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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

A. INTEREST OF *AMICI CURIAE*[1]

This Court's opinion will have a nationwide, economic impact, given how entwined the *Amici's* industry is to both the U.S. economy and the population's reliance on oil and natural gas, and the number of jobs and dollars the upstream, midstream, and downstream sectors represent. The oil and natural gas industry provides thousands of jobs and helps power day-to-day life for each American. Accordingly, both the Texas Oil & Gas Association ("TXOGA") and the American Petroleum Institute ("API") have joined as *amici* curiae to provide input on legal, policy, and practical considerations in cases affecting the industry.

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

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

API is a national trade association that represents all aspects of America's oil and natural gas industry. API's over 600 members, from large integrated companies to smaller independents, come from all segments of the industry. They are producers, refiners, suppliers, marketers, pipeline operators, and marine transporters, as well as service and supply companies that support the industry. API calculates that the oil and natural gas industry supports at least 10.9 million American jobs. API is also the leading standards-making body worldwide for the oil and natural gas industry, including standards and recommended practices incorporated or referenced in numerous state and federal regulations.

B. SUMMARY OF ARGUMENT

A day rate can meet the definition of salary under the Fair Labor Standards Act ("FLSA"), and the Fifth Circuit's majority opinion in *Helix* incorrectly complicates the interpretation of "salary," and the text of the Highly Compensated Employee exception ("HCE") itself. The decision should be overturned in favor of the plain text and intent of the FLSA, applied for decades to highly-skilled, highly-compensated workers paid a day rate. The high-compensation guarantees (i.e., day rates)—paid to oilfield consultants[2] in a

[2] Hereafter TXOGA and API will refer to the highly-compensated, highly-skilled oil patch workers at issue in this matter as "*consultants*." Many consultants are contracted as independent contractors through staffing companies or other third-party

"typical" weekly, biweekly, or monthly check for cumulative days worked—are the product of the significant bargaining power these highly-skilled, sought-after consultants leverage with oil and natural gas companies. Such guarantees are *precisely* a type of compensation method the Department of Labor ("DOL") contemplated when drafting the HCE, and further reflect the historic economic balance the industry must maintain given the particularly unpredictable nature of oil patch work.

Against this backdrop, the Fifth Circuit's majority opinion not only destabilizes the financial foundation underpinning of the oil and natural gas industry's exploration and production across the United States, but also departs from the collective rulings of the other Circuit and district courts which considered whether a day rate can be a salary. The majority opinion incorrectly complicates the HCE and related DOL regulations, and is an outlier to even another Fifth Circuit opinion, *Escribano v. Travis Cty., Texas*, which distilled the salary basis test to "generally mean[] what its label suggests: an employee is paid on a salary basis if he or she receives the same wage each pay period, regardless of 'the quality or quantity of the work performed.'" 947 F.3d 265, 267 (5th Cir. 2020) (Davis, Smith, Costa, circuit judges). This is precisely what a day rate is—a guaranteed dollar amount to be paid to consultants whether they show up for work on that day

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entities, but some consultants are direct employees of oilfield operators, like Respondent Hewitt.

for 20 minutes, or work a common, oil-and-natural-gas-industry hitch of 12 hours. Moreover, for consultants, a single day rate is well-above the weekly minimum amount required by the HCE, and the wage payments are issued on a weekly or less frequent basis.

While "the old adage that 'if at first you don't succeed, try again' does not apply to litigation in federal court," the contrary is happening to the oil and natural gas industry. *Sloane v. Gulf Interstate Field Servs., Inc.*, No. 4:16-CV-01571, 2017 WL 1105236, at *1 (M.D.Pa. Mar. 24, 2017). The industry is held hostage by a barrage of multi-million-dollar FLSA collective action lawsuits filed by plaintiffs' lawyers conflating sections of the DOL regulations to allege wage theft. These lawsuits—similar to Respondent Hewitt's underlying case—based on an invented fiction[3] of what a salary should "look like," rather than the textual meaning of the DOL regulations and applying the predominant, legal precedent.

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[3] "By artful use of italics, ellipses, and other misdirection, the majority describe § 541.602's salary basis test as an incomplete 'general' rule to justify looking outside of § 541.602 to § 541.604 whenever an employee's pay is calculated on a daily basis." *Hewitt v. Helix Energy Sols. Grp., Inc.*, 15 F.4th 289, 308 (5th Cir. 2021) (en banc) (Jones, J., dissenting).

C. ARGUMENT

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

The expertise and business practices of the oil and natural gas industry underscore that the pay method at issue is compliant with the text and intent of the FLSA. The complex work of oilfield consultants, like Respondent Hewitt, is required across a variety of upstream and midstream sectors to control the flow of oil and natural gas, maintain well integrity, and control pressure in wells and pipelines.[4] Consultants are sought-after workers, whose expertise protect the lives and safety of other oilfield workers and oil and natural gas assets, and are "not a [] class of minimum wage earners who perform rote tasks in less than ideal conditions." *See*, *e.g.*, *Sloane*, 2017 WL 1105236, at *1.[5] Thus, consultants negotiate and agree to their compensation, with ever-growing increases in the compensation guarantees they can and do demand.[6]

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[4] The oilfield (including offshore work) is a high-stakes and high-pressure environment. *See Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 375 (5th Cir. 2019).

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

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

This Court consistently considers input from relevant industry groups as *amici curiae*. *See*, *e.g.*, *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 223–24 (2016). And, to *correctly* contextualize and frame the legal dispute at hand, the history of the industry's compliant day rate pay method is important.[7] This pay practice flourished for decades without censure.[8] The U.S. Geological Survey can trace the "well paid," day rate compensation plan of the "oil patch" back to at least 1903 in California.[9] For decades, the industry has rightfully relied[10] on the long-standing business

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[7] *See*, *infra*, Section C(4).

[8] The same kind of reliance has impacted other industries. *See Encino*, 579 U.S. at 222 ("A summary discussion may suffice in other circumstances, but here—in particular because of decades of industry reliance on the Department's prior policy—the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position. The retail automobile and truck dealership industry had relied since 1978 on the Department's position[ ].") (citing Nat'l Auto. Dealers Ass'n, Comment Letter on Proposed Rule Updating Regulations Issued Under the Fair Labor Standards Act (Sept. 26, 2008)).

[9] "In 1903, California for the first time led the country in petroleum production with 24.38 million barrels, . . . During those early days of oil production, workers were well paid. A cable-tool driller at the Kern River field earned $5 for a 12-hour day, and he was expected to work 7 days a week." Kenneth I. Takahashi & Donald L. Gautier, *A Brief History of Oil and Gas Exploration in the Southern San Joaquin Valley of California*, *in U.S. Petroleum Systems and Geologic Assessment of Oil and Gas in the San Joaquin Basin Province, California* 9 (Allegra Hosford Scheirer ed. 2007), https://pubs.usgs.gov/pp/pp1713/03/pp1713_ch03.pdf.

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

practice of negotiating contracts with consultants stipulating the consultants' day rate pay,[11] Highly-skilled consultants with substantial experience negotiate among industry companies for the highest day rate contract they can get for the type of work they want to do, and when and where they want to do it. Industry expertise, established practices, and historical context are important when deciding certain legal issues. Justice Breyer's prescient discussion in the oral argument in *Parker Drilling Management Services, Ltd. v. Newton* exemplifies just how high the stakes are for the nationwide oil and natural gas industry, constituting significant revenue and jobs[12]:

> And you heard the answer they gave to the question I asked, which was that 97 percent of those involved in this are in the Fifth Circuit. So I'm slightly worried. I don't know if it's determinative, but I'm slightly worried about

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[11] *See*, *e.g.*, *Hurst Employers Cas. Co., Intervener v. Gulf Oil*, 251 F.2d 836, 838 (5th Cir. 1958) ("shall be paid for by Gulf at the applicable day rate set out below."); *Gulf Oil v. Wright*, 236 F.2d 46, 47 (5th Cir. 1956) ("The term 'day rate' shall . . . designate the work for which the Contractor is to be compensated at a stipulated sum per day.").

[12] The Bureau of Land Management (BLM) manages the 700 million acres of the Federal government's onshore subsurface mineral estate covering 30% of the nation including in Alaska, California, Colorado, several Eastern states, Idaho, the Montana-Dakotas, New Mexico, Oregon-Washington, Utah, and Wyoming. U.S. Dep't of Interior, Bureau of Land Mgmt., https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about (last visited Feb. 2, 2022). In Fiscal Year 2018 (the most-recent reporting), the BLM generated nearly $3 billion in Federal royalties, and over $1.1 billion in other, related revenue. *Id.*

> overturning a set of court of appeals decisions under which [the offshore oil and gas] industry and labor and everyone have worked, 97 percent of them, for 50 years.

Transcript of Oral Argument at 26, 53–54, *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881 (2019) (No. 18-389), 2019 WL 1672465.[13]

Despite the decades of uninterrupted practices, the status quo of the oil and natural gas industry was disrupted when plaintiffs' attorneys began a nationwide

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[13] *See also*, *e.g.*, *Christopher v. Smithkline Beechum*, 132 S. Ct. 2156, 2167 & 2173 (2012) (considering history of the pharmaceutical industry's reliance on its interpretation of the outside sales exemption, and decades of silence by the DOL on the industry's interpretation, and noting that highly paid pharmaceutical sales employees paid over $70,000 were hardly the type of employee the FLSA was intended to protect); *W. Virginia v. Env't Prot. Agency*, No. 20-1530, 2022 WL 2347278, at *18 (June 30, 2022) ("it is not plausible that Congress gave EPA the authority" to make changes that would "force a nationwide transition away from the use of coal" and impact the power sector); *see also McGirt v. Oklahoma*, 140 S. Ct. 2452, 2481 (2020) ("Finally, the State worries that our decision will have significant consequences for civil and regulatory law.") Justices Gorsuch, Sotomayor, Kagan, and Alito (Justices on both sides of the opinion and dissent) all asked questions regarding consequences and impact of various decisions the Court could make. Transcript of Oral Argument at 16–18, 23–25, 40–43, 79–82, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526), 2020 WL 2425717.

campaign[14] attacking the day rate in boilerplate, collective lawsuits.[15]

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[14] To illustrate this campaign: *Sloane*, 2017 WL 1105236, at *1 ("A few months later and following a radio campaign that sought to recruit potential gas workers to serve as class members, that same counsel arrived at this Court's doorsteps, armed with a new class representative but the same old theory.") *See also, infra*, Section C(4) at 22-3 and n.23. Additionally, an oil and natural gas industry staffing company filed a libel suit in Texas state against one such plaintiff's firm that targeted their workers with LinkedIn ads regarding non-payment of overtime on client projects. *Aerotek Inc. v. Josephson Dunlap LLP*, DC-20-06195, 162nd District Court, Dallas County, Texas (Apr. 29, 2020).

Finally, *compare* the time gap between *Brock v. On Shore Quality Control Specialists, Inc.*, No. CIV. A-84-CA-603, 1987 WL 31308, at *1 (W.D.Tex. Sept. 29, 1987) *remanded from* 811 F.2d 282, 284 (5th Cir. 1987) and the day rate cases in n.15, *infra*. In *Brock*, an industry-member defendant argued that the consultant-plaintiffs' compensation guarantee of at least $250 per week satisfied 29 C.F.R. § 541.214(a) (1986), "Special proviso for high salaried administrative employees." *Id*. at *1, *6. The Court found the consultants exempt from overtime under "Section 541.214(a) . . . [because] compensate[ion] [was] on a salary or fee basis at a rate of not less than $250 per week." *Id*. at *6, *8. Further, the U.S. Bureau of Labor Statistics Inflation calculator converts $250 in 1983 to the equivalent of $747.18 as of May 2022. https://www.bls.gov/.

[15] The instant *Amici* conducted a research survey finding hundreds of day rate lawsuits in the past 10 years. The following is a non-exhaustive list of 101 lawsuits (when including those cited in Section C(3), *infra*). These lawsuits are all (a) nationwide FLSA collective actions and/or a combination of a collective and Rule 23 state-law, class action, (b) comprised of putative classes of oilfield and/or offshore workers, most of whom are the "consultants" highlighted herein, and (c) filed against oil and natural gas industry members based on paying a day rate. Unless a Westlaw citation is included, the *Amici* are citing to the plaintiffs' complaints on PACER wherein they pled the foregoing.

Non-Texas Federal cases:

Louvierre v. Cherokee Contractors, 1:22cv173 (D.N.M. Mar. 7, 2022); *Sisk v. Energy Inspection Services*, 2:21cv1170 (D.N.M. Dec. 8, 2021); *Sanders v. XTO Energy Inc.*, 1:21-cv-01725 (D.Del. Dec. 7, 2021); *Lyman v. Gas Gathering Specialists*, 0:21cv2386 (D.Minn. Oct. 27, 2021); *Coleman v. System One Holdings*, 2:21cv1331 (W.D.Pa. Oct. 5, 2021); *Neighbors v. True Performance Directional Drilling*, 2:21cv882 (D.N.M. Sept. 8, 2021); *Jones v. Solaris Water Midstream*, 1:21cv567 (D.N.M. June 18, 2021); *Applegate v. Buckeye Partners*, 2:21cv791 (W.D.Pa. June 16, 2021); *Lee v. Schlumberger*, 2:21cv493 (D.N.M. May 28, 2021); *Taylor v. Hunt, Guillot, Associates LLC*, 1:21cv477 (D.N.M. May 25, 2021); *Cottrill v. MDM Services*, 8:21cv817 (C.D.Cal. May 3, 2021); *Rogers v. 3Bear Energy*, 1:21cv376 (D.N.M. Apr. 23, 2021); *Walker v. Pittsburgh Mineral Environmental Technology*, 2:21cv510 (W.D.Pa. Apr. 15, 2021); *Bone v. XTO*, 2:20-cv-0069 (D.N.M. July 14, 2020); *Aguilar v. DTE Energy*, 2:20cv11451 (E.D.Mich. June 4, 2020); *Price v. Devon Energy*, 2:20cv316 (D.N.M. Apr. 8, 2020); *McCord v. Liberty Energy Services*, 7:20cv2171 (S.D.N.Y. Mar. 11, 2020); *Altenhofen v. Southern Star Central Gas Pipeline*, 4:20cv30 (W.D.Ky. Feb. 24, 2020); *Romero v. Clean Harbors Surface Rentals*, 368 F. Supp. 3d 152 (D.Mass. 2019); *Oates v. Kinder Morgan*, 5:19-cv-01171-SLP (W.D.Okla. Dec. 18, 2019); *Wells v. Colonial Compliance Systems*, 3:19cv7810 (N.D.Cal. Nov. 27, 2019); *Fairchild v. The Williams Companies*, 2:19cv1465 (W.D.Pa. Nov. 8, 2019); *Robertson v. Rep Processing*, 1:19cv2910 (D.Colo. Oct. 11, 2019); *LeBlanc v. Halliburton*, 17-CV-0718, 2018 WL 3999567 (D.N.M. Aug. 21, 2018); *Kole v. Cleveland Integrity Services*, 5:18cv1803 (N.D.Ohio Aug. 6, 2018); *Stallings v. Antero Res. Corp.*, 1:17-CV-01939-RM-NYW, 2018 WL 1250610 (D.Colo. Mar. 12, 2018); *Hebert v. Chesapeake Energy*, 2:17-cv-00852-GCS-KAJ (S.D.Ohio Sept. 28, 2017); *Gleason v. MVCI Energy Services*, 1:17cv204 (D.N.M. Feb. 10, 2017); *Boyd v. Spectra Energy*, 7:16cv6902 (S.D.N.Y. Sept. 1, 2016); *Webb v. Quality Integrated Services*,

2:16cv457 (W.D.Pa. Apr. 15, 2016); *McCulloch v. Baker Hughes*, 1:16cv157 (E.D.Cal. Feb. 3, 2016); *Casarotto v. Expl. Drilling, Inc.*, 15-41-BLG-SPW-CSO, 2015 WL 8780050 (D.Mont. Dec. 15, 2015); *Herbert v. MudTech Services*, 2:15cv933 (W.D.Pa. July 17, 2015); *Dunne v. Computerized Mudlogging Services*, 4:15cv692 (N.D.Ohio Apr. 8, 2015); *Boudreaux v. Schlumberger*, 6:14cv2267 (W.D.La. July 8, 2014); *Prejean v. O'Brien's Response Management*, 2:12cv1045 (E.D.La. Apr. 24, 2012).

Texas Federal cases:

Kee v. Parnell Consultants, 1:22cv48 (W.D.Tex. Jan. 18, 2022); *Finley v. Sanchez Oil*, 4:22cv129 (S.D.Tex. Jan. 13, 2022); *Reed v. Enterprise Products Partners*, 4:22cv116 (S.D.Tex. Jan. 12, 2022); *Hardin v. The Texian Group Inc.*, 4:22cv111 (S.D.Tex. Jan. 12, 2022); *Shulark v. Ensite USA Inc.*, 4:21cv3684 (S.D.Tex. Nov. 9, 2021); *Price v. Trinity Operating*, 4:21cv3442 (S.D.Tex. Oct. 19, 2021); *Young v. Harvest Midstream*, 2:21cv226 (S.D.Tex. Sept. 29, 2021); *Mitchell v. Kestrel Field Services*, 4:21cv3100 (S.D.Tex., Sept. 23, 2021); *Huggins v. Boardwalk Pipelines*, 4:21cv2273 (S.D.Tex. July 14, 2021); *Roney v. Prime Energy*, 5:21cv586 (W.D.Tex. June 18, 2021); *Gamboa v. XTO Energy Inc.*, 5:21cv387 (W.D.Tex. Apr. 16, 2021); *Pardue v. 3B Inspection*, 4:21cv20 (W.D.Tex. Apr. 7, 2021); *Garrett v. Salt Creek Midstream*, 4:21cv11 (W.D.Tex. Feb. 19, 2021); *Guilbeau v. Schlumberger*, 5:21cv142 (W.D.Tex. Feb. 12, 2021); *Kennedy v. Turbo Drill Industries*, 7:20cv251 (W.D.Tex. Oct. 27, 2020); *Hamrick v. Enbridge Inc.*, 4:20cv3647 (S.D.Tex. Oct. 23, 2020); *Curtis v. Houston Inspection Field Services*, 4:20cv3515 (S.D.Tex. Oct. 14, 2020); *Curry v. FIS Operations*, 2:20cv215 (S.D.Tex. Aug. 25, 2020); *Cox v. Oasis Petroleum*, 4:20cv2903 (S.D.Tex. Aug. 18, 2020); *Bales v. Crestwood Midstream*, 4:20cv2654 (S.D.Tex. July 28, 2020); *Callaway v. Marathon Oil*, 5:20cv863 (W.D.Tex. July 24, 2020); *De Leon v. Northern Natural Gas Co.*, 7:20cv179 (W.D.Tex. July 24, 2020); *Tollefson v. Anadarko*, 7:20cv168 (W.D.Tex. July 13, 2020); *Chisum v. Callon Petroleum*, 4:20cv51

(W.D.Tex. July 10, 2020); *Doucet v. Boardwalk Pipelines*, 4:20cv1793 (S.D.Tex. May 22, 2020); *Isgett v. XTO Energy Inc.*, 4:20cv32 (W.D.Tex. Apr. 30, 2020); *Welch v. Jenn Energy*, 5:20cv59 (S.D.Tex. Apr. 20, 2020); *West v. Primexx Energy*, 7:20cv98 (W.D.Tex. Apr. 20, 2020); *Maillet v. Centennial Resource Development*, 4:20cv28 (W.D.Tex. Apr. 20, 2020); *Hutchings v. XTO Energy*, 7:20-cv-00094 (W.D.Tex. Apr. 16, 2020); *Stanley v. Patriot Inspection Services*, 6:20cv283 (W.D.Tex. Apr. 9, 2020); *Hinkle v. Phillips 66*, 4:20cv22 (W.D.Tex. Apr. 1, 2020); *Tipton v. Anadarko*, 4:20cv439 (S.D.Tex. Feb. 7, 2020); *Diaz v. Precision Well Logging*, 4:19cv4876 (S.D.Tex. Dec. 16, 2019); *Hester v. Phillips 66*,18-CV-1078, 2019 WL 1930271 (S.D.Tex. Apr. 30, 2019); *Bernstein v. Buckeye, Inc.*, 18-CV-097-DC, 2019 WL 2563841 (W.D.Tex. Apr. 24, 2019); *Stringer v. McDaniel Technical Services*, 7:19cv32 (W.D.Tex. Feb. 1, 2019); *Gutierrez v. Drill Cuttings Disposal*, 319 F. Supp. 3d 856 (W.D.Tex. 2018); *McLelland v. Carrizo Oil & Gas*, 4:18-cv-04214 (S.D.Tex. Nov. 6, 2018); *Grice v. Range Resources*, 3:18cv269 (S.D.Tex. Sept. 11, 2018); *Saltzman v. VON Energy*, 4:18cv2883 (S.D.Tex. Aug. 20, 2018); *Aaron v. DC International*, 3:18cv44 (S.D.Tex. Feb. 14, 2018); *Shirey v. Helix Energy Solutions*, 4:17cv2741 (S.D.Tex. Sept. 12, 2017); *Rosas v. Dark Star Prod. Testing*, 2:16-CV-140, 2017 WL 8682221 (S.D.Tex. July 31, 2017); *Snead v. EOG Res., Inc.*, 5:16-CV-1134-OLG, 2017 WL 6294875 (W.D.Tex. Feb. 14, 2017); *Cruz v. Conocophillips*, 208 F. Supp. 3d 811 (S.D.Tex. 2016); *McAfee v. Pioneer Natural Resources*, 4:16cv3298 (S.D.Tex. Nov. 8, 2016); *McGrew v. Quinn's Rental Servs.*, 16-CV-543, 2016 WL 3974836 (S.D.Tex. July 25, 2016); *Cator v. DXP Enterprises*, CV SA-15-CA-179-FB, 2016 WL 11580735 (W.D.Tex. May 19, 2016); *Shaffer v. M-I, LLC*, 14-CV-2966, 2015 WL 7313415 (S.D.Tex. Nov. 19, 2015); *York v. RWDY Inc*., 4:15cv3076 (S.D.Tex. Oct. 19, 2015); *DeFoor v. Sun Drilling*, 4:15cv701 (S.D.Tex. Mar. 16, 2015); *Songer v. Advanced Building Services*, 4:14cv3154 (S.D.Tex. Nov. 5, 2014); *Lucas v. Crescent Directional Drilling*, 4:14cv1635 (S.D.Tex. June 11,

Despite the defensible pay practice, the sheer mass and scale of these collective action lawsuits, including the time and expense and exposure associated with defending FLSA collective actions of this type,[16] push the oil and gas industry member-defendants into a corner. Thus results "discounted" collective settlements made for business-saving purposes, while plaintiffs' attorneys predominantly receive 33 to 40 percent of the settlement fund, equating to millions of dollars.

2. The Reasonable Relationship Test Does Not Apply to the HCE.

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

2014); *Meyer v. Phoenix Technology Services*, 4:14cv1490 (S.D.Tex. May 28, 2014); *Murphy v. Multi-Shot LLC*, 4:14cv1464 (S.D.Tex. May 23, 2014).

[16] Given that the number of hours worked in the oil patch can exceed 84 hours or more (seven, 12-hour days), one consultant (which is only one of several type of day rate positions in the oil patch) who is paid $1,500 a day, and works 240 days a year can accumulate $561,000 in overtime exposure over three years. At 100 consultants, that outside exposure quickly extrapolates to $56,000,000 with liquidated damages.

Every Circuit deciding this issue, with the exception of the Fifth Circuit, acknowledges this distinction. *Litz v. Saint Consulting Grp., Inc.*, 772 F.3d 1, 5 (1st Cir. 2014) (seeing "no reason" why § 541.604's requirements "should be grafted onto the materially different exemption" contained in sections 541.601 and 541.602(a)); *Anani v. CVS RX Servs., Inc.*, 730 F.3d 146, 149 (2d Cir. 2013) ("We perceive no cogent reason why the requirements of C.F.R. § 541.604 must be met by an employee meeting the requirements of C.F.R. § 541.601"); *Hughes v. Gulf Interstate Field Servs., Inc.*, 878 F.3d 183, 189–91 (6th Cir. 2017); *accord Faludi v. U.S. Shale Sols., LLC*, 950 F.3d 269, 275 (5th Cir. 2020) (finding a defendant's arguments advancing this point to be "well taken" while observing that a different issue was sufficient to resolve the appeal).[17]

The Fifth Circuit's majority opinion split from other Circuits when it conflated the reasonable relationship test with the HCE by improperly tethering § 541.602(a), the "salary basis" rule, with § 541.604(b). While the HCE expressly references the "salary-basis" rule set forth in § 541.602, it does not incorporate the reasonable relationship test in § 541.604(b). "[T]he majority should have started—and ended—with the plain terms of § 541.602 to determine that Hewitt

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[17] *See also Scott v. Antero Res. Corp*., No. 17-CV-0693-WJM-SKC, 2021 WL 2012326, at *1048 (D. Colo. May 20, 2021) (granting summary judgment based on the HCE against consultant-class holding "because their $1,000 day rate guarantees them at least [the HCE-required minimum] per week and they regularly received that predetermined amount on a weekly or less frequent basis"), *appeal filed*, No. 21-1188 (10th Cir. May 21, 2021).

satisfied the salary basis test." *Hewitt*, 15 F.4th at 307 (Jones, J., dissenting). "Hewitt . . . received his paycheck biweekly, as required by the first part of the salary basis test. And in any week in which he performed any work he was guaranteed a 'predetermined amount' of at least $963 (his day rate)." *Id*.

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

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

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

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

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

> § 541.604 from the salary basis test . . . Why spin off § 541.604 only to have courts effectively re-incorporate it back *sub silentio* into the new highly compensated employee exemption?

Hewitt, 15 F.4th at 313–14 (Jones, J., dissenting) (footnotes omitted). The regulatory history and text confirm that the reasonable relationship requirement is not intended to be applied to the HCE. As Justice Jones aptly recognizes, "[t]he Department excised the minimum guarantee plus extras subsection from the salary basis provision and, for the first time, transformed that subsection into a new § 541.604. The timing is meaningful." *Id*.

And while a haphazard interpretation of § 541.604(b) appears to address "day rates" by applying the reasonable relationship test to earnings computed on an "hourly, a daily or a shift basis," this is a red herring. Unlike a guarantee that represents an *aggregation* of multiple hours, days or shifts (which is likely what the DOL contemplated when creating this safeguard), a single day rate that, alone, already exceeds the regulatory salary minimum ($684) falls outside of the plain text and meaning of § 541.604(b). Indeed, the 1949 Weiss Report[18] expressly acknowledges—that salaries "paid on a daily or shift basis" satisfy the salary basis requirements "if the employment arrangement

[18] This is a comprehensive report regarding regulatory definitions of exempt employees, and was produced after 22 days of hearings and over 200 witnesses and statements, including significant testimony on behalf of various industries. *Id.* at 1–2.

includes a provision that [the employee] will receive not less than the amount specified in the regulations in any week in which he performs any work." Wage and Hour & Pub. Contracts Divs., Dep't of Labor, Defining the Terms "Executive" "Administrative" "Professional" "Local Retailing Capacity" "Outside Salesman" (1949), at 26 (the "Weiss Report"). This report finding was based on testimony from a coal industry representative regarding foremen daily compensation.—*Id.* at 26, n.100, 24, n.92. The DOL continues to rely on this historic report. *See* 2004 Final Rule, 69 Fed. Reg. 22,122, 22,174.

Stepping back and viewing the regulatory scheme as a whole, Subpart A, makes clear that Subpart G "contains regulations regarding salary requirements applicable to *most* of the exemptions" including the executive, administrative, and professional exemptions found in Subparts B, C, and D. 29 C.F.R. § 541.0(b) (emphasis added). It also states that Subpart G "contains a provision for exempting certain highly compensated employees" that is described separately from Subpart G's "regulations regarding salary requirements." *Id.* That the HCE is embedded within Subpart G is a clear indication that only those sections specifically enumerated in § 541.601, *i.e.*, §§ 541.602 and 541.605, apply to the HCE.

Applying the reasonable relationship requirement to the HCE is illogical, and inconsistent with a plain reading of the text. The calculations outlined in the HCE contemplate that highly compensated employees could receive total compensation well above the

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

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

payment arrangement inconsistent with § 541.604's reasonable relationship test, even though this type of arrangement is expressly contemplated by the very regulation that sets forth the HCE.

Moreover, the salary basis regulation's textual phrase "regularly receives" does not reflect a written or contractual requirement for the guarantee. 29 C.F.R. § 541.602(a). The Sixth Circuit, considering this issue, held that the foundation of the predetermined amount is *not* what the underlying employment agreement says, but rather the amounts the plaintiff *actually received*. *Hughes*, 878 F.3d at 188–89 (interpreting 29 C.F.R. § 541.602).[19]

Accordingly, a superficial application of the salary basis test disturbs a longstanding principle that exemptions should be analyzed based on the reality of the circumstances, not labels used by the parties. *See*, *e.g.*, *Zannikos v. Oil Inspections*, 605 F. App'x 349, 357 (5th Cir. 2015) (per curiam); *Orton v. Johnny's Lunch Franchise, LLC*, 668 F.3d 843, 848 (6th Cir. 2012); *Chicca v. St. Luke's Episcopal Health Sys.*, 858 F. Supp. 2d 777, 783 (S.D.Tex. 2012); *cf. Gray v. Powers*, 673 F.3d 352, 355 (5th Cir. 2012) (noting the origin of the economic reality test that governs the determination of employer status under the FLSA). In sum, "[t]extualism 'is not always easy,' it 'can be hard work and involve significant research,' and it 'is not glamourous,' but done

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

properly it is both 'straightforward' and 'fair.' Doing the hard work here refutes the view that § 541.601's exemption for highly compensated employees must be read in light of § 541.604 [reasonable relationship test]." *Hewitt*, 15 F.4th at 309 (Jones, J., dissenting) (quoting Diarmuid O'Scannlain, "*We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 312 (2017)).

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

The HCE, was "proposed [as] a special, streamlined rule for employees paid $65,000 or more annually." Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 68 Fed. Reg. 15,559, 15,571 (Mar. 31, 2003) ("2003 NPRM"). The DOL's discussion on crafting the highly compensated limitations on overtime entitlement for the most highly paid individuals in the country is instructive given that consultants squarely fit within the parameters the DOL contemplated for the HCE.[20] The DOL noted that "setting the highly compensated test at this salary level

[20] The analysis provided that "in the rare instances when employees receiving salaries of $100 a week or more did not meet all the other requirements of the regulations in every workweek, a determination that such employees are exempt would not defeat the objectives of the exemption [ ]." 2003 NPRM, 68 Fed. Reg. at 15,570; *see also* Report and Recommendations on Proposed Revision of Regulations, Part 541 Under the Fair Labor Standards Act, March 3, 1958, by Harry S. Kantor, Assistant Administrator, Presiding Officer ("Kantor Report") at 10.

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

The 2004 Final Rule describes the 1958 Kantor Report's "methodology of looking to the 'range of salaries *actually paid*' to employees is the 'most accurate approach to set the salary *levels*.'" *Id*. at 22,167 (emphasis added). Respondent Hewitt's "day rate," or to better reflect the economic reality, his "guarantee," resulted in his take-home compensation being "well over $200,000 each year." *Hewitt*, 15 F.4th at 297. Other consultants' guarantees can result in annual compensation exceeding $300,000. A $1,600 guarantee annualizes to $291,000 if the consultant works at least part of one day during 26 weeks out of the year, and to $384,000 during two-thirds of the weeks in a year. Complaint at 1, 4, *Steve Byrd v. ETX Energy, LLC*, No. 4:20-cv-01622 (S.D.Tex. May 7, 2020), Doc. 1 ("[O]ilfield worker['s] . . . day rate was $1,600 per day."); *Parrish*, 917 F.3d at 384–85 (noting that consultant earned $230,033.30 in 2013 and $279,777.31 in 2014").[21]

The truth is that consultants' own statements in these lawsuits repeatedly demonstrate—under oath—that they know and understand their guaranteed payment, which is not subject to change based on quality

[21] *See supra* Section C(2) at 15-17.

or quantity of work on any given day. For example, in *Hoeflein v. Crescent Drilling & Prod., Inc.*, the court considered consultant declarations in ruling on conditional certification. No. SA-19-CV-01194-FB, 2020 WL 1931849, at *2 (W.D.Tex. Apr. 21, 2020):

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

Id. at Pls.' Mot. Conditional Cert. at Exs. A-B.[22] In practical application, consultants, like other exempt workers that pass the salary basis test, have certainty as to their take home pay—in advance—given the guarantee, regardless of hours worked. This similarity is reflected in the salary basis test provisions applicable to non-HCE exempt individuals. *See*, *e.g.*, 29 C.F.R. § 541.602(a)(3) (employer allowed to use a make-up payment to meet required annual compensation level),

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[22] *See also Scott*, 2021 WL 2012326, at *1041 ("Antero paid Plaintiffs . . . at least $200,000 per calendar year . . . Plaintiffs agree that Antero paid them a day rate of at least $1,000 per day for each hitch.") (internal citations omitted); Amended Complaint at 4, *Carter v. All American Oilfield, LLC*, No. 3:21-cv-00007-JMK (D. Alaska Mar. 4, 2021) (Day rate of $1,027.76 and "[i]f Plaintiff worked a seven-day workweek, which was typical, he worked eighty-four hours in that workweek"); *Gutierrez v. Drill Cuttings Disposal*, 319 F. Supp. 3d 856, 858 (W.D.Tex. 2018) ("Plaintiffs allege that [they] regularly worked 84 hours in a week"); *Bernstein v. Buckeye, Inc.*, No. 18-CV-097-DC, 2019 WL 2563841, at *4 (W.D.Tex. Apr. 24, 2019) (same "typical schedule"); *Sloane*, 4:16-CV-01571 at *1 ("an annualized salary of $140,500").

§ 541.602(a)(1) ("need not be paid for any workweek in which they perform no work"); § 541.602(b)(1) (full day docking available when "absent from work for one or more full days for personal reasons").

The DOL's data behind the HCE shows that "[e]mployees earning $100,000 or more per year"—such as these consultants—"are at the very top of today's economic ladder." 2004 Final Rule, 69 Fed. Reg. at 22,174.[23] The DOL understood that in creating the HCE it would render certain non-manual workers ineligible for overtime. *Id.* at 22,214. Thus, the DOL designed the HCE to provide a compensation-based litmus test that avoids the burdens on employers attributed to the white-collar exemptions, and it expressly considered the HCE would *add* exempt employees to the nation's workforce. *Id*. The heightened burden[24] in the *Helix* majority opinion would make the HCE more difficult to apply to consultants, as well as other types of workers. *See Anani*, 730 F.3d at 149 (pharmaceutical industry); *Litz*, 772 F.3d at 5 (consulting firm).

Nowhere in the hundreds of pages of the DOL's annals of drafting, nor the HCE text itself, is the Fifth

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

[24] Indeed, the DOL's intent to create a "streamlined" exception to the more-robust exemption tests is reflected by the fact that the DOL considered, and invited comments, on "adopting a 'salary only' test for highly compensated employees [under which employees] earning a total annual compensation over a certain amount would automatically be considered exempt." 2003 NPRM, 68 Fed. Reg. at 15,571.

Circuit's requirement that to satisfy the HCE, the proponent must meet 29 C.F.R. § 541.601 *as well as* 29 C.F.R. § 541.604(b) in order to claim the exemption. What the HCE text *does* specifically require is that "'[t]otal annual compensation' must include at least $684 per week paid on a salary or fee basis as set forth in §§ 541.602[25] and 541.605."[26] 29 C.F.R. § 541.601(b)(1). Ignoring the reality that many consultants receive annualized pay of hundreds of thousands of dollars, which the worker receives on a weekly-or-less-frequent basis, regardless of how it is calculated, is contrary to the intent of the HCE and creates an illogical, disjointed analytical framework.[27]

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

A guarantee is a guarantee. But the Fifth Circuit's majority opinion does not address the reality of the consultants' (commonly) weekly, take-home paychecks, and conflates the DOL's regulatory definition of the

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[25] § 541.602 defines "salary basis" and is at issue and addressed *infra* Section C(2).

[26] § 541.605 is regarding payment on a fee basis and is not at issue.

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

"salary basis test" with what the majority deemed a "common parlance" idea of what a salary means.[28] Section 541.602(a) unequivocally tells us how to define salary—a guarantee of at least $684, received at least each week.

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

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

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

122924.[30] Further, according to the 2004 Final Rule, "legislative history indicates . . . the workers exempted typically earned salaries well above the minimum wage" and like, here, regarding oil patch work, "the type of work they performed was difficult to standardize to any time frame[.]" 69 Fed. Reg. at 22,123–24.

To best adapt to the reality of the day-to-day work in the oil and natural gas industry, and to the preference consultants command in this particular professional services market, companies rely on compensating with day rate guarantees. Courts in the First, Second, Third,[31]

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

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

Sixth,[32] and Tenth[33] Circuits endorse the key features of this pay method to consultants resulting in hundreds, or thousands, of dollars per day for specialized work. *See Hughes*, 878 F.3d at 189–91; *Litz*, 772 F.3d at 5; *Anani*, 730 F.3d at 149. The "nature" of work at "an oil-drilling site" demands training for safe operations and is such that "[a]n error in [judgment] can lead to losing a significant amount of money—sometimes hundreds of thousands of dollars." *Parrish*, 917 F.3d at 375, 383.

Consultants may float between companies and oilfields around the country (and the world) as they complete each project. The economic reality is that the guarantees in this industry are salaries not subject to reduction based on the quality or quantity of work and accommodate the unpredictability of the oil patch. Accordingly, when consultants step foot on a worksite, they are paid their guarantee, regardless of whether work continues through the rest of the hour, the day, or

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[32] Notably relevant consultant, day rate collective actions: *Fenley v. Wood Grp. Mustang, Inc*., 325 F.R.D. 232, 243 (S.D.Ohio 2018) (quoting *Hughes*, 878 F.3d at 190) ("the ultimate the outcome of this matter is dependent on whether the Inspectors' salaries "[were] in fact guaranteed [ ]"); *see also Ganci v. MBF Inspection Servs., Inc.*, 323 F.R.D. 249, 262 (S.D.Ohio 2017) ("this District has recently held that day rate compensation can satisfy the salary basis test if the employee in fact received weekly compensation of at least $455, regardless of whether the compensation was calculated per day or per week").

[33] *Scott*, No. 17-CV-0693-WJM-SKC, at *1041, 1048. (Consultant-plaintiffs concede they were guaranteed "at least $1,000 per day for each hitch.").

the week. Or, shuts down early because of weather or operational problems.[34]

Companies should be able to devise compensation structures that reflect unique work environments, and the FLSA has been interpreted to support this logic and payment structure. *See Brock*, 1987 WL 31308 at *7 ("[F]rom the[ir] testimony . . . that all the inspectors [] used their independent judgment and discretion to . . . shut down jobs when unsafe conditions so merited," among other court findings); *Acs v. Detroit Edison Co*., 444 F.3d 763, 765 (6th Cir. 2006) (emphasis added) (citing U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (July 9, 2003)) (finding the pay plan of a utility company with 24-hour operations to "ha[ve] satisfied the administrative requirements of the salary-basis test" based on the company's pay "*guarantee*" to its employees, despite some workweeks having less-than 40 hours, with others having more-than 40 hours).

To require the oil and natural gas industry to pay overtime on consultant compensation would increase consultant labor costs in exploration and production by a *minimum* of 26.2 percent—for the overtime costs alone and, when coupled with liquidated damages

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[34] For example, the Texas Railroad Commission regulates the state oil and natural gas industry. Using weather as only one illustration, the Commission website has issued at least 723 weather-based notices in recent years. Notifications are used to make judgment calls regarding safety-related and operational-integrity decisions. *See*, *e.g.*, Notice To Operators: Tropical Storm Nicholas (Sept. 13, 2021), https://www.rrc.texas.gov/announcements/091321-nto-tropical-storm-nicholas/ (last visited Feb. 6, 2022).

available under the FLSA, that co-efficient increases to 56.4 percent.[35] A *single* consultant making around $200,000 annually, like Respondent Hewitt, can result in an additional $52,000 a year in back wages. Appending these types of costs to expensive exploration will drive up oil and gas production costs, potentially slow down production, and threaten consultant jobs nationwide, contrary to the FLSA's intent. *Accord Marzuq v. Cadete Enterprises, Inc.*, 807 F.3d 431, 445–46 (1st Cir. 2015) (citing 2004 Final Rule, 69 Fed. Reg. at 22,124) ("job expansion [was] intended by the FLSA's time-and-a-half overtime premium," not to reduce jobs or opportunities *because* overtime is required).

Consultants perform hard work. The oil and natural gas industry is built on hard work. "Textualism . . . can be hard work" (*supra*), but the majority's opinion does not do the work and creates a broken result that consultants earning over $107,000 annually are not HCE-workers exempt from overtime.

D. CONCLUSION

The judgment of the court of appeals should be reversed. An industry-wide pay practice that has successfully aged for 120 years without censure should be upheld pursuant to the plain text and intent of the

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[35] The mathematical co-efficient for 84 hours (seven days of 12 hours) is 26.2 percent of overtime. *See* U.S. Dep't of Labor, Wage & Hour Div., *Coefficient Table for Computing Extra Half-Time for Overtime*, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/CoefficientTableWH-134.pdf. *See also supra*, Section C(1) at n.16.

FLSA. The U.S. oil and natural gas industry should not be upended because of non-textualist, inapposite interpretations of the word salary.

Respectfully submitted,

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