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 *AMICI CURIAE* INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA AND OFFSHORE OPERATORS COMMITTEE ON BEHALF OF PETITIONERS HELIX ENERGY SOL. GRP., INC.

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INTEREST OF *AMICI CURIAE*[1]

Independent Petroleum Association of America ("IPAA") represents independent oil and natural gas producers and has done so for ninety years. The IPAA represents over 5000 independent oil and natural gas producers and service companies across the United States. It serves as an informed voice for the exploration and production segment of the industry and advocates its members views before the United States Congress, the White House, and Federal Agencies.

The Offshore Operators Committee was formed in 1948 and has evolved into the offshore energy industry's principal representative regarding regulation of offshore exploration, development and producing operators on the Federal Outer Continental Shelf. Its objectives include consulting with and advising governmental entities concerning matters affecting the offshore petroleum industry. It is composed of over 100 corporations, associations, and individual members, representing more than 90% of the offshore energy production in the United States.

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[1] All parties have received timely notice and have consented in writing to the submission of this brief per Rules 37.2(a) and 37.3(a). Pursuant to Rule 37.6, counsel for the *amici curiae* authored this brief in whole; no party's counsel authored, in whole or in part, this brief, and no person or entity other than Schlumberger Technology Corporation contributed monetarily to preparing or submitting this brief.

The outcome of this litigation will affect the *amici curiae* members' payroll practices and use of day rate subject matter experts.

SUMMARY OF THE ARGUMENT

The *amici* respectfully submit this brief in order to address an important point of law that was raised below but not addressed in the Fifth Circuit's Opinion and to note the potentially significant impact that the Fifth Circuit's Opinion could have upon the oil and gas industry if allowed to stand.

The Department of Labor ("DOL") acknowledges that the controlling Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 213(a)(1), establishes a duties-based test for the white-collar exemptions and the DOL has no authority to impose a compensation-based test. Hewitt admits he satisfies the duties requirement of the exemption. Accordingly, the Fifth Circuit should have adopted an interpretation of the regulations that was consistent with the text of the FLSA that found Hewitt was exempt or set aside the regulations as contrary to the Act.

The Fifth Circuit was presented with a reasonable interpretation of the regulations at issue that relied on the tests specified in the regulations to conclude that Hewitt's "day rate", which always exceeded the minimum required salary of $455 per week, satisfied the "salary basis" requirement for exempt employees. Instead, the Fifth Circuit used the ordinary/lay meaning of the terms "salary" and "day rate" to conclude that Hewitt was not exempt even though he admits to meeting the statutory requirements for the

exemption. In doing so, the Fifth Circuit violated the rules for statutory interpretation.

The economic model of the oil industry centers around the daily costs of operations. Even the drilling rigs and platforms are hired out on a day-rental basis. This model has been in effect for many years and is driven by its economic efficiency. The Fifth Circuit's ruling places unnecessary burdens on an industry that is still of vital importance to the United States.

ARGUMENT

I. THE FIFTH CIRCUIT'S OPINION IS CONTRARY TO THE RULES OF STATUTORY INTERPRETATION.

The Fifth Circuit cited the demands of textualism and its duty to follow the text of the regulations contained in 29 C.F.R. Part 541, Subpart G, as its reason for determining that a management employee, who admittedly meets all the duty requirements of an exempt employee, nevertheless does not qualify as exempt because his minimum weekly pay of $963 (in weeks in which he performed any work) was designated as day rate pay rather than a salary. In doing so, the Fifth Circuit did not follow the text of the controlling statute or adopt a reasonable interpretation of the regulation that is consistent with the statute.

29 U.S.C. § 213(1)(a) states that the white-collar exemptions are defined by the duties performed by the employee without any requirement or even mention of any specific level of pay. As Hewitt admits he performs the duties of an exempt employee, he meets the statutory requirement. By disqualifying Hewitt based

upon its interpretation of the salary requirements stated in the regulations, the Fifth Circuit adopted an interpretation of the regulations that is contrary to the controlling statute and effectively elevated the regulations above the statute. That is contrary to basic rules of statutory construction.

A. The U.S. Code establishes a duties requirement for the white-collar exemptions, not a salary requirement.

The U.S. Code provision governing the white-collar exemptions is 29 U.S.C. § 213(a)(1).

> The provisions of [the minimum wage section and the maximum hour section] of this title shall not apply with respect to … any employee employed in a bona fide executive, administrative, or professional capacity ….

Id. There is no reference to or requirement for any specified method or level of pay in the statute. It is purely a duties requirement.

B. The DOL recognizes that the white-collar exemptions do not include a salary requirement and that it does not have the power to establish a salary requirement for the white-collar exemptions.

The Act authorizes the Department of Labor to define and delimit the white-collar exemptions through regulations.

> However, the Department's authority is limited by the plain meaning of the words in the statute and Congress' intent. Specifically, the Department's authority is limited to determining the essential qualities of, precise signification of, or marking the limits of those "bonafide executive, administrative, or professional capacity" employees who perform exempt duties and should be exempt from overtime pay. . . nor does the Department have the authority to categorically exclude those who perform "bona fide executive, administrative, or professional capacity" duties based on salary level alone. In fact, the Department admits "[T]he Secretary does not have the authority under the FLSA to adopt a 'salary only' test for exemption. 81 F.3d 446 (citing Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22122, 22173 (April 23, 2004)).

Nevada v. U.S. Dept. of Labor, 275 F.Supp. 3d 795, 805-06 (E.D. Tex. 2017).

It is the DOL's position that the salary test is just a proxy for the level of responsibility of the position.

> [T]he law does not give the Department authority to set minimum wages for executive, administrative, and professional employees. These employees are exempt from any minimum wage requirements. The salary level test is intended to help distinguish bona fide executive, administrative, and professional employees from

> those who were not intended by Congress to come within these exempt categories.
>
> * * *
>
> Salary levels "furnish a practical guide to the investigator as well as the employers and employees in borderline cases and simplify enforcement by providing a ready method for screening out *obviously nonexempt employees*."

69 Fed. Reg. 22122, 22165 (April 23, 2004) (emphasis added). Here, there was no need to rely on any proxy as Hewitt admits his duties qualify him for the exemption.

C. The Fifth Circuit failed to look at the controlling statute in interpreting the regulation.

There is an important rule of interpretation that the Fifth Circuit did not consider in this case. In interpreting the regulation, the court was required to do so in a way that is consistent with its governing statute.

> Review of an agencies' interpretation of its regulations involves a two-pronged analysis. First, we look to the plain language at the regulation. The words of the regulation must be "reasonably susceptible to construction placed upon them by the Secretary, both on their face and in light of their prior interpretation and application." *Id.* Second, "The Secretary's construction must be reviewed in relation to the governing statute." *Id.* "Agency regulations must

> be consistent with and in furtherance of the purposes and policies embedded in the Congressional statute which authorized them." *Id.*

University of California v. Shalala, 82 F.3d 291, 294 (9th Cir. 1996).

"[F]inally, 'a regulation must be interpreted in such a way as to not conflict with the objective of its organic statute." *Canyon Food Co., LLC v. Secretary of Labor*, 849 F.3d 1279, 1288 (10th Cir. 2018) (quoting *Time Warner Entertainment Co. v. Everest Midwest Licensee, LLC*, 381 F.3d 1039, 1050 (10th Cir. 2004)).

It is clear that the Fifth Circuit's interpretation of the regulations at issue here, 29 C.F.R. §§ 541.601, 602(a) and 604(b), conflicts with the underlying statute. Accordingly, if the Fifth Circuit's interpretation is valid, the proper remedy would be to set the regulation aside as it invalidates the exempt status of employees who qualify as exempt under the statute. *See Cheshire Hosp. v. New Hampshire-Vermont Hosp. Serv., Inc.*, 689 F.2d 1112, 1118 (1st Cir. 1982) ("Regulations which are inconsistent with the statute, or contrary to the manifest purposes of Congress in enacting the statute, must be set aside as contrary to law.").

Here, there is no need to invalidate the regulation. The Fifth Circuit was presented with a perfectly valid and reasonable interpretation of the regulation that does not conflict with the statute. The Fifth Circuit simply chose not to take that route.

II. HEWITT IS EXEMPT UNDER THE HIGHLY COMPENSATED EMPLOYEE EXEMPTION 29 C.F.R. § 541.601.

The highly compensated employee exemption has both a duties requirement and a compensation requirement. The duties test is met if the employee's primary duty includes performing non-manual work, and he customarily and regularly performs at least one exempt duty or responsibility. 29 C.F.R. § 541.604(a)&(d). Hewitt admits to meeting the exemption's duties test. The compensation portion of the exemption requires that the employee's total (or pro-rated) annual compensation exceed $100,000 of which at least $455 per week must be paid on a salary basis. *Id.* at (b). Again, there is no doubt that Hewitt meets the total compensation requirement as his compensation was over $200,000 per year.

This case turns on whether Hewitt meets the "salary basis" test. This is a term of art under the FLSA that is defined at 29 C.F.R. §§ 541.600 & 602. The Fifth Circuit found Hewitt was not paid on a salary basis even though he received at least $963, (one day's pay at his day rate), in any week in which he did any work.[2] The Fifth Circuit reached this conclusion by applying the ordinary/lay meaning to the terms "salary" and "day rate" rather than the tests found in the regulations. If the Fifth Circuit had properly

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[2] The district court found that Hewitt was exempt under § 541.601. This was based on the court's determination that his day rate of at least $963 satisfied the $455 salary basis requirement and his total compensation in each of the relevant years exceeded $200,000 (in the last year, he exceeded $200,000 on a *pro rata* basis).

applied the regulatory test, it would have concluded that he met the "salary basis" requirement.

A. Hewitt Satisfies 29 C.F.R. § 541.600.

There are two parts of § 541.600 that are relevant to the analysis. Subsection (a) establishes the minimum weekly compensation. In 2004 this was established at $455 per week.

> To qualify as an exempt executive, administrative or professional employee under section 13(a)(1) of the Act, an employee must be compensated on a salary basis at a rate of not less than $455 per week….

Id.[3]

Subsection (b) establishes the frequency of payment. Pay periods of longer than one week are permissible under the Act, but paying employees at the end of each workday, like daily cash payments to day laborers, is not.

> The $455 a week may be translated into equivalent amounts for periods longer than one week. The requirement will be met if the employee is compensated biweekly on a salary basis of $910, semimonthly on a salary basis $985.83, or monthly on a salary basis of $1,971.66. However, **the shortest period of *payment* that will meet this compensation requirement is one week**.

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[3] Salary basis is defined at 29 C.F.R. § 541.602.

Id. (emphasis added). This interpretation of § 541.600(b), as limited to confirming the frequency of payment, is confirmed by reviewing past versions of the regulation. A predecessor of § 541.600 was published in the Federal Register on January 12, 1970 (attached). It was then numbered § 541.117, and states:

> Except as otherwise noted in paragraph (b) of this section, compensation on a salary basis at a rate not less than $125 per week… is required for exemption as an executive…. *However*, the shortest period of payment which will meet requirement of payment "on salary basis" is a week.

Id.

Section 541.600 provides no guidance, or limitations, on how a "salary basis" is computed. Given § 541.604(b) specifically recognizes a "salary basis" may be *computed* on a day rate basis, a day rate can certainly satisfy § 541.600.

Hewitt identified the relevant facts for the § 541.600 analysis in his brief to the Fifth Circuit. He block-copied an excerpt from his offer letter to document it:

> Following are the proposed compensation elements for this position which should be in accordance with our prior discussions:
>
> Pay rate: $1,341.00 daily (to be paid on a **bi-weekly** basis)

(*Hewitt v. Helix Energy Sol. Grp.*, No. 4:17-CV- 2545, Doc. 514929637, p. 18 (5th Cir. April 24, 2019) (emphasis added).)

It is undisputed that Hewitt's "day rate" was never below $963 and his pay was bi-weekly. Thus, he received more than $455 in any week he performed any work. And he was paid once every two weeks. In other words, the pay rate and frequency of payment meet the requirements of § 541.600. In fact, if Hewitt worked just one day, he received more than the minimum requirement for a biweekly salary.

B. Hewitt Satisfies 29 C.F.R. § 541.602.

The next step of the analysis is determining if Hewitt's compensation structure meets the "salary basis" requirements of § 541.602. The two key factors at issue here are: 1) there must be a "predetermined amount" that the employee will receive if he performs *any work at all*; and 2) that predetermined amount may be *only a part* of the employees' compensation.

> *General Rule.* An employee will be considered to be paid on a "salary basis" within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variation in the quality or quantity of the work performed.…[A]n exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours

> worked. Exempt employees need not be paid for any work week in which they performed no work.

Id.

Once again, the ordinary meaning of the text of the rule is important. It refers to what the "employee regularly receives each pay period." In other words, it is referring to the amount paid and not how the amount was calculated. And again, it is not referring to the total amount received each pay period, it is referring to the amount not subject to reduction.

So, the question before the Court is whether the "predetermined amount" requirement stated in the regulation is satisfied equally by a "salary" composed of a single "day rate", which alone satisfies the predetermined weekly amount requirement, as it is by a traditional salary providing a full week's pay. The facts show that it is. Again, we need not look further than Hewitt's own Fifth Circuit brief.

> Bryan Butler, A Senior Project Manager for Helix, testified that employees like Hewitt "are paid a day rate whether they work a full day or just wake up on one of our boats."

(*Hewitt v. Helix Energy Sol. Grp.*, No. 4:17-CV- 2545, Doc. 514929637, p. 28 (5th Cir. April 24, 2019) (emphasis added).)

So, Helix's obligation was to pay the full rate promised, regardless of the number of hours worked or quality of the work, if Hewitt performed any work, or was merely present for duty. If Hewitt worked more

than one day, he still received that predetermined amount as well as the extra compensation above the predetermined amount.[4] There is no difference between this arrangement and one in which an employee is paid a minimum guaranteed amount of $455 designated as a "salary." Under either arrangement, the employee receives guaranteed weekly compensation above the threshold amount for any week in which he/she performs any work.

Except for the duration, (one day versus seven days), Helix's obligation under a promise of a "day rate" is the same as any employer's promise of a salary. And, as previously noted, nothing in the regulations prevents a "salary basis" from being computed on a day rate basis as § 541.604(b) recognizes that possibility.

Here, the facts also show that Hewitt's "day rate" satisfies the minimum weekly salary obligation under § 541.600. The minimum amount he will receive in any week in which he performs any work is $963. Section 541.602 specifically states that Hewitt can receive additional compensation above the predetermined amount without violating the salary basis requirement. So, the fact that Hewitt worked more days in a week

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[4] If Hewitt was *not* highly compensated, *i.e.* his total annual compensation was $100,000 or less, he would also have to comply with the reasonable relationship requirement of § 541.604(b) as his pay was calculated on a day rate basis. This does not apply to Hewitt, as discussed below, because § 541.604 does not apply to employees falling under the HCE. § 541.601. (The reasonable relationship test does not apply to exempt employees paid a traditional salary, regardless of their total compensation. Additional compensation for those employees is governed by §541.604(a).)

and received more than his "predetermined amount" of $963 does not affect the fact that his day rate satisfies both §§ 541.600 and 602.

III. WHEN AN EMPLOYEE SATISFIES THE EXEMPTION TEST UNDER 29 C.F.R. § 541.601, FURTHER ANALYSIS UNDER 29 C.F.R § 541.604 WOULD BE ERROR.

Other than the fact that the regulation is in the same subpart, the Fifth Circuit presents no authority to say that a highly compensated employee should be subject to a reasonable relationship test. The most likely reason is that the available evidence shows that proposition is against the intent of the drafters.

The highly compensated employee regulation itself supports this conclusion. At all material times, that regulation required total annual compensation of at least $100,000, of which $455 per week is paid on a salary or fee basis. *Id*. at § 541.601(b). $455 per week equates to an annual salary of $23,660.

The regulation also uses the term "salary basis" rather than just the word salary. As previously noted, "Salary basis" is defined by § 541.602 (a) and, as has been shown, the regulation does not place any limit on how the salary basis is *computed*. Finally, the highly compensated employee regulation does not expressly include or refer to § 541.604(b).

The language of the regulation is a direct repudiation of the application of the reasonable relationship test. By its own terms, it sets the acceptable threshold between total compensation and salary at an over four-to-one ratio. In other words, the

reasonable relationship test does not and cannot apply as it would invalidate the minimum salary level allowed by § 541.601. This is further supported by use of the term "salary basis", which is a predetermined, but not exclusive, amount that can be calculated *on any basis*.

Second, the DOL's own regulatory guidance for § 541.601 makes clear that the intent of the base salary requirement is that it be *no more* than the amount required for any other exemption. The original draft did not have any salary basis requirement. There were many comments regarding the appropriate levels and whether the test should be based on the salary level, the total compensation, or some combination. In the final rule, the DOL chose to add a salary basis requirement that was *at the same level as the other exemptions*, despite setting the *total compensation level* at the 90th percentile of all salaried employees, which is inherently outside a reasonable relationship analysis. The DOL explained:

> [S]ub-section 541.601(b)(1) contains a new safeguard against possible abuses that are of concern to some commenters, including the AFL-CIO: the "total annual compensation" must include at least $455 per week paid on a salary or fee basis. This change will ensure that highly compensated employees will receive at least the same base salary throughout the year as required for exempt employees under the standard tests, while still allowing highly

> compensated employees to receive additional income . . ..

69 Fed. Reg. at 22175.

The DOL never intended, or even contemplated, that the weekly salary basis for highly compensated employees must bear a reasonable relationship to the total compensation. Rather, the DOL intended that the regulatory requirement would be met as long as the base guaranteed amount was at least the $455 required for other exemptions, regardless of the total compensation.

This conclusion is further supported by applying the reasonable relationship test to the minimum requirements of the regulation. The DOL has recently explained that the § 541.604(b) reasonable relationship is satisfied if the additional amounts do not exceed approximately 50% of the guaranteed amount (in other words, the base salary). *See* DOL Opinion Letter FLSA2018-25 (Nov. 8, 2018). According to that guidance, the reasonable relationship test would require that an employee, whose total compensation is $100,000, have a guaranteed annual "base salary" of $66,666.67 per year, or $1,282.04 per week.[5] Adopting this requirement for the highly compensated employee regulation would be a significant judicial rewriting of § 541.601(b)'s requirement for a base salary of only $455 per week.

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[5] At the 50% level, the additional compensation above an annual guarantee of $66,666.67 would be $33,333.33, bringing the total compensation to $100,000. Dividing the $66,666.67 by 52 weeks provides the required weekly guarantee.

IV. EXCLUDING § 541.604(B) FROM THE HIGHLY COMPENSATED ANALYSIS IS CONSISTENT WITH DOL POLICY CONCERNS.

Section 541.604 was newly enacted in 2004. The DOL stated the rule reflects longstanding interpretations found in opinion letters and the Field Operations Handbook. That regulation was designed to protect lower paid employees from schemes where employees are paid by the hour and the guarantee is no more than an illusion. *See* 69 Fed. Reg. at 22183.

On the other hand, the DOL has noted that it makes sense to treat employees whose compensation is above $100,000 under more relaxed rules.

> The Department continues to find that employees at higher salary levels are more likely to satisfy the requirements for exemption as an executive, administrative, or professional employee. The purpose of § 541.601 is to provide a "short-cut test" for such highly compensated employees who "have almost invariably been found to meet all the other requirements of the regulations for exemption."

69 Fed. Reg. at 22174 (*quoting* the 1949 Weiss report at 22). As § 541.601(c) notes, "A high level of compensation is a strong indicator of an employee's exempt status . . .."

V. THE HOLDING IN FAVOR OF HEWITT WOULD NEGATIVELY IMPACT A VITAL INDUSTRY.

The record shows that Hewitt's total compensation was in excess of $200,000 per year. Cases, such as the district court's decision below and *Parrish v. Premier Directional Drilling, LP*, 917 F.3d 369 (5th Cir. 2019), demonstrate that highly skilled day rate personnel, which are common in the oilfield industry, are not mere day hire laborers. They are subject matter experts brought on to oversee specific technical operations in a complex, multi-million-dollar operation.

These experts play key parts in this complex industry. The drilling companies do not possess the technical expertise to monitor and control the myriad facets of modern drilling operations, and they rely on these day rate experts for their advice and support. The industry is obviously successful as, over the past decade, it has turned the United States from being a net energy importer to a net energy exporter.[6]

The economic model of the oil industry centers around the daily costs of operations. Even the drilling rigs and platforms are hired out on a day rental basis. This model has been in effect for many years and is driven by its economic efficiency. Oil industry employers paying outside contractors, including day-rate specialists, and some of their own employees, for services on a day-rate basis is part of that model.

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[6] The United States of America is no longer a net energy exporter as of 2021 due to a change in administration policies.

The Court should also recognize that subject matter experts such as these day-rate employees are highly compensated because they provide specialized services that contribute value to the operation. Forcing the industry to change compensation practices that meet the plain meaning of 29 U.S.C. § 213 and the regulations but with which Fifth Circuit disagrees only forces an entire industry (and potentially other industries as well) to adopt less efficient compensation plans and practices.

Given the above, it is evident that the Fifth Circuit's ruling is contrary to the regulations, unnecessary, and disturbs the basic business model of a vital industry. The oil industry is not asking for special consideration or a different rule. Consistent with *Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134 (2018), the oil industry is seeking a fair and reasonable interpretation of the current regulations. As the regulations clearly permit a finding that compensation calculated on a day rate basis can satisfy the salary requirement for the white-collar exemptions, the Fifth Circuit's decision in this case amounts to no more than an exercise of judicial fiat.

CONCLUSION

For the reasons discussed above, Helix's petition should be granted. A fair reading of the regulations supports a finding that Hewitt was properly classified as exempt. Hewitt admits that he is exempt under the duties portion of the test, a finding in his favor would create a direct conflict between the regulations and the FLSA's statutory language. Accordingly, the Court should apply a fair reading and conclude that Hewitt

satisfies the salary basis requirement and as he is highly compensated, no further analysis is necessary.

Respectfully submitted, this the 10th day of February, 2022.

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