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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Respondent is a highly skilled supervisor who earned over $200,000 annually while managing operations on Helix's vessels. He falls squarely within the FLSA's statutory exemption for those "employed in a bona fide executive … capacity," 29 U.S.C. §213(a)(1), and the regulation deeming exempt supervisory employees earning at least $455 a week and $100,000 a year, 29 C.F.R. §541.601 (the "HCE regulation"). The Fifth Circuit's determination that Respondent is nevertheless non-exempt because he does not satisfy the separate and inconsistent requirements of 29 C.F.R. §541.604 is wrong as a matter of text, context, and common sense, and it squarely conflicts with decisions from the First and Second Circuits.

Respondent's principal response is to change the subject and to try to revive the panel's subsequently abandoned holding concerning a different provision, §541.602, imposing the salary-basis test. But the Fifth Circuit plainly (and wisely) abandoned that theory in its revised panel opinion, and that discarded ruling played no role in the decision that divided the *en banc* court. That reality is not subject to reasonable dispute. The *en banc* majority expressly "accept[ed] Helix's premise" that Helix "complie[d] with §541.602," and it could do so because of its (misguided) view that "the only way" Helix could satisfy the HCE regulation was by "comply[ing] with §541.604(b)." Pet.App.16. Indeed, there would have been no need for four separate opinions and countless sharp words about textual fealty in interpreting §541.604 if the majority had held (or even believed) that Helix could

not satisfy §541.602's salary-basis test. To the extent that issue might remain open on remand, that is no barrier to this Court's review of the question presented.

When Respondent finally gets around to addressing the issue the *en banc* court actually resolved, he has precious little to say. His passing effort to deny the circuit split is based on the same sleight of hand as the *en banc* majority's, construing a provision requiring an exempt employee to *receive* payment "on a weekly … basis" to require his pay to be *calculated* on a weekly basis. On the merits, Respondent repeats a subset of the majority's arguments—the same flawed arguments the petition addressed and that the First and Second Circuits (along with the two dissenting opinions below) rejected. The circuits are squarely split on the applicability of §541.604 to the HCE regulation, not on the application of §541.602 or anything else. That circuit split is entrenched, with well-reasoned (and passionate) opinions on both sides. And the issue is important, especially given the Fifth Circuit's centrality to the petroleum industry and the prospect for nationwide FLSA collective actions seeking "minimum-wage" windfalls for supervisors bringing home $200,000 a year. This Court should grant the petition.

I. The Fifth Circuit's Decision Was Based On §541.604, Not §541.602 Or Anything Else.

A. The question presented in this petition and by the decision below is whether an employee whose compensation satisfies the HCE regulation's three-part test is thereby "deemed exempt," as the

regulation says (and the First and Second Circuits have held), or whether he is exempt only if his compensation *also* satisfies §541.604, the "[m]inimum guarantee plus extras" provision. Respondent's principal response is that Helix "cannot establish entitlement to the HCE Regulation" because it did not satisfy the second part of the HCE regulation's three-part test—*i.e.*, the salary-basis provision of §541.602. Opp.16. That is a non-defense of the decision below and a non-response to the petition.

Respondent repeatedly contends that the *en banc* majority actually held that Respondent's compensation did not satisfy §541.602's salary-basis test. *See, e.g.*, *id.* at 1 ("The Fifth Circuit correctly determined that Petitioners failed to establish they paid Respondent on a 'salary basis' under 29 C.F.R. §541.602[.]"); *id.* at 12 ("[T]he Fifth Circuit explained that … Helix could not meet the FLSA's 'general rule' for the salary-basis test."). Consequently, Respondent asserts, "it does not matter that the Fifth Circuit analyzed 29 C.F.R. §541.604(b), or whether the HCE Regulation is subject to 29 C.F.R. §541.604(b)." *Id.* at 3.

The best that can be said for Respondent's reading of the *en banc* decision is that it is a fair description of the first panel opinion in this case, which was promptly withdrawn and replaced with an opinion resting squarely on §541.604. In that long-since-withdrawn opinion, the panel held that "an employee who is paid a daily rate is not paid on a 'salary basis' under 29 C.F.R. §541.602(a)," Resp.App.2, and thus did not address whether §541.604's requirements

applied. But that opinion was withdrawn, and its §541.602(a) theory has never resurfaced.

To the contrary, in the *en banc* opinion, the court disavowed the original panel opinion's holding that a "daily rate can *never* meet the salary-basis test." Pet.App.4. It instead held that highly compensated day-rate employees like Respondent, even if their compensation satisfies every element of the HCE regulation itself (including its second element, which expressly incorporates §541.602's salary-basis requirement), are exempt only if their compensation *also* satisfies the separate minimum-guarantee-plus-extras requirement of §541.604. As the *en banc* majority put it, "the only way" to satisfy the HCE regulation "is to comply with §541.604(b)." Pet.App.16; *see id.* at 5 ("[A] daily-rate worker can be exempt from overtime—but only 'if' two conditions [in §541.604] are met."). In fact, when addressing Helix's argument that "it does not have to comply with §541.604(b) because it complies with §541.602" and the other elements of the HCE regulation, the *en banc* court explicitly "accept[ed] Helix's premise about §541.602" but nevertheless held that Respondent was non-exempt, explaining that Helix was required to also show that it compensated Respondent consistent with §541.604(b). *Id.* at 16.

To be sure, the *en banc* majority occasionally suggested that Respondent did not satisfy the "salary basis" test, *e.g.*, Pet.App.8, but only by treating §541.604 as an "exception[] or proviso[]" to the basic requirements of §541.602, *id.*—*i.e.*, even if Respondent was paid on a salary basis, it was not a salary that complied with §541.604 because too small a

percentage was guaranteed. The *en banc* majority never questioned that the requirements that actually appear in §541.602 were satisfied. It ruled against Helix solely because it believed that "the only way" to satisfy the HCE regulation "is to comply with §541.604(b)." Pet.App.16.

Finally, the implausibility of Respondent's reading of the *en banc* decision as really being about whether day rates can satisfy §541.602 is underscored by the number, tenor, and content of the *en banc* opinions. The Fifth Circuit did not issue four separate, passionate opinions about the proper reading of §541.604 and the uses and abuses of textualism because they were actually deciding the case on the basis of different text (that expressly addresses when paychecks are *received* and not how they were *calculated*). The debate was passionate precisely because 12 judges thought §541.604(b) imposes additional requirements on employees who satisfy the HCE regulation, and 6 judges read the HCE regulation as a standalone deeming provision that does not incorporate the inconsistent requirements of §541.604(b). That is the question presented in the petition and that has divided the circuits.

B. To the extent Respondent is contending that the mere possibility that he could prevail on his §541.602 arguments on remand is a reason to deny the petition, that argument is flawed in multiple respects.

First, the possibility that this question might remain open on remand is no reason to deny review. This Court routinely grants certiorari to resolve important questions that controlled the lower court's decision notwithstanding a respondent's assertion

that, on remand, it might prevail for a different reason. *See, e.g.*, *Badgerow v. Walters*, 141 S.Ct. 2620 (2021) (granting petition despite respondent's argument that it would prevail on alternative grounds on remand); *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 141 S.Ct. 2698 (2021) (same); *Kisor v. Wilkie*, 139 S.Ct. 657 (2018) (same).

Second, Respondent's prediction of success on remand is hard to credit. The panel abandoned his §541.602 theory for good reason. As the petition explained, Respondent *received* paychecks every two weeks, Respondent was guaranteed a predetermined minimum that more-than-doubled the minimum salary of $455 per week, and that minimum-guaranteed amount was not subject to reduction; §541.602 was thus readily satisfied. Pet.24-25. Simply put, an employee who receives a daily salary more than twice the weekly minimum and receives a paycheck every two weeks fully satisfies §541.602. If the Fifth Circuit thought otherwise, the panel would not have withdrawn its first opinion (which embraced Respondent's arguments), the *en banc* majority would not have disavowed the first panel opinion's reasoning that relied solely on §541.602, and the *en banc* court would have avoided a public dust-up over §541.604 and who was properly discharging "the hard work" of textualism. Pet.App.44 (Jones, J., dissenting).[1]

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[1] Respondent's §541.602 argument suffers a deeper flaw. It is one thing to establish a streamlined regulatory gateway for employees who obviously satisfy the statutory language and purposes. It is quite another thing for a regulation to treat highly compensated supervisory employees as non-exempt based on the details of how they receive their substantial pay. That approach would have no grounding in the statute. Nor does a Labor

II. The Circuit Split Is Real And Entrenched.

The Fifth Circuit held that an employee is not rendered exempt by the HCE regulation unless the employer also satisfies §541.604. As both dissents below correctly observed, that judgment conflicts with the decisions of two other circuits. *See* Pet.16-20.

Respondent claims that *Anani v. CVS RX Services, Inc.*, 730 F.3d 146 (2d Cir. 2013), and *Litz v. Saint Consulting Group, Inc.*, 772 F.3d 1 (1st Cir. 2014), are distinguishable because they involved employees paid based on weekly, not daily, rates. Opp.18. That distinction is triply irrelevant. First, as noted, under the relevant text, what matters is how often an employee *receives* his pay, not how that pay is calculated. An employee receiving a paycheck every two weeks calculated based on a weekly rate is no different from an employee receiving a paycheck every two weeks calculated based on a daily rate. *See* Pet.20.

Second, Respondent ignores that his guaranteed day-rate of $963 was well above the weekly threshold and nearly as high as the weekly rates of Litz ($1,000) and Anani ($1,250). Respondent was guaranteed $963 per week for any week in which he worked at least one day. *See* Pet.24. That is all the regulation requires.

Third, and most fundamentally, whether the salary paid out every two weeks is calculated based on a weekly or daily rate is a factual sideshow with no relevance to the fundamental legal question on which

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Department opinion letter that merely cites the withdrawn panel opinion move the needle, as a member of the panel pointed out. Resp.App.46a (Wiener, J., dissenting).

the circuits are divided—namely, whether the HCE regulation is a standalone streamlined exemption (as the First and Second Circuits have held) or whether an employee must also satisfy the additional (and inconsistent) requirements of §541.604 (as a majority of the Fifth Circuit has held).

Respondent makes no further effort to distinguish *Anani*, declining to defend the *en banc* majority's claim that *Anani*'s holding was "stray language." *See* Pet.19. As for *Litz*, Respondent claims in a footnote that "neither party [in *Litz*] relied on" §541.604. Opp.18 n.7. That is incorrect. As explained, the *Litz* plaintiffs argued in their opening brief that §541.604 and its "reasonable relationship" requirement applied to them, only to "sensibly abandon[]" the argument in their reply brief. *Litz*, 772 F.3d at 5. The First Circuit nevertheless addressed the argument and rejected it: "[W]e see no reason why [§541.604(b)'s] requirements should be grafted onto [the HCE exemption]." *Id.*

On the other side of the split, Respondent insists that the Sixth Circuit's discussion of §541.604 in *Hughes v. Gulf Interstate Field Services, Inc.*, 878 F.3d 183 (6th Cir. 2017), was holding, not dicta. Opp.19-20. If true, that would only deepen the circuit split.

In short, the circuit split is real. *Anani* and *Litz* held 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. This case, *Hughes*, and *Coates v. Dassault Falcon Jet Corp.*, 961 F.3d 1039 (8th Cir. 2020), hold or suggest the opposite. The courts of appeals are thus plainly divided on how these regulatory provisions interact.

III. The Fifth Circuit's Decision Is Wrong.

The HCE regulation's streamlined path to exemption for highly compensated supervisors is not subject to the detailed and inconsistent requirements of §541.604, which apply only to employees making far less than the HCE annual threshold. *See* Pet.25-33. Respondent's counterarguments lack merit.

In the petition, Helix noted that the HCE regulation cross-references several other provisions but not §541.604. Pet.27-28. Respondent echoes Judge Ho's concurrence by contending that the non-streamlined EAP regulations do not cross-reference §541.604, and yet all agree that they incorporate §541.604. Opp.20-21; *see* Pet.App.25 (Ho, J., concurring). But as Helix already explained, and Respondent never rebuts, that is inaccurate: The introductory statement to Part 541 expressly provides that Subpart G (which contains §541.604) applies to the traditional EAP regulations, but it does not say the same for the HCE regulation. *See* Pet.27-28. Furthermore, the EAP regulations lack the HCE regulation's deeming provision and inconsistent directions about minimum guarantees.

Respondent contends that the HCE regulation's cross-reference to §541.602 should be treated as a *de facto* cross-reference to §541.604 because §541.604 mentions a salary-basis requirement. Opp.21. That gets matters backwards. It is common ground that §541.604(b) imposes requirements different from and in addition to those in §541.602. Under those circumstances, the HCE regulation's express cross-reference to §541.602 and lack of any comparable cross-reference to §541.604(b) should be controlling.

That is especially true given that §541.602 imposes technical requirements compatible with the HCE regulation, while §541.604(b) imposes requirements at war with the thrust of the HCE regulation. Under the HCE regulation, an employee making $100,000 is presumptively exempt as long as she receives $23,660 in guaranteed salary, *i.e.*, if 75% of her pay is non-guaranteed. Under §541.604(b), it is virtually impossible for an employee with only 25% of her salary guaranteed to qualify as exempt. There is no good reason, absent an explicit cross-reference, to put the two regulations on a collision course.

Respondent's answer to the HCE regulation's deeming provision concedes its basic effect—*i.e.*, that it makes the HCE regulation self-contained and leaves no room for importing additional criteria. *See* Pet.26. Indeed, Respondent acknowledges that the deeming provision "means [employees] are exempt if they can establish pay on a salary basis as set forth in 29 C.F.R. §541.602." Opp.22. But he then reverts to his fallback argument, claiming that "Helix failed to pay [Respondent] on a salary basis." *Id.* As already explained, however, that is irrelevant at this juncture: this case comes to the Court on the premise that Helix *did* pay Respondent on a salary basis. *See* Part I, *supra*.

Respondent has no response to the other arguments in the petition. Even with 2,000 words to spare, Respondent tellingly does not dispute any of the following: the only reason for the agency to decouple the "[m]inimum guarantee plus extras" provision (§541.604) from the salary-basis regulation (§541.602) was to allow the HCE regulation to incorporate the

latter without also incorporating the former, Pet.28-29; the HCE regulation's rules for minimum-guaranteed pay conflict with the more restrictive rules in §541.604, *id.* at 29-31; the *en banc* majority's reading would strip the HCE regulation's unqualified approval of "extras" of all effect, *id.* at 31; applying §541.604(b) to the HCE regulation would impose two different minimum weekly guarantees on the same employees, *id.* at 31-32; and the *en banc* majority's interpretation puts the regulation in serious tension with the FLSA's text, *id.* at 32-33.

Rather than address these serious failings, Respondent offers unconvincing scattershot defenses of the decision below. Respondent bafflingly claims that it "appl[ied] 80 years of overwhelming, binding, and persuasive precedent to the facts of this case." Opp.23. Needless to say, courts do not take cases *en banc*, split 12-6, and generate four separate opinions when the issues are controlled by "overwhelming precedent." Respondent boasts that the majority opinion was "authored by a committed textualist." *Id.* at 11. But an equally committed textualist minority called the majority's reasoning "incorrect," "counterintuitive," and "counter to two other circuits' analysis," while offering "a much better textual interpretation." Pet.2; Pet.App.36. Respondent notes that the regulations do not exempt employees "based solely on the fact that they are well compensated," Opp.23, but no one claims otherwise—indeed, Respondent elsewhere accuses Helix of treating Respondent as exempt solely because of his job duties. *Id.* at 27. Respondent is not exempt just because of his high salary or just because of his supervisory position, but given that he had *both* and satisfied every other

element of the HCE regulation, a decision treating him as non-exempt is plainly flawed.

IV. The Question Presented Is Important.

Respondent does not dispute that whether §541.604 applies when determining whether highly compensated employees are exempt from the FLSA's overtime-pay requirements is an important and recurring issue. He does not dispute—and a broad coalition of *amici* states confirms, States.Br.1—that the question cuts across borders and industries, affecting a wide range of highly paid workers nationwide, who will now have every incentive to center nationwide collective actions in the Fifth Circuit. He does not dispute—and industry *amici* representing thousands of resource exploration and production companies confirm, TXOGA.Br.3-7; IPAA.Br.18-20—that the Fifth Circuit's decision would reward well-heeled supervisors with massive "minimum-wage" windfalls and impose significant retroactive liability for long-settled practices. And Respondent does not argue that the question requires further percolation.

If a statute designed to ensure a minimal standard of fair treatment for blue-collar workers really required windfalls for supervisors already making well over six figures, it would be an issue that cried out for congressional attention. But given that two circuits and six dissenting judges have concluded that the text does not require this counterintuitive result, the issue cries out for this Court's review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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