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

BRIEF FOR THE STATES OF MISSISSIPPI, ALABAMA, LOUISIANA, MONTANA, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The decision below upends a balance that Congress struck in the Fair Labor Standards Act. To protect workers, that Act sets a 40-hour workweek and guarantees overtime pay for work beyond that. To sustain employment and promote economic growth, however, the Act exempts many categories of employees from the overtime-pay requirement. That legislative balance holds only if courts respect the Act's text. Rulings that conflict with the Act's text—and broaden the overtime-pay requirement's scope—thwart Congress's effort to achieve multiple goals. The court of appeals reached such a ruling here.

The Fair Labor Standards Act exempts from its overtime-pay requirement "any employee employed in a bona fide executive ... capacity." 29 U.S.C. § 213(a)(1). Respondent Michael Hewitt was employed in such a capacity. He managed a dozen employees and executed petitioners' (Helix's) business programs. He concedes that he performed the duties of an executive. And he made over $200,000 a year when he worked for petitioners.

Yet a divided court of appeals ruled en banc that respondent was entitled to overtime pay. It did so based on regulations purporting to implement the statute's executive exemption. By regulation, an executive is exempt only if he is paid on a "salary basis." Respondent's pay satisfied that regulation. He received a minimum guaranteed amount for every week he worked for petitioners—a salary. But according to the court of appeals, that was not enough. The court reasoned that respondent was paid based on a daily rate—a minimum amount for each day he worked—

and his pay did not satisfy another regulation governing how daily-rate executives purportedly must be paid to be exempt.

This Court should reverse. The statute exempts respondent—an executive—from the overtime-pay requirement. If a regulation bestows overtime pay on him, then the regulation is "at odds with the statute." Petition Appendix (App.) 55 (Jones, J., dissenting). This Court avoids that result when it can. Here it can. The better view of the regulation governing certain employees paid a daily rate, 29 C.F.R. § 541.604(b), is that it does not apply to employees—like respondent—whose very high daily rate on its own exceeds what the agency requires for a weekly salary. That regulation applies to employees who are paid a daily rate that falls below the weekly amount that the agency guarantees to workers who are paid a salary. Employees like respondent receive the guaranteed weekly pay—the minimum weekly salary—that the agency required, and so are paid on a salary basis. They are exempt. If this Court has any doubts whether the daily-rate regulation applies here, it should resolve those doubts in light of the statutory text and conclude that it does not apply. Any other conclusion defies the statute.

The correct resolution of this case is important to the amici curiae States. The ruling below imperils protected business activity, awards sweeping windfalls, and upends employers' and employees' expectations—threatening the economic well-being of the amici States' employers and residents. This Court can avoid all that by ruling in line with the statute's text.

SUMMARY OF ARGUMENT

When a court construes an agency regulation, it should do so in light of the authorizing statute and should, when it can, interpret the regulation to align with the statute. The statute here provides that someone who is employed to perform in an executive capacity is exempt from federal overtime-pay requirements—no matter how his compensation is calculated. The administering agency has issued regulations that are in tension with the statute. The regulations make the executive exemption turn on the employee's compensation and how his compensation is computed. And the court below stretched those regulations farther from the statute—to bestow overtime pay on a highly paid executive because his total compensation may turn in part on how many days he works in a week. This Court should reject that view. Consistent with the statute, regulations, and sound principles of interpretation, this Court should hold that respondent was an exempt executive employee.

ARGUMENT

The Decision Below Defies The Fair Labor Standards Act And Should Be Reversed.

A. This Court's Precedents Establish That A Court Should, When Possible, Interpret A Regulation To Be Consistent With The Statute That Authorizes The Regulation.

This Court is often asked to decide whether an agency regulation "is based on a permissible construction of the statute" that the agency is administering. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). To meet that task the Court must, of course, interpret the statute

to decide whether the regulation exceeds the agency's authority and so is invalid.

But at other times, this Court is asked to interpret a regulation, not invalidate it. Take a case where no party challenges a regulation's validity and the parties clash only over what the regulation means.

When that happens, should a court look only to the regulation? Or should it also look to, and interpret, the statute? As this Court's precedents show, a court should look to and interpret the statute. And when construing a regulation, a court should—when it can—construe it to harmonize with the statute.

This understanding has deep roots. This Court has been "quite unwilling" to read a regulation to reach conduct when the "statute speaks so specifically in terms" that show that it does not reach that conduct. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976). Longstanding caselaw emphasizes that courts should "not interpret" a regulation "in a vacuum." *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984). "Rather," courts "must construe" a regulation "in light of the statute it implements." *Ibid.* A court should "not interpret an agency regulation to thwart a statutory mandate." *Ins. Co. of N. Am. v. Gee*, 702 F.2d 411, 414 (2d Cir. 1983); *Emery Mining Corp.*, 744 F.2d at 1415 (rejecting interpretation of a regulation that "plainly is at odds with the language and objective of the statute, even if arguably consistent with the language of the regulation"). When possible, then, a court should construe a regulation to harmonize with the statute it implements. *E.g.*, *LaVallee Northside Civic Ass'n v. Virgin Islands Coastal Zone Mgmt. Comm'n*, 866 F.2d 616, 623 (3d Cir. 1989)

(a court should "attempt reconciliation of seemingly discordant statutes and regulations").

This Court has long taken this approach when construing regulations. *E.g.*, *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 401 (2008) (rejecting a view of a regulation that "is in considerable tension with the structure and purposes of the" statute); *Ernst & Ernst*, 425 U.S. at 214 (refusing to apply a regulation to negligent conduct when the "statute speaks so specifically in terms of ... intentional wrongdoing ... and when its history reflects no more expansive intent"). It has done so recently with regulations implementing FLSA overtime exemptions. In *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), the Court rejected the Department of Labor's view of regulations—regarding the "outside salesman" exemption from the overtime-pay requirement—in part because that view was "flatly inconsistent with the FLSA." *Id.* at 159. The Court then evaluated the Act's text and aims in concluding that a pharmaceutical sales representative is an "outside salesman" under the regulations. *See id.* at 161-67. Similarly, in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), in holding that an FLSA regulation exempting domestic-service employment controlled over a conflicting regulation, a unanimous Court relied on the FLSA's aims in resolving a conflict between a literal reading of the two regulations. *Id.* at 169-70.

B. The Fair Labor Standards Act Precludes A Regulation That Bestows Overtime Pay On An Executive Because Of How That Executive's Compensation Is Computed.

The canon described above calls for a sound understanding of the statute. The Fair Labor Standards Act

is clear: If someone is employed to perform and performs the duties of an executive, then he is exempt from the Act's overtime-pay requirement. It does not matter how much he is compensated or how his compensation is computed. The statute does not permit an agency to deem someone who is employed in an executive capacity to be subject to the overtime-pay requirement based on features of his compensation.

The statute's text compels this conclusion. The Act exempts from its overtime-pay requirement "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). The exemption rests on an employee's functions and duties—requiring just that they be one of the three listed. The exemption does not turn on compensation.

To start, *capacity* means "[o]utward condition or circumstances; relation; character; position." Webster's New International Dictionary 396 (2d ed. 1934); *see* 2 Oxford English Dictionary 89 (1933) ("[p]osition, condition, character, relation"). As this Court has observed, after invoking these definitions to construe the word *capacity* in another FLSA exemption, "[t]he statute's emphasis on the 'capacity' of the employee counsels in favor of a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works." *Christopher*, 567 U.S. at 161 (construing FLSA's outside-salesman exemption). So too for the executive exemption. The word *capacity* conveys that the exemption turns on the functions that an employee performs. The word does not suggest that the exemption turns on the employee's compensation—whether it be his level of compensation or how his compensation is computed.

The words *executive*, *administrative*, and *professional* drive home that function-based understanding. Each of those words focuses on "a person's performance, conduct, or function." *Nevada v. U.S. Dep't of Labor*, 275 F. Supp. 3d 795, 804 (E.D. Tex. 2017). *Executive* means "[c]apable of performance," "operative," "[a]ctive in execution," "energetic," "[a]pt or skilful in execution," "[p]ertaining to execution," or "having the function of executing or carrying into practical effect." 3 Oxford English Dictionary 395. *Administrative* means "[p]ertaining to, or dealing with, the conduct or management of affairs," "executive," "[o]f the nature of stewardship, or delegated authority," or "a company of men entrusted with management." 1 Oxford English Dictionary 118. And *professional* means "[p]ertaining to, proper to, or connected with a or one's profession or calling" or "[e]ngaged in one of the learned or skilled professions, or in a calling considered socially superior to a trade or handicraft." 8 Oxford English Dictionary 1428. Each word affirms what *capacity* denotes: The executive exemption turns on an employee's functions, duties, or conduct—in particular, on whether those features place an employee in a category for which overtime compensation would not be expected or appropriate. None of the terms—capacity, executive, administrative, professional—"suggest[s]" that "salary" or compensation is relevant to the exemption. *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 529 (E.D. Tex. 2016).

The modifying term *bona fide* reinforces this function-based understanding of the statute's text. *Bona fide* means "[i]n good faith, with sincerity; genuinely." 1 Oxford English Dictionary 980. The phrase modifies "executive, administrative, or professional capacity." "The plain meaning of 'bona fide' and its placement in

the statute indicate" that the exemption applies "based upon the tasks an employee actually performs," *Nevada*, 218 F. Supp. 3d at 529—not, say, the job title that an employee is given. A business cannot apply the executive exemption to a janitor by calling him an Executive Vice President. But the exemption covers someone who performs executive duties.

Last, the statute says that the executive exemption applies to "any" employee who is employed in an executive (or other listed) capacity. Here, *any* "is best read to mean 'one or some indiscriminately of whatever kind.'" *Christopher*, 567 U.S. at 162 (some internal quotation marks omitted). "Any" denotes breadth and affirms that the exemption covers all employees who perform the duties and functions listed.

Taking the words of the exemption together leads to an unmistakable conclusion: If someone is employed to perform and does perform the duties of an executive, an administrator, or a professional, then he falls outside the overtime-pay requirement. And he is "employed" in an enumerated "capacity" based on his functions and duties alone. If his duties are "executive" (or "administrative" or "professional"), he is exempt. The statute requires no more. And it allows no more requirements—including compensation-based requirements. The exemption says nothing of compensation and nothing in it denotes or connotes compensation. So it leaves no room for the agency to "fill a gap" by adding a compensation requirement.

The statute does permit the agency to "define[ ] and delimit[ ]" the exemption's terms. 29 U.S.C. § 213(a)(1). That authority may give the agency some latitude in (for example) defining what duties are executive, administrative, or professional. *Nevada*, 218

F. Supp. 3d at 530. But the authority to define and delimit "is limited by the plain meaning of the statute" and does not allow the agency to rewrite the statute by adding a compensation requirement that has no basis in statutory text. *Ibid.* "Congress gave the" agency "the authority to define what type of duties qualify"; "it did not give" it "the authority to supplant the duties test and establish a salary test that causes bona fide" executives to "lose their exemption irrespective of their job duties and responsibilities." *Id.* at 531 n.6 (internal quotation marks omitted).

The statute's clear text is grounds enough to conclude that a regulation may not, based on features of an employee's compensation, bestow overtime pay on him when his duties qualify him for the executive exemption. Just a few Terms ago this Court construed another FLSA overtime exemption based only on the exemption's text—in an analysis that consumed barely a page in the Supreme Court Reporter. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1140-41 (2018); *id.* at 1140 ("Under the best reading of the text" of the statute, service advisors are "salesm[e]n ... primarily engaged in ... servicing automobiles.") (internal quotation marks omitted). The text here is similarly decisive.

But here there is more. The statutory structure confirms that an employee cannot be excluded from the exemption here based on his compensation. That structure shows that Congress knows how to make an overtime exemption turn on compensation. Congress has set forth dozens of exemptions from the overtime-pay requirement. *See* 29 U.S.C. § 213(a), (b). In several of those exemptions, Congress specified that the exemption turns on a feature of compensation. Certain agriculture employees may be exempt if they are

"paid on a piece rate basis." *Id.* § 213(a)(6). Some computer workers who are paid on an hourly basis may be exempt—but only if they are paid at least $27.63 per hour. *Id.* § 213(a)(17). A local-delivery driver may be exempt if he is "compensated ... on the basis of trip rates." *Id.* § 213(b)(11). A baseball player is exempt only if he is provided a minimum weekly salary. *Id.* § 213(a)(19). Certain persons employed "by a nonprofit educational institution" must, to be exempt, be paid, "on a cash basis, at an annual rate of not less than $10,000." *Id.* § 213(b)(24). A criminal investigator is exempt if he is paid "availability pay" under 5 U.S.C. § 5545a. *Id.* § 213(a)(16).

When Congress wants to make an exemption turn on a feature of compensation, it says so. It did not make the executive exemption turn on compensation. So a regulation cannot bring an employee within the Act's overtime-pay requirement based on how he is compensated when he is in fact "employed in a bona fide executive ... capacity." 29 U.S.C. § 213(a)(1).

C. The Court Of Appeals Erred When It Construed The Regulations Here To Bestow Overtime Pay On Respondent—An Executive—Based On How His Compensation Was Computed.

Now the ultimate issue: Under the regulations, is respondent exempt from the FLSA's overtime-pay requirement? He is. And if there were any doubt, the Court should resolve it in light of the statute itself—which exempts respondent. The court of appeals' contrary decision should be reversed.

To start, respondent was exempt under the statute. He was "employed in a bona fide executive ...

capacity." 29 U.S.C. § 213(a)(1). He concedes that he performed executive duties. App.4, 85. As a tool pusher he customarily supervised about a dozen employees and was charged with executing petitioners' oil-and-gas-service programs. App.78-79.

Under the regulations, respondent was also exempt. The regulations impose three requirements for the executive exemption. Respondent met all three.

First, respondent had to perform executive duties. 29 C.F.R. § 541.100(a)(2)-(4). (We cite the regulations that applied at the relevant time. *Cf.* Pet.Br.6 n.1.) He concededly met this requirement. App.4.

Second, respondent had to be paid at least $455 per week. 29 C.F.R. § 541.100(a)(1). He met this requirement. He never made less than $963 in a week when working for petitioners. *See* App.79 n.2. (As Part B shows, the statute provides no textual basis for this minimum-compensation requirement. But respondent satisfied it.)

Third, respondent had to be paid on a salary basis. 29 C.F.R. § 541.100(a)(1), (b); *see id.* § 541.602(a). The regulations provide as a "[g]eneral rule" that an employee is paid on a salary basis if he "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 variations in the quality or quantity of the work performed." *Id.* § 541.602(a). And "an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked," but "[e]xempt employees need not be paid for any workweek in which they perform no work." *Ibid.*

Respondent met the salary-basis requirement. He was paid on "a weekly, or less frequent basis": every two weeks. *See* App.79. When he was paid, he "regularly receive[d] ... a predetermined amount constituting all *or part* of" his compensation—he received at least $963 for each week in which he worked at all. *See* App.79 n.2. That predetermined amount was not subject to reduction based on "the quality or quantity of the work performed." He received at least that amount if he did any work in a week. *See* App.79. And he received his "full salary" (the predetermined minimum amount) "for any week in which" he "perform[ed] any work." *See ibid.* So he was paid on a salary basis: he received a minimum guaranteed amount—a salary—for any week in which he worked at all. 29 C.F.R. § 541.602.

The en banc majority viewed matters differently. Because respondent received a daily rate for each day that he worked, the court reasoned that he was paid *with* (not, as 29 C.F.R. § 541.602(a) requires, "without") "regard to the number of days or hours worked" and so needed to satisfy another regulation that addresses workers whose compensation is computed on a daily basis. App.8-10. Under that regulation, 29 C.F.R. § 541.604(b), "[a]n exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the [executive] exemption or violating the salary basis requirement, if" two conditions are met. First, "the employment arrangement" must "also include[ ] a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked." 29 C.F.R. § 541.604(b). Second, "a reasonable relationship" must "exist[ ] between the guaranteed amount and the amount actually earned." *Ibid.* A reasonable

relationship exists "if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek." *Ibid.*

According to the en banc court, neither condition was met. First, "the employment arrangement" between petitioners and respondent lacked "a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked." *See* App.11. Rather, petitioners paid respondent "a daily rate without offering a minimum weekly required amount paid 'regardless of the number of hours, days or shifts worked.'" *Ibid.* (quoting 29 C.F.R. § 541.604(b)). Second, "a reasonable relationship" did not "exist[ ] between the guaranteed amount and the amount actually earned," 29 C.F.R. § 541.604(b): petitioners paid respondent "orders of magnitude greater than the minimum weekly guaranteed amount"—his daily rate. App.11.

This Court should reject that ruling. If the en banc majority's view of the regulations were right, then the regulations would defy the statute. The statute makes an employee exempt if he is "employed in a bona fide executive ... capacity." Respondent performed the duties of an executive, so the statute exempts him. *Supra* Part B. The court of appeals' view of the regulations would cause respondent to fall outside the exemption based on how his compensation is computed. A court should not accept that conflict with the statute unless it has no better option.

Here there is a better option. The better view of 29 C.F.R. § 541.604(b) is that it does not apply to respondent and employees compensated as he is.

The court below erred in thinking that 29 C.F.R. § 541.604(b) applies here. The court thought that respondent was paid *with* (not, as 29 C.F.R. § 541.602(a) requires, "without") "regard to the number of days ... worked," so the court believed that respondent had to meet the daily-rate requirements in 29 C.F.R. § 541.604(b). *See* App.8-11. But that is not the best reading of section 541.602(a)'s "without regard" requirement. Under section 541.602(a) it is the employee's *salary* that cannot be paid with "regard to the number of days ... worked." Section 541.602(a) says that "an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." The employee's "full salary" is different from an employee's full compensation. The "full salary" is the regularly paid, "predetermined amount constituting all *or part* of the employee's compensation" that is "not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602(a) (emphasis added). If the employee gets a salary at the required level, he can receive further compensation (even on a daily rate) and still satisfy the salary-basis requirement.

Take respondent. His *full salary* was the minimum amount that he received in any week in which he did any work—$963. That salary was paid without regard to the number of days he worked, so long as he worked at some point in the week. He did receive *further compensation*, based on a daily rate. But that compensation was not his *salary*, so it does not matter that it was paid with "regard to the number of days ... worked." Section 541.604(b) does not apply because respondent was guaranteed $963 for each week in

which he did *any* work—a salary that far exceeds the minimum the regulations require.

Section 541.604(b) applies to a different set of workers—those whose daily (or hourly or shift) rate does not on its own exceed the minimum weekly guarantee that the regulations require. Section 541.604(b) speaks to hourly, daily, and shift-basis workers and says that an employee will not "los[e]" the executive exemption if his employment arrangement "guarantee[s]" that the employee will receive "at least the minimum weekly required amount." But respondent never "los[t]" the exemption and never needed the safety valve that section 541.604(b) supplies. Petitioners satisfied section 541.602, and section 541.604(b) never came into play. Section 541.604(b)'s minimum-pay directive makes sense only for—and applies only to—someone whose daily (or hourly or shift) rate does not on its own catapult him above the weekly salary level that the regulations require. Someone does not need section 541.604(b)'s extra protections if he is paid so well that if he does any work in a week then he exceeds the agency's minimum weekly salary guarantee.

Similarly, section 541.604(b)'s reasonable-relationship test makes sense only for—and applies only to—employees who are not guaranteed the minimum weekly salary whenever they work at all in a week. As the court of appeals itself explained, "the reasonable relationship test ensures that the minimum weekly guarantee is not a charade." App.10. It "sets a ceiling on how much the employee can expect to work in exchange for his normal paycheck"—"by preventing the employer from purporting to pay a stable weekly amount without regard to hours worked, while in reality routinely overworking the employee far in

excess of the time the weekly guarantee contemplates." *Ibid.* (emphasis omitted). That logic has no force for those in respondent's shoes. He enjoyed not just a high weekly guarantee but also more pay for each other day he did any work—which all brought him more than $200,000 a year. The reasonable-relationship test makes sense (if at all) only for someone who receives a daily (or hourly or shift) rate that does not on its own meet the weekly salary level that the regulations require.

If there were any doubt whether 29 C.F.R. § 541.604(b) applies to employees like respondent—those whose daily rate exceeds the regulation's weekly salary-level requirement—this Court should resolve that doubt in a way that respects the FLSA's text. As explained in Part A, a court should "construe" regulations "in light of the statute" they "implement[ ]." *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984); *see* App.61 n.26 (Jones, J., dissenting) ("The regulations, if possible, should be read in harmony with [the statute's] text."). Here, that means holding that section 541.604(b) does not apply to employees like respondent—those whose daily rate exceeds the regulation's weekly salary-level requirement. Any other approach causes the regulations to defy the statute's text. App.55, 61 (Jones, J., dissenting) ("[t]he majority's conclusion is ... at odds with the statute" and the court should have adopted an interpretation of the regulation "that is more faithful to the statute"). A court should be "quite unwilling" to reach that result because, as Part B explains, the "statute speaks so specifically in terms" exempting executives from the overtime-pay requirement—regardless of how their pay is computed. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976).

The court of appeals embraced a view of the regulations that is "flatly inconsistent with the FLSA." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012). The error undermines the balance struck in that statute, unleashes massive windfalls, inflicts harms that cut across industries, upends legitimate business expectations, and exceeds the administering agency's authority. This Court should construe the regulations consistently with the authorizing statute and reject the judgment below.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted.

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