high end to deem certain highly compensated employees exempt based on a more streamlined test. It does so by deeming exempt any employee who earns above certain annual and weekly compensation thresholds and who regularly performs *any* of several enumerated executive, administrative, or professional duties. *See* 2004 Final Rule, 69 Fed. Reg. at 22,173 (describing HCE regulation as "a short-cut test of exemption" for high-salaried employees). More specifically, an employee is "deemed exempt" if (1) he receives at least $100,000 in "total annual compensation," (2) his "total annual compensation" "include[s] at least $455 per week paid on a salary … basis," and (3) he performs "one or more of the exempt duties or responsibilities of an executive, administrative or professional employee." 29 C.F.R. §541.601.

All three tests are satisfied here. Respondent concedes that the first and third requirements, *i.e.*, the salary-level test and duties test, are satisfied. *See* App.85-86. All that remains in dispute is the salary-

basis test. The term "salary basis" is defined in §541.602. Section 541.602 states that an employee is paid on a "salary basis" if he "[1] regularly receives each pay period on a weekly, or less frequent basis, [2] a predetermined amount constituting all or part of the employee's compensation, [3] which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. §541.602(a). It further specifies 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," but "need not be paid for any workweek in which they perform no work." *Id.* §541.602(a).

Respondent satisfies the salary-basis test because his daily rate exceeds the weekly salary threshold and the other regulatory requirements are satisfied. First, Respondent received paychecks bi-weekly, *i.e.*, every two weeks, satisfying the requirement that he "receive[]" pay "on a weekly, *or less frequent* basis." *Id.* §541.602(a). Second, in any week in which he worked a single day, Respondent was guaranteed a "predetermined amount" that always exceeded the minimum weekly salary of $455—specifically, his daily rate of $963 to $1,341. If Respondent worked only one day in a week, that predetermined amount constituted "all" of his compensation for the week; if he worked more than one day (as was typical), the predetermined amount constituted "part" of his compensation. *Id.* Either way, the "predetermined amount constitut[ed] all or part of [Respondent's] compensation" and exceeded $455. *Id.* Third, the predetermined amount—$963 to $1,341 depending on the year—was not subject to reduction because of

variations in the quality or quantity of the work that Respondent performed. He received the full amount for any day on which he performed any work, regardless of whether work continued through the end of the day, shut down early because of weather, or ran long because of an operational problem. Because Respondent satisfies the salary-basis test, and thus all three parts of the HCE regulation, he is "deemed exempt" from the FLSA's overtime-pay requirements. 29 C.F.R. §541.601(a).[5]

B. The "Minimum Guarantee Plus Extras" Provision, 29 U.S.C. §541.604, Does Not Apply to Highly Compensated Employees.

The *en banc* majority did not dispute any of the above analysis. But instead of stopping there, the majority chose to look outside of the HCE regulation to the separate "[m]inimum guarantee plus extras" provision at 29 C.F.R. §541.604, even though that provision neither mentions nor is mentioned by the HCE regulation. And because Helix did not argue that its compensation practices satisfied §541.604, the

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[5] Nor does the reference in 29 C.F.R. §541.602(a) to the employee's "full salary" not being reduced based on "the number of days or hours worked" mean that Respondent was not paid at least $455 per week on a salary basis. The term "full salary" in §541.602(a) refers back to the "regularly receive[d] … predetermined amount" described earlier in §541.602(a), which for Respondent was his daily rate. As long as he came to work for one day in a given week, he received his full weekly salary of $963 to $1,341 (which equates to $50,000 to $70,000 annually), and this amount was never reduced based on "the number of days or hours worked" in that week. 29 C.F.R. §541.602(a); ROA.668.

court held that Respondent was non-exempt. The *en banc* majority's analysis is wrong. As the First and Second Circuits have held, and as the two dissenting opinions below forcefully demonstrated, the HCE regulation provides a standalone and streamlined path to exemption for highly compensated supervisors that is not subject to the detailed requirements of §541.604, which must be satisfied for employees making far less than the HCE annual threshold. The text, structure, and regulatory history make that clear.

Starting with the text, the HCE regulation underscores its standalone nature by making clear that an employee that satisfies its provision "is *deemed* exempt." 29 C.F.R. §541.601(a) (stating that "an employee with total annual compensation of at least $100,000 is *deemed exempt* … if the employee customarily and regularly performs any one or more of the exempt duties" (emphasis added)). Deeming reflects a judgment of definitive equivalence. *See, e.g.,* Black's Law Dictionary (11th ed. 2019) (defining "deem" to mean, *inter alia*, "treat … as if"); Cambridge Dictionary (10th ed. 2007) (defining "deem" to mean "to consider or judge something in a particular way"). When someone is deemed to have a certain status, there is no room for further inquiry or the application of additional criteria. *See Webster v. Doe*, 486 U.S. 592, 600 (1988) (holding Congress' use of "deems" rather than "is" foreclosed judicial review). By specifying that employees who satisfy the HCE regulation are thereby "deemed exempt," full stop, the agency made clear that the HCE regulation is self-contained and not subject to any limitations external to the HCE regulation itself.

That conclusion is further reinforced by the absence of any express cross-reference to or incorporation of §541.604. The agency did exactly that with several other provisions: The current HCE regulation expressly incorporates most of §541.602 (while explicitly carving out §541.602(a)(3)) as well as §541.605 and §541.606. *See* 29 C.F.R. §541.601(b)(1) (2021). But the HCE regulation does not follow suit with respect to §541.604. To the contrary, the HCE regulation covers some of the same territory as §541.604, but in a much more permissive manner. Whereas §541.604 protects against employees receiving too much of their overall pay in commissions and other variable payments—a reasonable concern with employees making as little as $23,660 a year—the HCE regulation expressly provides that total annual compensation "may also include" commissions and non-discretionary bonuses. When a regulation carefully incorporates some provisions but not others, the omissions must be treated as intentional, *see* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 107-11 (2012), especially where, as here, the deeming language makes clear that the regulation is self-contained.

The majority opinion and Judge Ho's solo concurrence tried to explain away this omission in two ways, neither of which succeeds. Judge Ho claimed that that the traditional EAP regulations also do not expressly reference §541.604, even though all agree that §541.604 applies to them. App.25 (Ho, J., concurring). That would be only a partial answer in light of the deeming provision, but in all events it is inaccurate: The introductory statement to Part 541 expressly provides that Subpart G (which contains

§541.604) applies to all of the traditional EAP regulations. *See* 29 C.F.R. §541.0; *see* App.47 (Jones, J., dissenting). It does not say the same for the HCE regulation, which includes specific references to the provisions of Subpart G that are relevant—*i.e.*, §§541.602, 541.605, and 541.606.

The majority opinion, for its part, characterized §541.604 as an "exception[] or proviso[]" to the salary-basis test in §541.602, and thus claimed that the HCE regulation's reference to the salary-basis test automatically encompasses §541.604. App.8. That characterization is untenable. Section 541.602 sets out the "[g]eneral rule" for the salary-basis test in subpart (a), and then enumerates seven "[e]xceptions" in subpart (b). None of those enumerated exceptions mentions §541.604. If the agency intended for §541.604 and its "reasonable relationship" test to be an "exception[] or proviso[]" to the salary-basis test, it would have made that clear by including it with the "[e]xceptions" in §541.602(b). The agency instead made §541.604 its own, separate provision. There is no textual or logical reason to treat it as an anomalous eighth exception instead of what it plainly is—a standalone provision that applies only where the regulation elsewhere directs.

The regulatory history of §541.604 confirms its inapplicability to the HCE regulation. Before the agency promulgated the HCE regulation, the "[m]inimum guarantee plus extras" provision did not have its own subsection (*i.e.*, current §541.604) but instead was part of the salary-basis regulation.[6] But

[6] At the time, the salary-basis regulation was at 29 C.F.R. §541.118. Subpart (a) was the predecessor to today's salary-basis

when the agency promulgated the HCE regulation in 2004, it also separated the "[m]inimum guarantee plus extras" provision from the salary-basis regulation and placed it in its own subsection, §541.604. The new HCE regulation then expressly referenced the salary-basis test but did not say a word about the new §541.604. If the agency wanted the new §541.604 to restrict the new HCE regulation, there would have been no reason to decouple it from the salary-basis regulation. The only sensible reason for doing so was to allow the new HCE regulation to incorporate the salary-basis test *without* also incorporating the "[m]inimum guarantee plus extras" provision. *See* App.55 (Jones, J., dissenting) ("Why spin off §541.604 only to have courts effectively re-incorporate it back *sub silentio* into the new highly compensated employee exemption?"). That inference is reinforced by the HCE regulation's express non-incorporation of §541.602(a)(3), the only part of §541.602 that puts any limits on how much of a worker's salary can take the form of commissions and bonuses.

The failure of the HCE regulation to incorporate §541.604 was no accident. As noted, the HCE regulation contains its own permissive rules for well-compensated supervisors who make a "minimum guarantee plus extras," and they differ from the more detailed and restrictive rules in §541.604. Section 541.604 reflects a concern that workers receive a disproportionate share of their compensation in non-guaranteed "extras," and grants only *qualified*

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test now found at §541.602, while subpart (b) was entitled "Minimum guarantee plus extras" and was the predecessor to today's §541.604.

permission for employers to pay their employees such extras, *i.e.*, only if there is "a reasonable relationship … between the guaranteed amount and the amount actually earned." 29 C.F.R. §541.604(b). The HCE regulation, in contrast, does not share this concern when it comes to highly compensated supervisors and thus grants employers *unqualified* permission: "Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period." 29 C.F.R. §541.601(b)(1). As the Labor Department explained when both §541.602(a)(3) and the express carve-out for it in the HCE regulation were added in 2019, "employers are … permitted to fulfill more than three quarters of the HCE total annual compensation requirement"—*i.e.*, all amounts above the minimum weekly guarantee of $455—"with commissions, nondiscretionary bonuses, and other forms of nondiscretionary deferred compensation." 84 Fed. Reg. at 51,249. Finally, that de-regulatory intent is further reinforced by the express permission for employers to make a sizeable final payment to ensure that an employee crosses the annual compensation threshold. That provision would be frustrated if that large final paycheck ran afoul of §541.604(b)'s "reasonable relationship" test.

In other words, whereas §541.604(b) requires that the bulk of the employee's earnings come from the weekly guarantee, §541.601(b)(1) is indifferent about how a highly compensated employee's total compensation gets to $100,000. That differential treatment makes good sense: While the agency was understandably concerned about employers using low

base salaries and substantial commissions and bonuses to overwork their lower-earning white-collar staff—recall that the EAP regulations can apply to workers earning as little as $23,660 per year—such concerns dissipate when the employees reach six figures and above.

The *en banc* majority's reading would undermine that sensible regulatory judgment and strip the HCE regulation's unqualified approval of "extras" of all effect, violating the rule "against reading a text in a way that makes part of it redundant." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007). The basic reason for having a standalone HCE exemption is to give employers certainty and streamline the process with respect to highly compensated employees. Their high salary moots the need to undertake some of the more detailed regulatory inquiries appropriate for workers making one-fourth as much. By subjecting highly compensated workers to the detailed and uncertain requirements of §541.604, without any textual justification, the decision below undermines the basic regulatory judgment underlying the separate HCE pathway.

Superimposing §541.604(b)'s "reasonable relationship" test on the HCE regulation would create conflict between those two provisions at a more granular level as well. The Department of Labor has explained that the "reasonable relationship" test is satisfied only if "extras" do not exceed 50% of the employee's guaranteed weekly pay. *See* Dep't of Labor, Opinion Letter FLSA2018-25, at 2 (Nov. 8, 2018). If that rule applied to highly compensated

employees, it would mean that an employee with total annual compensation of $100,000 must have a minimum weekly guarantee of $1,282.05 (for a total of $66,666.67 per year), for any lesser guarantee would make the extras-to-base ratio exceed 0.5-to-1. But the HCE regulation, by its own terms, requires a minimum weekly guarantee of only $455. *See* 29 C.F.R. §541.601(b)(1). The Fifth Circuit's reading thus places the regulation at odds with itself, effectively imposing two different minimum weekly guarantees on the same employees.

Finally, the *en banc* majority's interpretation of the regulation is at odds with the FLSA and common sense. The FLSA itself exempts from its overtime requirements any employee working in a "bona fide executive, administrative, or professional capacity," without regard to the details of whether pay is calculated on a weekly or daily basis or whether such supervisory employees are paid in fixed sums or variable bonuses. 29 U.S.C. §213(a)(1). That statutory language reflects the statute's principal concern with the working conditions of blue-collar employees, not white-collar supervisors. When workers are paid little more than the minimum wage in many jurisdictions, there is good cause to look into the details of their pay structure to ensure that they are not disguised blue-collar workers. But where, as here, workers indisputably perform executive functions and earn well into the six figures, there is no *statutory* basis for denying them an exemption based on the details of their pay structure. The HCE regulation wisely avoids narrowing the regulatory exemption in ways that the statutory exemption neither justifies nor supports by providing a

streamlined pathway for highly compensated supervisors in which such payment details play little role. The majority's reading, by contrast, bends over backwards to *avoid* that sensible result. The net result is a regulatory exemption that focuses on minutiae with no grounding in statutory text and workers making over $200,000 and concededly performing executive functions entitled to massive windfalls. The framers of the FLSA would indeed be "turning over in their respective graves," App.67, at such counterintuitive results, and the fault lies not in the text of the FLSA or its implementing regulations, but in the misconstruction of those texts in the decision below.

III. The Question Presented Is Important, And This Case Presents It Cleanly.

Whether §541.604—and, specifically, its "reasonable relationship" requirement, §541.604(b)—applies when determining whether highly compensated employees are exempt from the FLSA's overtime-pay requirements is an important and recurring issue. The question affects the entire spectrum of highly paid white-collar workers whose compensation includes a guaranteed amount plus additional payments based on an hourly, daily, or per-shift rate—including the pharmacists in *Anani*, the consultants in *Litz*, the inspectors in *Hughes*, the production supervisors in *Coates*, and so on. And the issue is nowhere more critical than in the resource exploration and production industry, which for decades has paid managers based on a daily-pay-rate model that reflects "the historic economic balance the industry must maintain given the highly

unpredictable nature of oil patch work." App.75 (Wiener, J., dissenting). If allowed to stand, the Fifth Circuit's decision would reward highly paid supervisors making hundreds of thousands of dollars with massive windfalls, impose significant retroactive liability for long-settled practices, and require a wholesale and unnecessary restructuring of the way in which an entire industry operates—especially given the centrality of the Fifth Circuit to the resource exploration industry. Moreover, the very fact that the affected supervisors are highly compensated means that they will be entitled to outsized time-and-a-half awards based on considerations with no grounding in statutory or regulatory text. Simply put, under the decision below, the workers least entitled to overtime pay will receive the largest windfalls.

This Court has regularly granted certiorari (and reversed) when courts of appeals have imposed liability on employers who have done nothing more than pay well-compensated workers in conformity with long-settled industry practice. *See, e.g., Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S.Ct. 1881 (2019); *Encino Motorcars*, 138 S.Ct. 1134; *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27 (2014); *Christopher*, 567 U.S. 142. This Court has explained, for example, that it may be "possible for an entire industry to be in violation of the [FLSA] for a long time" with no one noticing, but the "more plausible hypothesis" is that the industry's practices simply were not unlawful. *Christopher*, 567 U.S. at 158. So too here.

The concerns with the Fifth Circuit's departure from the First and Second Circuits' interpretations are

magnified because the FLSA provides for nationwide collective actions. *See* 29 U.S.C. §216(b). As a consequence, the Fifth Circuit's rule will likely become the *de facto* nationwide rule for all companies with at least some highly compensated employees within the Fifth Circuit, forcing those employers to restructure their operations *nationwide* even within the First and Second Circuits, where a contrary commonsense rule prevails. Moreover, unlike decisions affecting only a single industry, *see, e.g.*, *Encino Motorcars*, 138 S.Ct. at 1138, *Christopher*, 567 U.S. at 147, the decision below applies to highly compensated supervisors no matter their line of work. In conjunction with the FLSA's collective-action mechanism, the Fifth Circuit's rule will thus affect a broad swath of the economy, making it a particularly sweeping and troublesome deviation from the regulatory design and from the decisions of other courts of appeals.

This case is an ideal vehicle for resolving the split. Because, in its view, §541.604 has no applicability here, Helix did not argue below that it satisfied §541.604, *see* App.11, so this Court can answer the question presented without being sidetracked by the contours of the "reasonable relationship" test or the correctness of the Department of Labor's view that the test is satisfied only if "extras" do not exceed 50% of the predetermined salary. *See* Dep't of Labor, Opinion Letter FLSA2018-25, at 2 (Nov. 8, 2018). Similarly, Helix did not argue that Respondent was an independent contractor rather than an employee, an issue that lurks in other cases presenting this question. *See, e.g.*, *Faludi v. U.S. Shale Sols., L.L.C.*, 936 F.3d 215 (5th Cir. 2019), *opinion withdrawn and*

superseded, 950 F.3d 269 (5th Cir. 2020).[7] Accordingly, the posture of this case will allow the Court to focus solely on the core question of whether 29 C.F.R. §541.604 applies to the HCE regulation.

Finally, this issue has received extensive analysis in the lower courts, making further percolation unnecessary. In the Fifth Circuit alone, this issue has been addressed in two divided panel opinions, *see Faludi*, 936 F.3d 215, *withdrawn and superseded*, and *Hewitt*, 983 F.3d 789, *vacated*, and four separate opinions emerging from the *en banc* process. The First and Second Circuits have likewise squarely addressed the question, *see Litz*, 772 F.3d 1 and *Anani*, 730 F.3d 146, as have several district courts. There is no reason to wait any longer before resolving this important and recurring question. The relevant considerations and competing interpretations are all on the table, and all that remains is for this Court to provide a definitive answer and restore certainty and common sense in this area of the law.

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[7] In *Faludi*, a divided Fifth Circuit panel initially held on facts similar to those here that a plaintiff was exempt under the HCE regulation. 936 F.3d at 220. In particular, contrary to the *en banc* majority decision below, the panel held that §541.604 "does not apply to employees who meet the requirements of the highly compensated employee exemption." *Id.* But the panel later withdrew its opinion and resolved the case by concluding that the plaintiff was an independent contractor not subject to the FLSA. *See* 950 F.3d at 275-76.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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