No. 21-984

In The
Supreme Court of the United States

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

Petitioners,

v.

MICHAEL J. HEWITT,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

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

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A. INTEREST OF *AMICI CURIAE*[1]

The oil and natural gas industry represents a significant portion of the U.S. economy, from upstream extraction of oil and gas in resource-dense regions of the country, to mid-stream movement and down-stream processing in every corner of our country. The industry provides thousands of jobs and powers each individual's day-to-day life in some way. Accordingly, both the Texas Oil & Gas Association ("TXOGA") and the American Petroleum Institute ("API") have joined as *amici curiae* to provide input on legal, policy, and practical considerations in cases affecting the oil and natural gas industry.

TXOGA is a statewide trade association representing every facet of the Texas oil and gas industry including small independents and major producers. Collectively, the membership of TXOGA produces in excess of 80 percent of Texas' crude oil and natural gas, operates over 80 percent of the state's refining capacity, and is responsible for the vast majority of the state's pipelines. In fiscal year 2021, the oil and natural gas industry employed more than 422,000 Texans in direct jobs and paid $15.8 billion in state and local taxes and state royalties, funding our state's schools, roads and first responders.

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[1] Timely notice was given and counsel of record for all parties consented to the filing of the brief in writing. S. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

API is a national trade association that represents all aspects of America's oil and natural gas industry. API's over 580 members, from large integrated companies to smaller independents, come from all segments of the industry. They are producers, refiners, suppliers, marketers, pipeline operators, and marine transporters, as well as service and supply companies that support the industry. API calculates that the oil and natural gas industry supports at least 10.9 million American jobs.[2] API is also the leading standards-making body worldwide for the oil and natural gas industry, including standards and recommended practices incorporated or referenced in numerous state and federal regulations.

B. SUMMARY OF ARGUMENT

The high-compensation guarantees commanded by oilfield consultants[3] are the product of the significant bargaining power these highly-skilled, scarce consultants leverage with oil and natural gas companies, and are, in fact, a type of compensation method the Department of Labor ("DOL") contemplated when drafting the Highly Compensated Employee exception

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[2] Am. Petroleum Inst., *News, Policy & Issues*, https://www.api.org/news-policy-and-issues/american-jobs (last visited Feb. 2, 2022).

[3] Hereafter TXOGA and API will refer to the highly-compensated, highly-skilled oil patch workers at issue in this matter as "consultants." Many consultants are contracted as independent contractors through staffing companies or other third-party entities, but some consultants are direct employees of oilfield operators, like Respondent Hewitt.

("HCE"). These guarantees further reflect the historic economic balance the industry must maintain given the particularly unpredictable nature of oil patch work. Against this backdrop, the Fifth Circuit's majority opinion departs from all of the circuit courts that have ruled on these legal issues. The opinion departs from the Fair Labor Standards Act ("FLSA") text and intent and destabilizes the financial foundation underpinning exploration and production in the most oil and natural gas-rich regions across the United States. The opinion will impact states' economies, as well as the U.S. economy, given the country's use of oil and gas, the amount of jobs and dollars the midstream and downstream sectors represent.

C. ARGUMENT

1. The Industry has a Century-Long History of Using Textually-Compliant "Day Rate" Guarantees.

The context and expertise of the oil and natural gas industry will underscore that the pay method at issue is compliant with the text and intent of the FLSA. This Court has historically considered input from relevant amici curiae, and DOL guidance (or lack thereof) in its oral arguments and opinions. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 223–24 (2016). Here, the DOL did provide extensive reasoning behind the HCE. And the industry's historical pay

practice—referred to by the industry[4] term "day rate"[5]—meets the purposefully streamlined requirements.

This pay practice has been relied upon and survived for decades without censure.[6] The U.S. Geological Survey, created by Congress in 1879, can trace the "well paid," day rate compensation plan of the "oil patch" back to at least 1903 in California.[7] The

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[4] Oil Patch Glossaries: Schlumberger, *Oilfield Glossary* (Jan. 2022), https://glossary.oilfield.slb.com/. As does the U.S. Energy Information Administration. U.S. Energy Info. Admin., *Glossary* (Jan. 2022), https://www.eia.gov/tools/glossary/index.php.

[5] *See, e.g.*, *Hurst v. Gulf Oil Corp.*, 251 F.2d 836, 837 n.2 (5th Cir. 1958) (discussing the portion of the contract describing the contractors, work and stating, "[t]he time required for the performance of all work referred to in this paragraph shall be paid for by Gulf at the applicable day rate set out below.").

[6] The same kind of reliance has impacted other industries. *See Encino*, 579 U.S. at 222 ("[H]ere, the unavoidable conclusion is that the 2011 regulation was issued without the reasoned explanation that was required in light of the Department's change in position and the significant reliance interests involved . . . A summary discussion may suffice in other circumstances, but here—in particular because of decades of industry reliance on the Department's prior policy—the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position. The retail automobile and truck dealership industry had relied since 1978 on the Department's position [ ]." (citing Nat'l Auto. Dealers Ass'n, Comment Letter on Proposed Rule Updating Regulations Issued Under the Fair Labor Standards Act (Sept. 26, 2008)).

[7] "In 1903, California for the first time led the country in petroleum production with 24.38 million barrels, . . . During those early days of oil production, workers were well paid. A cable-tool driller at the Kern River field earned $5 for a 12-hour day, and he was expected to work 7 days a week." Kenneth I. Takahashi &

industry has rightfully relied[8] on the long history of negotiating day rates, but was disrupted nationwide when a group of plaintiffs' attorneys began a campaign attacking the practice in boilerplate, collective action lawsuits.[9]

The complex work of oilfield consultants, like Respondent Hewitt, is required across a variety of upstream and midstream sectors to control the flow of oil and natural gas, maintain well integrity, and control pressure in wells and pipelines.[10] Consultants are

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Donald L. Gautier, *A Brief History of Oil and Gas Exploration in the Southern San Joaquin Valley of California*, *in U.S. Petroleum Systems and Geologic Assessment of Oil and Gas in the San Joaquin Basin Province, California* 9 (Allegra Hosford Scheirer ed. 2007), https://pubs.usgs.gov/pp/pp1713/03/pp1713_ch03.pdf.

[8] *See, e.g.*, *Encino*, 579 U.S. at 222–23 ("Dealerships and service advisors negotiated and structured their compensation plans against this background understanding.").

[9] *Compare Brock v. On Shore Quality Control Specialists, Inc.*, No. CIV. A-84-CA-603, 1987 WL 31308, at *1 (W.D. Tex. Sept. 29, 1987), *remanded from*, 811 F.2d 282, 284 (5th Cir. 1987) *with, e.g.*, *Sloane v. Gulf Interstate Field Servs., Inc.*, No. 4:16-CV-01571, 2017 WL 1105236, at *1 (M.D. Pa. Mar. 24, 2017) (internal citations omitted) ("Put simply, the old adage that 'if at first you don't succeed, try again' does not apply to litigation in federal court . . . A few months later and following a radio campaign that sought to recruit potential gas workers to serve as class members, that same counsel arrived at this Court's doorsteps, armed with a new class representative but the same old theory." *See also infra* p. 28 and n.32, in Section C(4). Regardless that the pay practice is legally supported, the time and expense associated with defending FLSA collective actions of this type push hydrocarbon-company defendants into a corner, no matter the merits of such defendants' defenses and legal arguments.

[10] The oilfield (including offshore work) is a high-stakes and high-pressure environment, where "[a]n error in [judgment] can

sought-after, shrewd, and tough workers, whose expertise protect the lives and safety of other oilfield workers and oil and natural gas assets. Thus, consultants drive their compensation negotiations, with ever-growing increases in the compensation guarantees they demand.[11] *See, e.g.*, *Sloane v. Gulf Interstate Field Servs., Inc.*, No. 4:16-CV-01571, 2017 WL 1105236, at *1 (M.D. Pa. Mar. 24, 2017) ("[T]his is not a putative class comprised of minimum wage earners who perform rote tasks in less than ideal conditions.").[12]

This is also a nationwide, Federal issue. The Bureau of Land Management ("BLM") manages the 700 million acres of the Federal government's onshore subsurface mineral estate covering 30 percent of the nation including in Alaska, California, Colorado, several Eastern states, Idaho, the Montana-Dakotas, New Mexico, Oregon-Washington, Utah, and Wyoming.[13] In Fiscal Year 2018 (the most-recent reporting), the BLM

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lead to [an operator] losing a significant amount of money—sometimes hundreds of thousands of dollars." *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 375 (5th Cir. 2019).

[11] Annualized pay of many consultants can range from $140,000 to $385,000. *See infra* Sections C(3)–(4).

[12] Indeed, in *Hughes v. Gulf Interstate Field Servs. Inc.*, the plaintiff-consultants admitted they met the duties requirement of the HCE, as well as the annualized income level. *See Hughes v. Gulf Interstate Field Servs., Inc.*, No. 2:14-cv-000432, 2016 WL 4197596, at *3 (S.D. Ohio Aug. 3, 2016), *modified on clarification*, 2016 WL 10592321 (S.D. Ohio Sept. 6, 2016), *and rev'd and remanded on other grounds*, 878 F.3d 183 (6th Cir. 2017).

[13] U.S. Dep't of Interior, Bureau of Land Mgmt., About the BLM Oil and Gas Program, https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about (last visited Feb. 2, 2022).

generated nearly $3 billion in Federal royalties, and over $1.1 billion in other, related revenue. *Id.*

Regarding this industry and its impact, Justice Breyer's discussion in the oral argument in *Parker Drilling Management Services, Ltd. v. Newton* is prescient:

> And you heard the answer they gave to the question I asked, which was that 97 percent of those involved in this are in the Fifth Circuit. So I'm slightly worried. I don't know if it's determinative, but I'm slightly worried about overturning a set of court of appeals decisions under which [the offshore oil and gas] industry and labor and everyone have worked, 97 percent of them, for 50 years.

Transcript of Oral Argument at 26, 53–54, *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881 (2019) (No. 18-389), 2019 WL 1672465.[14]

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[14] *See also*, *e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2481 (2020) ("Finally, the State worries that our decision will have significant consequences for civil and regulatory law.") Justices Gorsuch, Sotomayor, Kagan, and Alito (justices on both sides of the opinion and dissent) all asked questions regarding consequences and impact of various decisions the Court could make. Transcript of Oral Argument at 16–18, 23–25, 40–43, 79–82, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526), 2020 WL 2425717; *see also Christopher v. Smithkline Beechum Corp.*, 132 S. Ct. 2156, 2167 & 2173 (2012) (considering history of the pharmaceutical industry's reliance on its interpretation of the outside sales exemption, and decades of silence by the DOL on the industry's interpretation, and noting that highly paid pharmaceutical sales employees paid over $70,000 were hardly the type of employee the FLSA was intended to protect).

2. The Reasonable Relationship Test Does Not Apply to the HCE and the Fifth Circuit's Contrary Decision Creates a Circuit Split.

The oil and natural gas industry's compensation guarantee system is built around a plain, common sense reading of the HCE, 29 C.F.R. § 541.601. Since the modern HCE's creation in 2004, the industry has relied on the independence of the HCE from the reasonable relationship test set out in 29 C.F.R. § 541.604(b). While both sections address the issue of salary basis for an exempt employee, they cannot be read to overlap without creating illogical and conflicting results.

Every other Circuit deciding this issue has acknowledged this distinction. *Litz v. Saint Consulting Grp., Inc.*, 772 F.3d 1, 5 (1st Cir. 2014) (seeing "no reason" why § 541.604's requirements "should be grafted onto the materially different exemption" contained in sections 541.601 and 541.602(a)); *Anani v. CVS RX Servs., Inc.*, 730 F.3d 146, 149 (2d Cir. 2013) ("We perceive no cogent reason why the requirements of C.F.R. § 541.604 must be met by an employee meeting the requirements of C.F.R. § 541.601"); *Hughes v. Gulf Interstate Field Servs., Inc.*, 878 F.3d 183, 189–91 (6th Cir. 2017); *accord Faludi v. U.S. Shale Sols., LLC*, 950 F.3d 269, 275 (5th Cir. 2020) (finding a defendant's arguments advancing this point to be "well taken" while observing that a different issue was sufficient to resolve the appeal).

The Fifth Circuit's majority opinion represents a split from other Circuits by conflating the reasonable relationship test with the HCE by improperly tethering § 541.602(a), the "salary basis" rule, with § 541.604(b). While the HCE expressly references the "salary-basis" rule set forth in § 541.602, it does not incorporate the reasonable relationship test in § 541.604(b).

To be sure, the salary-basis test does not turn on *how* the employer calculates the employee's salary. Section 541.602(a) only requires that the employee regularly "receive[] . . . on a weekly, or less frequent basis, a predetermined amount. . . . " When that requirement is satisfied, how an employer denominates the payment unit (be it hourly, daily, weekly, or annually) is not dispositive. And the HCE itself contemplates "extras" in the form of commissions, nondiscretionary bonuses and other nondiscretionary payments—and there is *no* requirement that those extras bear a reasonable relationship to the guaranteed amount. In fact, the HCE's own language, § 541.601(b)(2), expressly permits a single lump-sum catch-up payment. And unlike § 541.602(a)(3), which permits a catch up at year end up to 10 percent of the salary guarantee, no such cap exists within the HCE.

On the other hand, a plain reading of § 541.604 describes an avenue for exempt employees (not highly-compensated employees) who are paid a minimum guarantee plus extras, and requires that the "extras" bear a reasonable relationship to the minimum guarantee. Through its creation of these two separate

regulations, the DOL expressed its clear intention that each be applied separately and independently.

The plain text of the regulations does not support the Fifth Circuit majority's interpretation. Section 541.601 states that "[t]otal annual compensation" must include at least $684 per week paid on a salary or fee basis as set forth in §§ 541.602 and 541.605." It does not make any reference to § 541.604, which contains the reasonable relationship requirement. If the DOL intended for the HCE to include the reasonable relationship requirement, it could have done so by expressly incorporating § 541.604 into § 541.601. The fact that the text of § 541.601 does not reference § 541.604, as it does other sections, is a clear indication that § 541.601 operates independently of § 541.604 and its reasonable relationship requirement.

Likewise, § 541.602, which addresses the salary basis test, does not include any reference to § 541.604, undermining the *Helix* majority's conclusion that § 541.604 is an exception or proviso to the salary basis test. Again, if that is what the DOL intended, it could have included an express reference to § 541.604 in § 541.602—or even combined the two provisions into a single section. In fact, prior versions of the regulations did just that. As noted in Justice Jones's dissent:

> The minimum guarantee plus extras provision used to be part and parcel of the salary basis test . . . But in 2004, the Department of Labor first promulgated the provision for highly compensated employees in § 541.601. Contemporaneous with the creation of the

> regulatory exemption for highly compensated employees came the decoupling of today's § 541.604 from the salary basis test . . . Why spin off § 541.604 only to have courts effectively re-incorporate it back *sub silentio* into the new highly compensated employee exemption?

Hewitt v. Helix Energy Sols. Grp., Inc., 15 F.4th 289, 313–14 (5th Cir. 2021) (en banc) (Jones, J., dissenting) (footnotes omitted). The regulatory history and text confirm that the reasonable relationship requirement is not intended to be applied to the HCE. "The Department excised the minimum guarantee plus extras subsection from the salary basis provision and, for the first time, transformed that subsection into a new § 541.604. The timing is meaningful." *Id*.

And while a haphazard reading of § 541.604(b) appears to address "day rates" by applying the reasonable relationship test to earnings computed on an "hourly, a daily or a shift basis," this is a red herring. Unlike a guarantee that represents an *aggregation* of multiple hours, days or shifts (which is likely what the DOL contemplated when creating this safeguard), a single day rate that, alone, already exceeds the regulatory salary minimum ($684) falls outside of the plain text and meaning of § 541.604(b).

Stepping back and viewing the regulatory scheme as a whole, Subpart A, makes clear that Subpart G "contains regulations regarding salary requirements applicable to *most* of the exemptions" including the executive, administrative, and professional exemptions

found in Subparts B, C, and D. 29 C.F.R. § 541.0(b) (emphasis added). It also states that Subpart G "contains a provision for exempting certain highly compensated employees" that is described separately from Subpart G's "regulations regarding salary requirements." *Id.* That the HCE is embedded within Subpart G is a clear indication that only those sections specifically enumerated in Section 541.601, *i.e.*, Sections 541.602 and 541.605, are intended to apply to the HCE.

Moreover, applying the reasonable relationship requirement to the HCE is illogical and inconsistent with a plain reading of the text. The calculations outlined in the HCE contemplate that highly compensated employees could receive total compensation well above the weekly $684 guarantee. The HCE requires a minimum guarantee of $684 per workweek ($35,568 annualized), and at least $107,432 in total annual compensation, thus contemplating a correlation between the guarantee amount and the amount actually earned that is 422.7 percent greater than the minimum guarantee. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,121, 22,175 (Apr. 23, 2004) ("2004 Final Rule"). However, § 541.604(b) requires a narrower ratio. *See* 29 C.F.R. § 541.604(b) (demonstrating a weekly ratio of 150 percent of the guarantee). A conclusion that employees who regularly receive pay substantially greater than the guarantee could not qualify as highly compensated employees would be a conflicting and expressly unintended result. *See* 29 C.F.R. § 541.601(c).

Further, if an employee is paid a guarantee of $684 on a weekly basis, Section 541.601(b)(2) contemplates that the approximately $70,000 shortfall could be made up in a single lump sum payment at the end of the year, with no reasonable relationship requirement. *Id.* § 541.601(b)(2). And although the recently added § 541.602(a)(3) to the salary basis regulation states that up to 10 percent of the salary basis may be satisfied by nondiscretionary bonuses, incentives, and commissions, it expressly excludes from this limitation highly compensated employees under § 541.601. As such, under the HCE, there is no cap on the amount that can be satisfied through these types of payments. The Fifth Circuit majority's reasoning renders this payment arrangement inconsistent with § 541.604's reasonable relationship test, even though this type of arrangement is expressly contemplated by the very regulation that sets forth the HCE.

Moreover, the salary basis regulation's textual phrase "regularly receives" does not reflect a written or contractual requirement for the guarantee. 29 C.F.R. § 541.602(a). The Sixth Circuit, considering this issue, held that the foundation of the predetermined amount is *not* what the underlying employment agreement says, but rather the amounts the plaintiff *actually received*. *Hughes*, 878 F.3d at 188–89 (interpreting 29 C.F.R. § 541.602).[15] Accordingly, a superficial application of

[15] "[The] regulatory phrase was once longer; it used to read: 'if *under his employment agreement* he regularly receives.'" *Hughes*, 878 F.3d at 188–89 (quoting 29 C.F.R. § 541.118(a) (1973)) (emphasis in original).

the salary basis test disturbs a longstanding principle that exemptions should be analyzed based on the reality of the circumstances, not labels used by the parties. *See, e.g.*, *Zannikos v. Oil Inspections (U.S.A.), Inc*., 605 F. App'x 349, 357 (5th Cir. 2015) (per curiam); *Orton v. Johnny's Lunch Franchise, LLC*, 668 F.3d 843, 848 (6th Cir. 2012); *Chicca v. St. Luke's Episcopal Health Sys.*, 858 F. Supp. 2d 777, 783 (S.D. Tex. 2012); *cf*. *Gray v. Powers*, 673 F.3d 352, 355 (5th Cir. 2012) (noting the origin of the economic reality test that governs the determination of employer status under the FLSA).

3. The Fifth Circuit Majority Opinion Inappropriately Complicates the HCE Analysis.

The HCE, was "proposed [as] a special, streamlined rule for employees paid $65,000 or more annually." Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 68 Fed. Reg. 15,559, 15,571 (Mar. 31, 2003) ("2003 NPRM"). The DOL's discussion on crafting the highly compensated limitations on overtime entitlement for the most highly paid individuals in the country is instructive given that consultants squarely fit within the parameters the DOL contemplated for the HCE.[16] The DOL

[16] The analysis on the Special Proviso provided that "in the rare instances when employees receiving salaries of $100 a week or more did not meet all the other requirements of the regulations in every workweek, a determination that such employees are exempt would not defeat the objectives of the exemption [ ]." 2003

noted that "setting the highly compensated test at this salary level provides the Department with the confidence that . . . in the rare instances when these employees do not meet all other requirements of the regulations, a determination that such employees are exempt would not defeat the objectives of section 13(a)(1) of the Act." 2004 Final Rule, 69 Fed. Reg. at 22,174 (quoting 1949 Weiss Report at 22–23).

The 2004 Final Rule describes the 1958 Kantor Report's "methodology of looking to the 'range of salaries *actually paid*' to employees is the 'most accurate approach to set the salary *levels*.'" *Id*. at 22,167 (emphasis added). Respondent Hewitt's "day rate," or as better reflecting reality, his "guarantee," resulted in his take-home compensation being "well over $200,000 each year." *Hewitt*, 15 F.4th at 297. Other consultants' guarantees can result in annual compensation exceeding $300,000 or more per year, with a $1,600 guarantee—for any amount of work on one day—annualizing to $291,000 if the consultant works on projects 26 weeks out of the year, and to $384,000 if the consultants' projects span two-thirds of the weeks in a year. Complaint at 1, 4, *Steve Byrd v. ETX Energy, LLC*, No. 4:20-cv-01622 (S.D. Tex. May 7, 2020), Doc. 1 ("[O]ilfield worker['s] . . . day rate was $1,600 per day.");

NPRM, 68 Fed. Reg. at 15,570; *see also* Report and Recommendations on Proposed Revision of Regulations, Part 541 Under the Fair Labor Standards Act, March 3, 1958, by Harry S. Kantor, Assistant Administrator, Presiding Officer ("Kantor Report") at 10.

Parrish, 917 F.3d at 384–85 (noting that consultant earned "$230,033.30 in 2013 and $279,777.31 in 2014").[17]

The truth is that consultants' own statements in these lawsuits repeatedly demonstrate—under oath—that they do know the guarantee they have agreed to, which is not subject to change based on quality or quantity of work. In *Hoeflein v. Crescent Drilling & Prod., Inc.*, the court considered consultant declarations in ruling on plaintiff's motion for conditional certification. No. SA-19-CV-01194-FB, 2020 WL 1931849, at *2 (W.D. Tex. Apr. 21, 2020):

- "The day rate I received was paid without regard to the number of hours I worked each day or in a workweek."
- "I was paid a day rate regardless of the particular job or location I worked on."

Pls.' Mot. Conditional Cert. Ct. Auth. Notice at Exs. A–B, *Hoeflein v. Crescent Drilling & Prod., Inc.*, No. SA-19-CV-01194-FB (W.D. Tex. Jan. 17, 2020).[18] In

[17] *See infra* Section C(2).

[18] *See also Scott v. Antero Res. Corp.*, No. 17-CV-0693-WJM-SKC, 2021 WL 2012326, at *1041 (D. Colo. May 20, 2021) ("Antero paid Plaintiffs . . . at least $200,000 per calendar year . . . Plaintiffs agree that Antero paid them a day rate of at least $1,000 per day for each hitch.") (internal citations omitted); Amended Complaint at 4, *Carter v. All American Oilfield, LLC*, No. 3:21-cv-00007-JMK (D. Alaska Mar. 4, 2021) (Day rate of $1,027.76 and "[i]f Plaintiff worked a seven-day workweek, which was typical, he worked eighty-four hours in that workweek"); *Gutierrez v. Drill Cuttings Disposal Co.*, LLC, 319 F. Supp. 3d 856, 858 (W.D. Tex. 2018) ("Plaintiffs allege that [they] regularly

practical application, consultants have more certainty as to their take home pay—in advance—than other categories of exempt employees that—without question—pass the salary basis test. *See, e.g.*, 29 C.F.R. § 541.602(a)(3).

And the DOL's data behind the HCE shows that "[e]mployees earning $100,000 or more per year"—such as these consultants—"are at the very top of today's economic ladder." 2004 Final Rule, 69 Fed. Reg. at 22,174.[19] The DOL understood that in creating the HCE it would render certain non-manual workers ineligible for overtime: "About 107,000 nonexempt white-collar workers who earn $100,000 or more per year could be converted to exempt salaried status as a result of the new highly compensated test." *Id.* at 22,214. Thus, the DOL designed the HCE to provide a compensation-based litmus test that avoids the burdens on employers attributed to the white-collar exemptions, and it expressly considered the HCE would *add* exempt employees to the nation's workforce. *Id*. The heightened burden in the *Helix* Opinion[20] would make

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worked 84 hours in a week"); *Bernstein v. Buckeye, Inc.*, No. 18-CV-097-DC, 2019 WL 2563841, at *4 (W.D. Tex. Apr. 24, 2019) (same "typical schedule"); *Sloane*, 4:16-CV-01571 at *1 ("an annualized salary of $140,500").

[19] *See also* U.S. Bureau of Lab. Stats., *Economic News Release* (Apr. 16, 2021), https://www.bls.gov/news.release/wkyeng.t05.htm (national pay scale).

[20] Indeed, the DOL's intent to create a "streamlined" exception to the more-robust exemption tests is reflected by the fact that the DOL considered, and invited comments, on "adopting a 'salary only' test for highly compensated employees [under which employees] earning a total annual compensation over a certain

the HCE more difficult to apply to consultants, as well as other types of workers. *See Anani*, 730 F.3d at 149 (pharmaceutical industry); *Litz*, 772 F.3d at 5 (consulting firm).

Nowhere in the hundreds of pages of the DOL's annals of drafting, nor the HCE text itself, is the Fifth Circuit's requirement that to satisfy the HCE, the proponent must meet 29 C.F.R. § 541.601 (the HCE regulation itself) *as well as* 29 C.F.R. § 541.604(b) (regulation for "Minimum Guarantee Plus Extras") in order to claim the exemption. What the HCE text *does* specifically require is that "'[t]otal annual compensation' must include at least $684 per week paid on a salary or fee basis as set forth in §§ 541.602[21] and 541.605."[22] 29 C.F.R. § 541.601(b)(1). Ignoring the reality that many consultants receive annualized pay of hundreds of thousands of dollars is contrary to the intent of the HCE and overcomplicates the analysis.[23]

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amount would automatically be considered exempt." 2003 NPRM, 68 Fed. Reg. at 15,571.

[21] § 541.602 defines "salary basis" and is at issue and addressed *infra* Section C(2).

[22] § 541.605 is regarding payment on a fee basis and is not at issue.

[23] The repeated references to the HCE (29 C.F.R. § 541.601) throughout both the 2003 notice of proposed rulemaking, and the 2004 Final Rule, look at the HCE through the lens of *annualized* compensation. *See generally* 2003 NPRM, 68 Fed. Reg. at 15,560; 2004 Final Rule, 69 Fed. Reg. at 22,174.

4. Consultants' Guarantees Are the Result of Bargaining by Skilled Professionals and Are Necessitated by the Unpredictable Nature of Work in the Oil and Natural Gas Industry.

Indeed, "[i]t *is* the salary-basis test that is sharply contested in this case[,]"[24] and the text plainly supports that the day rates paid to consultants constitute salaries under the FLSA, regardless of what the parties call the compensation. The consultants at issue "regularly receive[ ] each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of [their] compensation." 29 C.F.R. § 541.602(a). Consultants do not receive their pay on a daily basis, they *receive* pay on a weekly, or less frequent basis. Further, they know *before* each week, that if they work one day—or even just one hour on one day—they will receive *at minimum* their guaranteed day rate for that week, which for the consultants at issue, is $684-plus. Consistent with this definition, the DOL issued an opinion letter on January 7, 2020, acknowledging that what payments are called does not determine whether the payments satisfy the salary basis test. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2020-2, at 1, 3 (Jan. 7, 2020), 2020 WL 122924.[25]

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[24] *Hewitt*, 15 F.4th at 291 (emphasis added).

[25] *See also* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter at 3 (Sept. 3, 1999), 1999 WL 1788150; *Faludi v. U.S. Shale Sols., LLC*, No. 17-20808, 2019 WL 3940878, at *3 (5th Cir. Aug. 21, 2019); *West v. Anne Arundel Cnty.*, 137 F.3d 752, 761–63 (4th Cir. 1998) (holding the salary basis test met when "Plaintiffs

A guarantee is a guarantee. But the majority opinion does not address the reality of the consultants' take-home pay and conflates the DOL's regulatory definition of the "salary basis test" with a corporate-type, "common parlance" idea of what a salary represents.[26] As noted above, § 541.602(a) tells us what a salary is—a guarantee of at least $684, received at least each week.

To best adapt to the reality of the day-to-day work, and to the preference of the consultants themselves, companies have relied on compensating consultants with guarantees. Courts in the First, Second, Third,[27] Sixth,[28] and Tenth[29] Circuits have endorsed the key

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receive a minimum predetermined amount every two weeks, plus additional compensation in the form of overtime").

[26] "As a matter of common parlance, we typically associate the concept of 'salary' with the stability and security of a regular weekly, monthly, or annual pay structure. By contrast, we do not ordinarily think of daily or hourly wage earners—whose pay is subject to the vicissitudes of business needs and market conditions—as 'salaried' employees." *Hewitt*, 15 F.4th at 291.

[27] *Sloane*, No. 4:16-CV-01571 at *17 (In denying FLSA and Rule 23 certification, "Thus, somewhat confusingly, for Plaintiffs to prevail, they must contend that a promised amount guaranteed for a set period of days was not a salary. Just because a salary is expressed as a guaranteed amount per day does not mean that it is no longer a salary—just the same as expressing it in an hourly, bi-weekly, monthly, or quarterly increments does not convert it from a salary to an 'hourly rate,' 'monthly rate,' or 'quarterly rate.' ").

[28] *Fenley v. Wood Grp. Mustang, Inc*., 325 F.R.D. 232, 243 (S.D. Ohio 2018).

[29] *Scott*, No. 17-CV-0693-WJM-SKC, at *1048 ("Therefore, because the Court finds that Plaintiffs fall within the highly

features of this method used to pay consultants hundreds or thousands of dollars a day for specialized work. *See Hughes*, 878 F.3d at 189–91; *Litz*, 772 F.3d at 5; *Anani*, 730 F.3d at 149. The "nature" of work at "*an oil-drilling site*" demands training for safe operations and is such that "[a]n error in [judgment] can lead to [an operator] losing a significant amount of money—sometimes hundreds of thousands of dollars." *Parrish*, 917 F.3d at 375, 383 (emphasis in original). Further, consultants may float between companies and oilfields around the country (and the world) as they complete each project. The economic reality is that the guarantees in this industry are salaries not subject to reduction based on the quality or quantity of work and accommodate the unpredictability of the oil patch.

Accordingly, when consultants step foot on a wellsite, they are paid that guaranteed amount, regardless of whether work continues through the rest of the hour, the day, or the week, shuts down early because of weather, or runs long because of an operational problem. *See, e.g.*, R.R. Comm'n of Tex., https://www.rrc.texas.gov/search/?q=weather (last visited Feb. 6, 2022).[30]

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compensated employee exemption of the FLSA, they are not entitled to overtime compensation, and the Court will grant summary judgment in favor of Antero.") *appeal docketed*, No. 21-1188 (10th Cir. May 20, 2021).

[30] The Texas Commission regulates the oil and natural gas industry, and its website shows that its online archive for oil and gas announcements begins in 2014. Using weather as only one illustration, the Texas Railroad Commission has issued at least 723 weather-based notices and announcements. Weather notifications and data are used by oilfield operators to make judgment

Companies should be able to devise compensation structures that reflect unique work environments, and the FLSA has been interpreted to support this. *See Brock v. On Shore Quality Control Specialists, Inc.*, No. CIV. A-84-CA-603, 1987 WL 31308, at *7 (W.D. Tex. Sept. 29, 1987) ("[F]rom the[ir] testimony . . . that all the inspectors [ ] used their independent judgment and discretion to . . . shut down jobs when unsafe conditions so merited," among other examples noted by the court); *Acs v. Detroit Edison Co*., 444 F.3d 763, 765 (6th Cir. 2006) (emphasis added) (citing U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (July 9, 2003)) (finding the pay plan of a utility company with 24-hour operations to "ha[ve] satisfied the administrative requirements of the salary-basis test" based on the company's pay "*guarantee*" to its employees, despite some workweeks having less-than 40 hours, with others having more-than 40 hours).

To require the oil and natural gas industry to pay overtime on consultant compensation would increase consultant labor costs in exploration and production by a *minimum* of 26.2 percent—for the overtime costs alone and, when coupled with liquidated damages available under the FLSA, that co-efficient increases to 56.4 percent.[31] A *single* consultant making around

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calls as to whether or not to close a site, among other safety-related and operational-integrity decisions. *Id.*, Notice To Operators: Tropical Storm Nicholas (Sept. 13, 2021), https://www.rrc.texas.gov/announcements/091321-nto-tropical-storm-nicholas/ (last visited Feb. 6, 2022).

[31] The mathematical co-efficient for 84 hours (seven days of 12 hours) is 26.2 percent of overtime. *See* U.S. Dep't of Labor,

$200,000 annually, like Respondent Hewitt, can result in an additional $52,000 a year in back wages. Appending these types of costs to expensive exploration will drive up oil and gas production costs, slow down production, and threaten consultant jobs nationwide, contrary to the FLSA's intent. *Accord Marzuq v. Cadete Enterprises, Inc.*, 807 F.3d 431, 445–46 (1st Cir. 2015) (citing 2004 Final Rule, 69 Fed. Reg. at 22,124) (noting "the potential job expansion intended by the FLSA's time-and-a-half overtime premium").

D. CONCLUSION

An industry-wide pay practice that has successfully aged for 120 years without censure until the flood of targeted plaintiff lawsuits should be upheld pursuant to the plain text and intent of the FLSA. The U.S. oil and natural gas industry should not be upended because of inapposite interpretations of the word "salary."

Wage & Hour Div., *Coefficient Table for Computing Extra Half-Time for Overtime*, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/CoefficientTableWH-134.pdf (last visited Feb. 6, 2022).

Helix's Petition should be granted and the judgment of the court of appeals should be reversed.

Respectfully submitted,

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