No. 21-984

In The Supreme Court of the United States

HELIX ENERGY SOLUTIONS GROUP, INC., ET AL,
Petitioners,

v.

MICHAEL J. HEWITT,
Respondent.

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

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

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") respectfully submits this brief as *amicus curiae* in support of Petitioners.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community, including the proper interpretation of the Fair Labor Standards Act ("FLSA"). *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, No. 16-1362; *Integrity Staffing Sols., Inc. v. Busk*, No. 13-433; *Sandifer v. United States Steel Corp.*, No. 12-417.

The Chamber's members have a strong interest in an interpretation of the FLSA and the highly compensated employees ("HCE") exemption that delivers on the certainty and administrability the exemption was meant to provide. The Fifth Circuit's

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[1] This brief is filed with the written consent of all parties. No counsel for either party authored this brief in whole or in part, nor did any party or other person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the brief's preparation or submission.

reading would contravene that clear purpose. The Chamber urges this Court to reverse.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FLSA and its overtime provisions were designed to protect blue-collar employees working oppressively long hours for substandard wages—not attorneys, consultants, and other white-collar professionals making six-figure salaries. Consistent with that purpose, the HCE exemption was meant to provide employers with a straightforward safe harbor from overtime liability for their highest-paid employees. Tying up employers in litigation over the technical details of how they pay such high-earning employees would turn the FLSA on its head.

But this is exactly what has occurred in the Fifth Circuit (and elsewhere). Across industries, despite the HCE exemption, employers have faced overtime lawsuits from their most highly-trained and highest-paid employees over compliance with the detailed additional requirements of 29 C.F.R. § 541.604.

As Petitioners explain, importing section 541.604's separate conditions into application of the HCE exemption is incorrect as a textual matter. Pet. Br. 24-38; *see also* Pet. App. 38-53 (Jones, J., dissenting); *id.* at 69-73 (Wiener, J., dissenting). And it runs contrary to the historical context of the FLSA, the purposes of the HCE exemption, and common sense. This Court should reverse to ensure that the HCE exemption comports with the original meaning of the statute and regulation.

ARGUMENT

I. CONGRESS ENACTED THE FLSA TO PROTECT "BLUE COLLAR" WORKERS MAKING SUBSTANDARD WAGES

Congress passed the FLSA in 1938, during the depths of the Great Depression, to protect blue-collar workers from dangerously long hours and substandard wages. *See* ELLEN C. KEARNS ET AL., THE FAIR LABOR STANDARDS ACT 1-3 (3d ed. 2015). As the President then urged Congress, the FLSA was needed to assist the "third of our population, the overwhelming majority of which is in agriculture or industry, [that] is ill-nourished, ill-clad and ill-housed." Franklin D. Roosevelt, Message to Congress on Establishing Minimum Wages and Maximum Hours (May 24, 1937).

Addressing working conditions for blue-collar workers had been an ongoing issue in the half-century leading up to the FLSA, when several industry-specific predecessor statutes were enacted to limit daily hours. Starting in 1868, Congress mandated eight-hour days for federal employees who were "laborers, workmen, and mechanics." 15 Stat. 77, ch. 72 (1868). In 1915, federal sailors were limited to a nine-hour day while in harbor. Seaman's Act of 1915, Pub. L. No. 63-302, § 2, ch. 153, 38 Stat. 1164. And in 1936, manufacturing employees working under federal contracts were limited to eight-hour days. Walsh-Healey Act of 1936, Pub. L. No. 74-846, § 1, ch. 881, 49 Stat. 2036-2037.

The FLSA expanded on those efforts by addressing inferior working conditions for low-paid

workers more broadly. Its stated purpose was to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202. It was

> designed to raise substandard wages and to give additional compensation for overtime work as to those employees within its ambit, thereby helping to protect this nation "from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health."

United States v. Rosenwasser, 323 U.S. 360, 361 (1945) (citing S. REP. NO. 75-884, at 4 (1937)). As this Court has recognized, "the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945); *accord United States v. Darby*, 312 U.S. 100, 115 (1941) (FLSA addressed "substandard labor conditions").

The FLSA's overtime provisions specifically were meant to protect workers with minimal bargaining power from long hours detrimental to their health and well-being, and to spread limited employment among more workers. *See Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577-578 (1942) (FLSA not only meant to "raise substandard wages" but also to "spread employment"), *superseded by statute*, Portal-to-Portal Act of 1947, *as recognized in Trans World*

Airlines, Inc. v. Thurston, 469 U.S. 111, 128 n.22 (1985); *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1175-1176 (7th Cir. 1987) (purposes of FLSA overtime provisions to prevent "taking jobs away from workers who prefer to work shorter hours," "to spread work," and to protect workers from "long hours of work [that] might impair their health or lead to more accidents").

Because Congress's aim in the FLSA was to protect blue-collar workers, highly paid white-collar workers were exempt from its overtime requirements. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 166 (2012) (those making "more than $70,000 per year" were "hardly the kind of employees that the FLSA was intended to protect"). These professionals had bargaining power and no need for protection from dangerous overwork. Thus, the FLSA's wage and overtime provisions have never applied to those "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). This statutory provision has been referred to as the "white collar" exemption. *See, e.g.*, Proposed Rule and Request for Comments, 68 Fed. Reg. 15560, 15560 (Mar. 31, 2003).

II. THE HCE EXEMPTION WAS INTENDED TO PROVIDE EMPLOYERS WITH A SIMPLER OVERTIME SAFE HARBOR FOR THEIR HIGHEST-PAID EMPLOYEES

In passing the FLSA, Congress authorized the Department of Labor to promulgate executive, administrative, and professional ("EAP") regulations implementing the statutory exemption for white-collar

workers contained in section 213(a)(1). Pub. L. No. 75-718, § 12, ch. 676, 52 Stat. 1060, 1067 (1938). The Department issued the first version of those regulations shortly after the FLSA's passage. After revisions in the 1940s and 1950s, the EAP regulations remained essentially unchanged until 2004. Proposed Rule and Request for Comments, 68 Fed. Reg. at 15560.

But the longstanding EAP regulations failed to provide employers with an administrable exemption for their highest-paid employees. Many stakeholders were concerned that the longstanding regulatory tests were "too complicated, confusing, and outdated." 68 Fed. Reg. at 15563. In amending the EAP regulations in 2004, the Department sought to better achieve the goal of providing employers with a clear and simple safe harbor for their highest-paid employees. *See Anani v. CVS RX Servs., Inc.*, 730 F.3d 146, 148 (2d Cir. 2013).

1. The Longstanding EAP Regulations Were Exceedingly Complex

The EAP regulations in place until 2004 used a functional, duties-based test coupled with detailed salary conditions to determine whether an employee was overtime exempt. The regulations had three main components.

First, the employer had to show it paid the employee on a salary basis. The employee had to "regularly receive[] each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of

variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a) (2003). That pre-2004 test included a "[m]inimum guarantee plus extras" provision detailing when an employee could be paid variable compensation in addition to the guaranteed amount. *Id.* § 541.118(b) (formatting omitted).

Second, the employer had to show that it paid the employee at least a specified weekly base salary amount. Two such salary levels—a lower and a higher level—existed for each category (executive, administrative, and professional).[2]

Third, the employer had to satisfy a complicated duties test. The "long" duties test applied where the employee's salary met only the lower salary level, while the "short" duties test applied to those meeting the higher salary level. There were different, detailed long and short duties tests for executive, [3]

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[2] *Compare* 29 C.F.R. §§ 541.117(a) (lower executive level $155/week), 541.211(a) (lower administrative level $155/week), *and* 541.311(a) (2003) (lower professional level $170/week), *with id.* §§ 541.119(a), 541.214(a), 541.315(a) (higher level for all three $250/week).

[3] *See* 29 C.F.R. §§ 541.1(a)-(d), 541.102, 541.103, 541.104, 541.105, 541.106, 541.107, 541.112 (2003) ("long" duties test for executives required management as primary duty; customary and regular supervision of at least two other employees; hiring and firing authority; and customary and regular exercise of discretion); *id.* § 541.119(a) ("short" duties test required management as primary duty and customary and regular direction of two or more other employees).

administrative, [4] and professional [5] employees, respectively.

2. The 2004 Amendments Moderated the Duties, Salary-Level, and Salary-Basis Tests for the Highest-Paid Employees

Unsurprisingly, the early white-collar exemption tests were deemed so "[c]onfusing, complex and outdated" that they "serve[d] as a trap for the unwary but well-intentioned employer." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22122, (Apr. 23, 2004). The Department therefore sought to clarify and simplify the tests in 2004—particularly with respect to the highest-paid employees. The HCE exemption was to provide a "safe harbor for

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[4] *See* 29 C.F.R. §§ 541.2(a), 541.206, 541.215, 541.2(b), 541.201(a), 541.207 (2003) ("long" duties test for administrative employees required primary duty of either office or non-manual work, or administration of an educational institution; discretion and independent judgment; and assisting other exempt employees, performing specialized or technical work under only general supervision, or executing special assignments and tasks under only general supervision); *id.* § 541.214 ("short" test included only primary duty and discretion requirements).

[5] *See* 29 C.F.R. §§ 541.3, 541.301(a), 541.302, 541.303, 541.304, 541.305, 541.306 (2003) ("long" duties test required performance of work requiring discretion and work predominantly intellectual and varied in character, along with additional different primary duties tests for "learned professionals," "artistic professionals," "teachers," and "computer programmers"); *id.* § 541.315 ("short" test included only primary duty and discretion requirements).

employers" and a "high degree of certainty regarding the exemption." *Anani*, 730 F.3d at 148.

To do this, the Department eliminated the separate "short" and "long" duties tests, substituting a single standard duties test for executive, administrative, and professional employees, respectively. *See* 29 C.F.R. §§ 541.100 (executive), 541.200 (administrative), 541.300 (professional).

At the same time, it separately adopted the HCE exemption for certain employees making over $100,000 per year.[6] 29 C.F.R. § 541.601(a). It categorized these employees as exempt so long as their "primary duty includes performing office or non-manual work," *id.* § 541.601(d), and they meet a simplified duties test requiring that they "customarily and regularly perform[] *any one or more* of the exempt duties or responsibilities of an executive, administrative or professional employee." *Id.* § 541.601(c) (emphasis added).

So, for example, an employer paying its executives less than $100,000 per year has to show (1) management as the primary duty; (2) customary and regular direction of at least two other employees' work; *and* (3) hiring and firing authority. 29 C.F.R.

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[6] The Department again revised the relevant regulations in September 2019, effective January 1, 2020. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51230 (Sept. 27, 2019). It raised the HCE exemption threshold amount to $107,432 but did not make other relevant substantive changes. *Id.* at 51231. Unless otherwise noted, the regulations cited in this brief are those applicable during the period in dispute in this case. *See* Pet. App. 89-97.

§ 541.100(a)(2)-(4). But for executives paid over $100,000, the employer need only show any one of these three. *Id.* § 541.601(a), (c).

With respect to the salary-level test for the HCE exemption, the Department streamlined the inquiry by separating the "[m]inimum guarantee plus extras" provision (*see* 29 C.F.R. § 541.604) from the salary-basis requirement (*see id.* § 541.602) and incorporating only the latter. To do so, the Department placed the salary requirement in a separate regulation, which the HCE exemption in section 541.601 specifically cross-references. Rather than cross-reference the minimum guarantee provision (and its "reasonable relationship" test), the HCE regulation identifies the sorts of items that can and cannot be included to meet annual compensation requirements and thus satisfy the exemption. In sum, whereas section 541.601 explicitly incorporates certain provisions of the salary-basis test—namely, sections 541.602 and 541.605—it says nothing about section 541.604, where the minimum guarantee provision now resides. *See id.* § 541.601(b)(1).

3. The HCE Exemption Was Meant to Streamline the Regulatory Structure for the Highest-Paid Employees

By paring all three tests, the HCE exemption was meant to "streamline[]" the regulatory structure for employers with respect to those "at the very top of today's economic ladder." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. at 22173-22174. This HCE "short-cut"

test was expected to "facilitate the administration of the regulations without defeating the purposes of section 13(a)(1)." *Id.* at 22173 (quoting Harry Weiss, *Weiss Report* at 22-23, *in* REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER AT PUBLIC HEARINGS ON PROPOSED REVISIONS OF REGULATIONS, PART 541 (U.S. Dep't of Labor June 30, 1949) ("1949 Weiss Rep.")); *see also id.* at 22175 (HCE exemption is "alternative, simplified method" that "should remain straightforward and easy to administer"); *id.* at 22236 (revised rules should "provide clear and concise regulatory guidance to implement the statutory exemption").

The Department recognized that salary level is a reliable proxy for whether overtime is appropriate:

> [T]he salary paid to an employee is the "best single test" of exempt status ***, which has "simplified enforcement by providing a ready method of screening out the obviously nonexempt employees" and furnished a "completely objective and precise measure which is not subject to differences of opinion or variations in judgment."

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. at 22165 (quoting 1949 Weiss Rep. 8-9). In other words, those making six figures are so plainly exempt from overtime—and thus outside the classes of workers promised FLSA protection—that it is unnecessary to subject them to rigorous and detailed regulatory requirements.

By simplifying the test for these highest-paid individuals, the HCE exemption was also designed to "result in a considerable saving of time for the employer" and to "reduc[e] litigation costs." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. at 22123, 22174 (quoting 1949 Weiss Rep. 22-23).

The Fifth Circuit's decision requiring employers to satisfy section 541.604's detailed requirements on top of section 541.601's salary-level test contradicts that aim. The statutory and regulatory context instead supports only one conclusion: the 2004 regulatory simplification eliminated the requirement that employers comply with the minimum-guarantee-plus-extras provision contained in section 541.604 for those highest-paid employees who satisfy the HCE exemption contained in section 541.601. *See* Pet. Br. 28-47; Pet. 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?"); *see also* U.S. Dep't of Labor, Fact Sheet #17H: Highly-Compensated Workers and the Part 541-Exemptions Under the Fair Labor Standards Act (FLSA) (Sept. 2009) (listing HCE exemption requirements without reference to "reasonable relationship" requirement).

III. THE HCE EXEMPTION, PROPERLY INTERPRETED, AVOIDS WASTEFUL OVERTIME LITIGATION AND WINDFALLS FOR HIGHLY PAID EMPLOYEES

Despite the clear purposes of the FLSA and HCE exemption, employers across industries have found themselves in costly litigation over whether they must satisfy section 541.604's detailed requirements in paying their most advanced employees six-figure salaries. Employers should be able to tailor the precise terms of such high salaries on an industry-specific basis, given their specialized needs, without running afoul of the FLSA's overtime regulations or engaging in protracted litigation to enjoy the HCE exemption's safe harbor.

The cases concerning whether section 541.604 applies to section 541.601 involve highly paid white-collar employees in a variety of professions. Often those employees collect negotiated six-figure compensation, without any overtime complaints until they are discharged and sue.

Jeff Faludi, for example, had been in practice as an attorney for sixteen years when he took a consulting position that paid $1,350/day, with annual compensation of approximately $260,000. *Faludi v. U.S. Shale Sols., L.L.C.*, 950 F.3d 269, 271-272 (5th Cir. 2020). After sixteen months, he left and sued for unpaid overtime under the FLSA. *Id.* at 271-272. It was not until three years later, after district court and appellate litigation, that Faludi was held to be overtime-exempt as a highly compensated employee. *Faludi v. U.S. Shale Sols., L.L.C.*, 936 F.3d 215, 221

(5th Cir. 2019). The panel withdrew its opinion a year later, holding Faludi was instead exempt as an independent contractor. *Faludi*, 950 F.3d at 276. It was only through further litigation that his employer was awarded partial costs. *Faludi v. U.S. Shale Sols., L.L.C.*, No. CV H-16-3467, 2020 WL 2042322, at *4 (S.D. Tex. Apr. 28, 2020) (awarding $7,121.74 in fees).

Another similar case was brought by Salah Anani, a pharmacist, who received a guaranteed salary of $1,250 per week and over $100,000 per year. *Anani*, 730 F.3d at 147. His employer paid him for overtime work, but not at a time-and-a-half rate. *Id.* Anani argued he was entitled to FLSA overtime because his ratio of total earnings to guaranteed salary was too high under section 541.604. *Id.* at 149. Only after six years of litigation did the Second Circuit hold that section 541.604 did not apply and Anani was overtime-exempt. *Id.* at 149-150.

In another case, Crystal Litz and Amanda Payne, project managers at a political consulting company, made $1,000 minimum each week and annual salaries far above the $100,000 threshold. *Litz v. Saint Consulting Grp., Inc.*, 772 F.3d 1, 1-2 (1st Cir. 2014). They sued, again arguing their salaries did not satisfy section 541.604's requirements. *Id.* at 5. It was only after four years of litigation that the employer won, with the First Circuit holding that section 541.604 did not apply. *Id.*

In yet another instance, Tom Hughes and Desmond McDonald were welding inspectors paid over $100,000 annually. *Hughes v. Gulf Interstate Field Servs., Inc.*, 878 F.3d 183, 186 (6th Cir. 2017). The

dispute again turned on whether section 541.604 applied to these highly compensated employees. *Id.* at 189. The employer lost on appeal. *Id.* at 193. After five years of litigation, it decided to settle the case. Order Granting Motion for Final Approval of Settlement, *Hughes v. Gulf Interstate Field Servs., Inc.*, No. 2:14-cv-00432-EAS-EPD (S.D. Ohio Apr. 29, 2019), Dkt. No. 162; *see also, e.g.*, U.S. Dep't of Labor, Wage & Hour Division, Opinion Letter on Fair Labor Standards Act, 2020 WL 5367070, *1-2 (Aug. 31, 2020) (question whether HCE exemption applied to employees of executive education program, who had to have master's degrees or PhDs, and whom company paid $1,500 per day, applying section 541.604); *Coates v. Dassault Falcon Jet Corp.*, 961 F.3d 1039, 1041 (8th Cir. 2020) (dispute over whether highly compensated team leaders and production liaisons at airplane components facility exempt, applying section 541.604).

In all these examples, the employers compensated their most highly trained employees with six-figure pay—yet were subject to drawn-out litigation (and all of its attendant costs) over the minutiae of section 541.604. That result is at odds with the HCE exemption's goal of providing certainty and simplicity for employers, as well as "considerable saving of time" and "reduc[ed] litigation costs." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. at 22123, 22174 (quoting 1949 Weiss Rep. 22-23). That is not how a safe harbor is supposed to work.

Like Respondent, the relevant employees have negotiating power and choice in seeking work. They

are pharmacists, attorneys, consultants, inspectors, and project managers—hardly those "lack[ing] sufficient bargaining power to secure for themselves a minimum subsistence wage," whom the FLSA was actually intended to protect. *O'Neil*, 324 U.S. at 707 n.18.

Neither the FLSA nor the HCE exemption is meant to constrain employers from paying such highly compensated employees using the structure that works best for their industry. Both employers and employees benefit from flexibility in pay structure for white-collar workers. *See, e.g.*, U.S. Dep't of Labor, Opinion Letter, 2020 WL 5367070, at *1 (education program structured where employees had flexibility to reject or accept education projects); *Coates*, 961 F.3d at 1044-1045 (airplane components facility paid high annual salaries with biweekly payments but tracked projects on hourly basis to accurately determine project costs for accounting); Br. of the Texas Oil & Gas Ass'n, Inc. & the American Petroleum Inst. as *Amici Curiae* in Support of Petitioners 20-22, No. 21-984 (U.S. Feb. 9, 2022) (explaining benefits of day-rate structure in oil and gas industry).

Indeed, the HCE exemption was designed to provide a separate and additional avenue for "defin[ing] and delimit[ing]" which employees work in a "bona fide executive, administrative, or professional capacity" within the meaning of section 213(a)(1), not to make that inquiry more complicated and confusing. As the HCE exemption recognizes, there is no reason to question the "bona fide" EAP classification for employees making six figures.

For all these reasons, overlaying the minimum-guarantee-plus-extras requirement of section 541.604 on the HCE exemption requirements in section 541.601 for six-figure employees is not supported by the text of the HCE exemption as enacted by the Department of Labor, is inconsistent with purpose of the FLSA, and is at odds with the common-sense understanding of how the law should be interpreted. Neither Congress in the statute, nor the Department of Labor in the HCE regulations, intended for employers to be subject to hidden trip-wires in their attempts to comply with the terms of the HCE exemption.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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