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 *AMICUS CURIAE* MASSACHUSETTS NURSES ASSOCIATION IN SUPPORT OF RESPONDENT

NICHOLAS D. WANGER
Counsel of Record
MCDONALD LAMOND CANZONERI
352 Turnpike Road, Suite 210
Southborough, Massachusetts 01772
(508) 485-6600
nwanger@masslaborlawyers.com

Counsel for Amicus Curiae

315500

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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29 C.F.R. § 541.301(e)(2) 16

29 C.F.R. § 541.601 . . . . *passim*

29 C.F.R. § 541.602 . . . . 4, 5

29 C.F.R. § 541.602(a) 3

29 C.F.R. § 541.604 . . . . 1, 4, 5, 6

American Association of Colleges of Nursing,
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Amy Witkoski Stimpfel, Douglas M. Sloane, Linda H. Aiken, The Longer The Shifts For Hospital Nurses, The Higher The Levels Of Burnout And Patient Dissatisfaction, Health Aff (Millwood) (2012) 20, 21

Ann P. Bartel, Nancy D. Beaulieu, Ciaran S. Phibbs, Patricia W. Stone, Human Capital and Productivity in a Team Environment: Evidence from the Healthcare Sector, American Economic Journal: Applied Economics, 231 (April 2014) .19

Carol Proper, John Van Reenen, Can Pay Regulation Kill? Panel Data Evidence on the Effect of Labor Markets on Hospital Performance, 118 Journal of Political Economy 222 (2010) 18

Defining and Delimiting the Exemptions. for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122 (April 23, 2004) 6, 7, 8

H.R.Rep. No. 93–913 (1974) 11

Herbert Applebaum, The American Work Ethic and the Changing Workforce: An Historical Perspective 168 (1998) 12, 13

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Howard D. Samuel, Troubled passage: the labor movement and the Fair Labor Standards Act, 123 Monthly Labor Review 32 (2000) 9

John F. Manning, Textualism and Legislative Intent, 91 Va. L. Rev. 419 (2005) 9

John S. Forsythe, Legislative History Of The Fair Labor Standards Act, 6 LCP 464 (1939) . . . 9, 12

Linda H. Aiken, PhD, RN, Sean P. Clarke, PhD, RN, Douglas M. Sloane, PhD, Julie Sochalski, PhD, RN, Jeffrey H, MD, Phd, Hospital Nurse Staffing and Patient Mortality, Nurse Burnout, and Job Dissatisfaction, 288 JAMA 1987 (2002) 15, 23

Massachusetts Nurses Association, Massachusetts Nurses Warn of Rapidly Deteriorating Patient Care Quality and Widespread Unsafe Conditions as they Call for Improvements to Staffing, Pay and Benefits in Latest 'State of Nursing' Survey Released for National Nurses Week 17, 23

Philip L. Rones, Randy Ilg & Jennifer M. Gardner, Trends in Hours of Work Since the Mid-1970s, 120 Monthly Lab. Rev. 3 (April 1997) 13

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President Woodrow Wilson, Aug. 29, 1916, endorsing the Adamson Act. Arthur S. Link, ed., The Papers of Woodrow Wilson, vol. 38 (Princeton 1982) 11

Robert L. Kane, MD, Tatyana A. Shamliyan, MD, MS, Christine Mueller, PHD, RN, Sue Duval, PhD, Timothy J Wilt, MD, MPH, The Association of Registered Nurse Staffing Levels and Patient Outcomes, 45 Medical Care 1195 (2007) 22

Robert Whaples, Winning the Eight-Hour Day, 1909–1919, 50(2) The Journal of Economic History 393 (1990) 10

Scott D. Miller, Revitalizing the FLSA, 19 Hoftra Lab & Empl L.J 1 (2001) 10

Scott D. Miller, Work/Life Balance and The White-Collar Employee Under The FLSA, 7 Employee Rts. & Emp. Pol'y J. 5 (2003) . . . . *passim*

U.S. Bureau of Labor Statistics, Occupational Outlook Handbook: Registered Nurses 24

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U.S. Surgeon General, Addressing Health Worker Burnout (2022) 24

Virginia Smith Major, Katherine J. Klein, and Mark G. Ehrhart, Work Time, Work Interference With Family, and Psychological Distress, 87 Journal of Applied Psychology 427 (2002) 14

INTEREST OF *AMICUS CURIAE*

Massachusetts Nurses Association (MNA) is a union that represents more than 23,000 members throughout the state. Registered nurses comprise the vast majority of MNA's membership. Since its inception in 1903, MNA has continuously advocated both for its members and Massachusetts patients. MNA's views are informed by the daily experiences of its member nurses as well as longstanding institutional knowledge of proper nursing procedures and standards. The outcome of this litigation could deprive MNA's hardworking members of overtime pay and compromise the quality of care offered by the hospitals where they work.[1]

SUMMARY OF THE ARGUMENT

The text of 29 C.F.R. § 541.601 is clear. In order to qualify for the Highly Compensated Employee (HCE) exemption, a worker must be paid on a fee or salary basis. Petitioners have never maintained that Hewitt was compensated on a fee basis; therefore, for the exemption to apply, Hewitt must have been paid on a salary basis. Because Hewitt was a day-rate worker, his compensation violates the salary basis requirement unless his pay scheme comports with § 541.604. The regulations contain neither an indication that the definition of "salary basis" in § 541.601 differs from its meaning in other sections nor a suggestion that § 541.604 does not apply to § 541.601 as

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.

it does to every other exemption. At its core, Petitioners' argument asks the Court to read the salary basis requirement out of § 541.601. The Court should reject this position as wholly divorced from the unambiguous meaning of the regulatory text.

Petitioners' description of the Fair Labor Standards Act's (FLSA) underlying purpose is inaccurately narrow. In addition to protecting the most vulnerable workers from exploitation, the FLSA's proponents sought to reduce working hours by imposing an overtime penalty on employers. It was thought that decreased hours would generally augment the nation's welfare by protecting public health and spurring employers to spread work by hiring more employees. Studies demonstrate that the FLSA's overtime protections remain necessary safeguards because overwork persists as a problem for many Americans.

Nurses constitute the foundation of America's healthcare system. A properly functioning hospital depends upon a full complement of registered nurses (RNs) who are able to navigate an inherently stressful work environment, confident that their employer will provide for both their financial and overall wellbeing. Should the Court adopt Petitioners' interpretation of the HCE exemption, numerous veteran nurses represented by MNA could lose overtime compensation. Beyond depriving veteran nurses of financial security, this drastic pay reduction would have a number of regrettable consequences. Without guaranteed overtime compensation, RN attrition would dramatically increase, aggravating a pre-existing shortage of nurses. Free of any financial penalty, healthcare employers would overwork nurses rather than hiring additional staff. These

predictable effects would, in turn, worsen outcomes for patients.

ARGUMENT

I. Hewitt Is Not Exempt Pursuant To The Clear Text Of The HCE Regulation.

The Fifth Circuit panel correctly determined that a textualist approach compels the conclusion that Hewitt was not an exempt Highly Compensated Employee because he was not paid on a fee or salary basis. The HCE regulation is not ambiguous. Pursuant to 29 C.F.R. § 541.601, an employee is deemed an HCE when three conditions are met: (1) a requisite amount of annual compensation, $100,000 at the time Hewitt worked for Helix Energy Solutions; (2) a requisite amount of weekly compensation, $455.00 during the relevant period of Hewitt's employment, that must be paid on fee or salary basis; and (3) customary or regular performance of executive, administrative, or professional duties. Here, there is no dispute that Hewitt received more than $100,000 in annual compensation and met the so-called duties test. However, it should be equally clear that Hewitt was not paid on a fee or salary basis, as explicitly required by the regulation.

Petitioners have never argued that Hewitt was paid on a fee basis; for him to be exempt, he must have been paid on a salary basis. The regulations provide a clear definition of compensation on a salary basis that includes the proviso that a salaried employee must be paid on a "weekly, or less frequent basis." 29 C.F.R. § 541.602 (a). Hewitt received his compensation on a daily basis. A

straightforward reading of § 541.602, therefore, indicates that Hewitt was not compensated on a salary basis.

The inquiry does not end here because 29 C.F.R. § 541.604 expands the definition of salaried to encompass certain employees paid on an hourly or daily basis so long as two criteria are satisfied. First, the compensation scheme must guarantee "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. Second, a reasonable relationship must exist between the guaranteed amount and the employee's actual compensation. Id. The regulatory scheme is unambiguous; unless a day-rate worker meets § 541.604's requirements, they are not paid on a salary-basis and thus, cannot be exempt.

Though it is posed as a textualist argument, Petitioners' brief asks the Court to adopt a position completely severed from a plain reading of the regulatory language. Petitioners contend that the Court should simply disregard the "fee or salary basis" prerequisite of § 541.601 and find that any worker who meets the duties test and the annual and weekly compensation requirements, is exempt as an HCE. Perhaps recognizing that this position directly conflicts with the text, the Petitioners claim that the Fifth Circuit erred by accepting their assertion that Hewitt was compensated on a salary-basis and then by needlessly imposing the additional requirements of § 541.604. Petitioners' Brief (July 8, 2022) at 25. This reading of the Fifth Circuit's opinion depends on isolating a single phrase from its context. Id. When the relevant passage from the underlying decision is read in full, it is apparent that, far from accepting that Hewitt was paid on a salary-basis, the Court emphasized that his

pay violated the salary-basis requirement because it failed to meet § 541.604's criteria: "Helix admits that Hewitt's pay is 'computed on a daily basis,' so it must comply with § 541.604." Hewitt v. Helix Energy Sols. Grp., Inc., 15 F.4th 289, 293 (5th Cir. 2021).

Petitioners fundamentally distort the relationship between the regulations at issue. § 541.604 is not an additional hurdle to deeming an employee exempt; instead, it expands the exemptions by allowing certain employees to qualify as salaried even if their rate of compensation does not meet the salary-basis definition. § 541.601 is not a standalone provision. The HCE exemption contains no carveout, explicit or otherwise. The language incorporates terms of art defined elsewhere in the regulations without any suggestion that they should be afforded a unique meaning that wholly departs from their import in other sections. Indeed, § 541.601 incorporates "salary basis," a term defined in § 541.602. Because he was paid at a day-rate, Hewitt does not qualify as salaried pursuant to § 541.602's definition. However, Hewitt could still qualify as salaried, and therefore exempt, if Helix's compensation methodology conformed to § 541.604's conditions. The parties agree that Hewitt's pay scheme did not conform to § 541.604's requirements; therefore, Hewitt is non-exempt.

A perusal of the Department of Labor's (DOL) preamble for the HCE exemption is instructive insofar as it reveals that the agency considered whether it should maintain a salary-basis requirement with the white-collar exemption and explicitly determined that retaining this traditional requirement was the optimal course: "the salary basis requirement is a valuable and easily applied

criterion that is a hallmark of exempt status."[2] The commentary also explains that § 541.604's reasonable relationship test is crucial for preventing comparatively well-compensated day-rate or hourly workers, such as nurses, from being erroneously categorized as exempt, salaried workers. Taking up the example of a nurse compensated on an hourly basis, the DOL observed that § 541.604's reasonable relationship requirement would prohibit an employer from treating the nurse as exempt unless her minimum guaranteed pay was "roughly equivalent" to her actual weekly compensation.[3]

The agency also made it clear that the phrase "salary basis" as used in the HCE exemption carried the same meaning as the phrase traditionally held in previously established exemptions. Indeed, in rejecting interest group proposals that the agency remove the salary basis requirement from the executive, administrative, or professional exemption altogether, the DOL stated: "The Department's final rule retains . . . the requirement that an exempt employee must be paid on a 'salary basis.'"[4]

In reaching this conclusion, the DOL emphasized that the salary basis test is not a mere formality or empty complication. Rather, the DOL, in its role as the authoritative interpreter of the FLSA, has continued to embrace the longstanding view that, regardless of

2. Defining and Delimiting the Exemptions. for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22175 (April 23, 2004).

3. Id. at 22184.

4. Id. at 22176.

the amount of their compensation, an employee cannot be considered a bona fide executive, administrator, or professional if they do not enjoy the relative freedom of managing their own time rather than hewing to the strictures of hourly or daily compensated work:

> The Department thus has determined over the course of many years that executive, administrative and professional employees are nearly universally paid on a salary basis. This practice reflects the widely-held understanding that employees with the requisite status to be bona fide executives, administrators or professionals have discretion to manage their time. Such employees are not paid by the hour or task, but for the general value of services performed.[5]

When the HCE exemption was drafted and implemented in 2004, the DOL clearly announced that no purported executive, administrative, or professional employee should be made to forego the protections of the FLSA unless their pay scheme was consistent with the salary basis requirement.

Tellingly, nowhere in the Department's commentary, is there any suggestion that high enough compensation would remove the need for an employee to meet other exemption prerequisites. In formulating the HCE regulation, the DOL explicitly rejected a proposal for a "bright-line" test contingent upon level of compensation alone.[6] The

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5. Id. at 22177.

6. Id. at 22173.

Department explained that § 541.601 is not a truly novel exemption but merely an iteration of an ongoing practice whereby the DOL has applied somewhat less stringent duty tests to executive, administrative, or professional employees who meet a certain pay threshold: "Section 541.601 is merely a reformulation of such a test."[7] The DOL's understanding of the HCE exemption as contiguous with its prior implementation of the FLSA indicates that the provision is to be read as akin to previously established exemptions, not as an autonomous section wherein phrases such as "salary basis" are invested with new meanings distinct from their definitions throughout the remainder of the regulations.

II. Petitioners' Brief Fundamentally Misunderstands The Apparent Purpose of The FLSA.

Petitioners contend that the Fifth Circuit's ruling must be wrong because it would result in Hewitt, who earned over $200,000 per year when employed by Helix, receiving damages for unpaid overtime. This argument, which pervades Petitioners' brief, maintains that the legislative intent underlying the FLSA was confined to "protect[ing] low-wage, blue-collar workers from workplace exploitation." Petitioners Brief (July 8, 2022) at 20. Hewitt is not a low-wage worker; therefore, as the Petitioners would have it, the FLSA must not govern his work.

Proponents of textualist interpretation have persuasively argued that the compromises endemic to the legislative process render the final statutory text the

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7. Id. at 22174.

most reliable guide to a law's meaning, preferring "text over spirit" because it is simply not possible to divine the former with any accuracy.[8] The FLSA's intricate legislative history exemplifies the difficulty inherent in any attempt to deduce a unified statutory purpose. Nine renditions of the bill were circulated in congress for over a year before the legislature passed the tenth and final version.[9] Given this complex history, any claim to have reduced the law's animating intent to a simple, unified idea is doomed to failure.

Indisputably, one of the FLSA's core purposes was to ensure reasonable pay for the most vulnerable workers. However, the historical context from which the law arose reveals that this was only one of its purposes. The passage of the FLSA's overtime provision was the culmination of a reduced work hours movement rooted in the 19th Century.[10] The FLSA imposed overtime not merely to ensure that workers were fairly compensated but to decrease the hours they worked by providing a disincentive to employers in the form of a financial penalty.[11] It was hoped that reduced hours would augment the nation's general wellbeing

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8. John F. Manning, Textualism and Legislative Intent, 91 Va. L. Rev. 419, 419 (2005).

9. John S. Forsythe, Legislative History Of The Fair Labor Standards Act, 6 LCP 464, 474. (1939).

10. *See generally*, Howard D. Samuel, Troubled passage: the labor movement and the Fair Labor Standards Act, 123 Monthly Labor Review 32 (2000), https://www.bls.gov/opub/mlr/2000/12/art3full.pdf.

11. Scott D. Miller, Work/Life Balance and The White-Collar Employee Under The FLSA, 7 Employee Rts. & Emp. Pol'y J. 5, 14 (2003).

both by protecting Americans from the physical and psychological toll of overwork and by inducing employers to hire more workers.[12]

Advocacy for shorter working hours was central to the American labor movement from the late 19th Century until the passage of the FLSA. A popular refrain amongst workers after the Civil War was: "Eight hours for work, eight hours for rest, eight hours for what we will."[13] The goal of reduced hours largely motivated the formation of the American Federation of Labor in the 1880s as well as the 1919 steel strike.[14] Proponents of a shorter working day argued that an eight-hour day would bring myriad benefits to the nation. Public health would benefit because overworked employees were more likely to make dangerous mistakes.[15] Communities would flourish because workers would have more time to devote to social, religious, and civic pursuits.[16] Finally, the job market would improve because employers would be induced to hire more workers if they could no longer demand exorbitant

12. Id.; Scott D. Miller, Revitalizing the FLSA, 19 Hoftra Lab & Empl L.J 1, 10 (2001).

13. Scott D. Miller, Revitalizing the FLSA, 19 Hoftra Lab & Empl L.J 1, 1 (2001).

14. Robert Whaples , Winning the Eight-Hour Day, 1909–1919, 50(2) The Journal of Economic History 393, 393 (1990), https://www.cambridge.org/core/journals/journal-of-economic-history/article/abs/winning-the-eighthour-day-19091919/8D4EA873FD43A77D8F18CBDC2847AE8C.

15. Scott D. Miller, Revitalizing the FLSA, 19 Hoftra Lab & Empl L.J 1, 10 (2001).

16. Id.

hours from their current employees.[17] Woodrow Wilson's remarks regarding the passage of the Adamson Act, a bill that capped the workday length for interstate railway employees, are representative insofar as they assert that reduced working hours would be a boon to society as a whole:

> The whole spirit of the time and the preponderant evidence of recent economic experience [speaks] for the eight hour day. It has been adjudged by the thought and experience of recent years a thing upon which society justified in insisting as in the interest of health, efficiency, contentment, and a general increase of economic vigor.[18]

President Roosevelt's letter to congress in support of the FLSA's passage adopted this linkage between decreased workhours and national flourishing: "self-supporting and self-respecting democracy can plead no justification for... stretching workers' hours."[19] Courts also recognized that the overtime provision was meant to encourage hiring. *See, e.g.* Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 577-578 (1942) (explaining that overtime provision of FLSA was meant, among other things, to promote a distribution of employment opportunities). Initial drafts of the FLSA expressly empowered regulators to limit the

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17. Scott D. Miller, Work/Life Balance and The White-Collar Employee Under The FLSA, 7 Employee Rts. & Emp. Pol'y J. 5, 14 (2003).

18. President Woodrow Wilson, Aug. 29, 1916, endorsing the Adamson Act. Arthur S. Link, ed., The Papers of Woodrow Wilson, vol. 38 (Princeton 1982), p. 97.

19. Roosevelt, *Public Papers*, VI(May 24, 1937), pp. 209-14.

hours of workers.[20] In the final bill, these ceilings were replaced by the overtime requirements that financially penalize employers for overworking their employees. The FLSA's historical context demonstrates that congress intended not only to ensure that vulnerable workers were fairly compensated but also to promote the overall wellbeing of the nation by reducing working hours.

The historical evidence also strongly suggests that the FLSA's so-called white-collar exemption was originally intended to encompass a far narrower swath of employees than that suggested by Petitioners. Historians have concluded that, at the time of the FLSA's passage, white-collar, middle-management workers identified strongly with their employers.[21] Such workers were well-compensated and many advanced to owning their own companies.[22] Legislatures envisioned the white-collar exemption as applying to these upwardly mobile, highly paid employees whose perspectives tended to align with their employers rather than other workers. Most contemporary white-collar workers lead professional lives radically different from those of their predecessors:

> Most white-collar workers today are workers, not middle-class managers. In income and life style they are closer to blue-collar workers than

20. John S. Forsythe, Legislative History Of The Fair Labor Standards Act, 6 LCP 464, 466-472. (1939).

21. Scott D. Miller, Work/Life Balance and The White-Collar Employee Under The FLSA, 7 Employee Rts. & Emp. Pol'y J. 5, 17-18 (2003).

22. Herbert Applebaum, The American Work Ethic and the Changing Workforce: An Historical Perspective 168 (1998).

> to owners . . . Most office work is repetitive, manual monotonous, and mechanical rather than intellectual and mentally creative.[23]

Petitioners' claim, therefore, that the FLSA was never intended to protect well-paid workers lacks historical foundation. The FLSA's white-collar exemption was meant only to exclude employees who identified with upper-management and could even hope to direct their own firms one day.

Academics have found that overwork is an ongoing concern for Americans, particularly family units that include so-called white-collar workers.[24] The phrase "time-squeeze" denotes, "the shortage of meaningful time for personal, home, community, and cultural life as a result of long work hours."[25] Many analyses have concluded that Americans are, on the whole, overworked. One study, for example, concluded that, in the latter half of the 20th Century, the number of Americans working over 49 hours a week increased significantly.[26] This rise in hours impacted white-collar and female workers acutely.[27]

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23. Id.

24. Scott D. Miller, Work/Life Balance and The White-Collar Employee Under The FLSA, 7 Employee Rts. & Emp. Pol'y J. 5, 5-6 (2003).

25. Id. at 5.

26. Philip L. Rones, Randy Ilg & Jennifer M. Gardner, Trends in Hours of Work Since the Mid-1970s, 120 Monthly Lab. Rev. 3, 5 (April 1997).

27. Scott D. Miller, Work/Life Balance and The White-Collar Employee Under The FLSA, 7 Employee Rts. & Emp. Pol'y J. 5, 35 (2003).

Another inquiry discovered that work time in America increased by an average of 66 hours between 1976 and 1993.[28] Excessive work hours appear to have a predictably negative impact on the well-being of individual employees and their families. A gulf separates the work preferences of dual-income couples from their significantly higher, actual work hours.[29] Couples with children are especially likely to prefer shorter hours but are often unable to achieve this goal.[30] A recent study found that longer work hours were associated with perceptions that work interfered with family time and symptoms of psychological distress, such as depression.[31]

III. Petitioners' Expansive Interpretation Of The HCE Exemption Would Negatively Impact Both The Nursing Profession And Public Health.

Petitioners' aggressively broad interpretation of the HCE exemption, entirely unmoored from the regulatory text, imperils the overtime pay of nurses. As selfless frontline workers who have risked their own and their

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28. Id.

29. Phyllis Moen, The time-squeeze: Is the increase in working time due to employer demands or employee preferences?, 44 American Behavior Scientist 1115, 1116. (2001).

30. Id. at 1132.

31. Virginia Smith Major, Katherine J. Klein, and Mark G. Ehrhart, Work Time, Work Interference With Family, and Psychological Distress, 87 Journal of Applied Psychology 427, 432-434 (2002), https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.565.8359&rep=rep1&type=pdf.

loved ones' health to treat patients throughout the ongoing Covid-19 pandemic, nurses deserve more than applause; they are owed a fair wage that includes overtime compensation. Depriving veteran nurses of overtime pay would harm devoted healthcare workers and decrease the quality of patient care in numerous hospitals.

America's healthcare system relies upon the dedication and talent of its nurses. Though doctors formulate the diagnosis and overall patient care strategy, it is nurses who must implement complicated treatment plans in challenging, unpredictable circumstances. This crucial work demands constant vigilance: "[r]egistered nurses constitute an around-the-clock surveillance system in hospitals for early detection and prompt intervention when patients' conditions deteriorate."[32] Nurses also serve in various administrative positions where they are responsible for ensuring staff cooperation and a hospital's adherence to high standards. It is not, therefore, surprising that patient outcomes are linked directly to variables such as: nurse-patient ratio, nurse educational attainment, experience level, and quality of life. Petitioners' atextual interpretation of the HCE exemption would risk depriving many experienced nurses of hard-earned overtime pay. Removing the financial penalty of overtime would also result in employers overworking nurses and declining to hire a sufficient number of RNs in spite of severe staffing shortages.

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32. Linda H. Aiken, PhD, RN, Sean P. Clarke, PhD, RN, Douglas M. Sloane, PhD, Julie Sochalski, PhD, RN, Jeffrey H, MD, Phd, Hospital Nurse Staffing and Patient Mortality, Nurse Burnout, and Job Dissatisfaction, 288 JAMA 1987, 1992 (2002), https://jamanetwork.com/journals/jama/fullarticle/195438.

Many RNs represented by MNA meet the current $107, 432.00 annual pay threshold of the HCE exemption. By their eleventh year of employment, a sizable fraction of MNA nurses earn at least $53.00 per hour, resulting in weekly and yearly pay well-above the current HCE requirements. The Department of Labor has already averred that RNs generally qualify for the Learned Professional exemption if compensated on a salary basis at a minimal weekly rate. 29 C.F.R § 541.301(e)(2). Given the HCE exemption's designedly relaxed duties test, employers could successfully argue that many RNs qualify as professionals for that section's purposes.[33] A significant number of veteran nurses, therefore, would be considered exempt pursuant to the HCE exemption should this Court accede to Petitioners' request that the salary basis condition be effectively removed from § 541.601. Petitioners' interpretation, if pursued to its logical conclusion, would also vitiate the salary basis prong of the Learned Professional exemption, thereby stripping lower-earning nurses of overtime pay. 29 C.F.R § 541.300. This deprivation of overtime would represent an enormous hardship for MNA's membership. RNs rely upon overtime opportunities both to supplement their income and to meet unforeseen financial exigencies.

Absent the additional economic support provided by overtime, MNA confidently predicts that many of its members would be compelled either to leave the nursing profession altogether, or at the very least, seek more remunerative healthcare work outside the traditional

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33. Defining and Delimiting the Exemptions. for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22173 (April 23, 2004).

hospital setting. This is not mere speculation. In the latest State of Nursing Survey conducted by MNA, an annual randomized survey of Massachusetts nurses, 64% of respondents indicated that inadequate pay or benefits were a significant issue.[34] The proportion of Massachusetts nurses who are struggling due to insufficient pay and benefits has risen dramatically in the past few years, from 27% in 2019 to nearly two-thirds in 2022.[35] This extraordinary statistic is necessarily connected to 33% of 2022 respondent RNs reporting that they intend to leave the nursing profession sooner than expected due to stresses associated with Covid-19; indeed, more than 80% of nurses said that their employer did only a "fair or poor job" of compensating nurses for their efforts during the Covid-19 Pandemic.[36] Given these worrisome survey results, it is clear that depriving nurses of overtime would lead to a catastrophic increase in attrition.

As discussed below, a drain of the most experienced nurses would assuredly decrease the quality of patient care. The resulting inadequate staffing levels could also snowball into even more attrition given that low staffing levels play a central role in job dissatisfaction and burnout. Finally, it is doubtful that as many academically talented students will spend the time and money necessary to

34. Massachusetts Nurses Association, Massachusetts Nurses Warn of Rapidly Deteriorating Patient Care Quality and Widespread Unsafe Conditions as they Call for Improvements to Staffing, Pay and Benefits in Latest 'State of Nursing' Survey Released for National Nurses Week, https://www.massnurses.org/news-and-events/p/openItem/12421 (last visited August 30, 2022).

35. Id.

36. Id.

become RNs if the profession's financial rewards are so dramatically diminished.

An econometric study of outcomes in English hospitals supports the proposition that a decrease in RN pay would endanger patients.[37] In that study, economists examined public English hospitals where nurses' wages are essentially flat throughout the country and set by the government. Controlling for potentially confounding variables, the study found that, in regions where nurses had higher-paying employment opportunities outside of subject hospitals, patient outcomes were significantly worse. Specifically, a ten percent increase in the outside wage was associated with a seven percent increase in death for patients.[38] These results appeared to confirm the thesis that "[w]hen the outside market wage is high, the regulated wage acts as a pay ceiling, and we would expect this to cause difficulties in recruitment and retention, especially of high-quality workers, which in turn should lead to lower service quality."[39] This reasoning also applies to the probable results of dramatically decreasing the compensation of the most experienced and skilled nurses in the US. Not only would RNs suffer financially; patients would also receive lower quality care.

Quantitative evidence indicates that any increased turnover in experienced nurses would render hospitals significantly less effective. Economists concluded that

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37. Carol Proper, John Van Reenen, Can Pay Regulation Kill? Panel Data Evidence on the Effect of Labor Markets on Hospital Performance, 118 Journal of Political Economy 222 (2010).

38. Id at 222.

39. Id. at 223

retention of experienced nurses in a given hospital unit is associated with superior performance, while changes in nursing staff are linked to decreased productivity.[40] The study measured the productivity of various VA hospital units by tracking each patient's residual length of stay—the difference between expected length of stay and actual length of stay—as well as the composition of the nursing team in each unit.[41] The paper found that two attributes of nurses in a given unit had a noticeable connection with residual length of stay: level of a staff member's qualifications and duration of a nurse's employment in a particular hospital unit.[42] When the makeup of a nursing unit was relatively stable, that team was more effective.[43] In contrast, when the group composition altered, the remedial length of stay increased.[44]

The researchers explained their results, in part, as a reflection of the cooperative nature of effective nursing.[45] The nurses of a unit are a team; all teams are more successful when their members have worked together long enough to trust one another and to anticipate each other's

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40. Ann P. Bartel, Nancy D. Beaulieu, Ciaran S. Phibbs, Patricia W. Stone, Human Capital and Productivity in a Team Environment: Evidence from the Healthcare Sector, American Economic Journal: Applied Economics, 231 (April 2014), http://dx.doi.org/10.1257/app.6.2.231.

41. Id. at 231-232.

42. Id. at 250.

43. Id.

44. Id.

45. Id. at 257.

thought processes. If hospitals lose RNs due to inadequate compensation, team cohesion will suffer and, as a result, so will patients' health. The paper's connection of nurses' education levels to their effectiveness is also relevant to the instant matter. It is foreseeable that more qualified staff will be especially likely to leave hospitals for higher paying jobs elsewhere because their pedigree will furnish them with opportunities more lucrative than the options available to their less credentialed colleagues.

Without the penalty of overtime compensation, hospitals will unduly extend nurses' working hours. Absent overtime pay, hospitals can save money by prolonging the hours of existing staff rather than hiring additional workers. This likely scenario could severely undermine the quality of care at impacted hospitals for several related reasons. First, when nurses are overworked, they are unable to perform as well. Second, if Hospitals can compensate nurses at straight time rates regardless of their hours, they will lack any direct financial incentive to alleviate dangerous staffing shortages by hiring additional RNs. The burnout occasioned by overly long hours and staffing shortages would likely increase attrition rates, thereby aggravating already existing staffing scarcities.

Researchers at the University of Pennsylvania Nursing School analyzed a survey of 22,275 nurses in four states to understand the impact of extended hours on nurses' experience of their work.[46] The inquiry relied upon

46. Amy Witkoski Stimpfel, Douglas M. Sloane, Linda H. Aiken, The Longer The Shifts For Hospital Nurses, The Higher The Levels Of Burnout And Patient Dissatisfaction, Health Aff (Millwood), (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3608421/pdf/nihms448267.pdf.

a hospital consumer survey to measure patient satisfaction. By comparing these data sets, researchers were able to observe the influence that nurses' shift duration had on patients' perceptions of their time at a hospital. This study reached two equally significant conclusions. Excessively prolonged hours were associated with both increased levels of burnout and decreased patient satisfaction.[47] The proportion of RNs who reported burnout and a desire to resign increased when nurses worked shifts greater than 13 hours.[48] Indeed, the chances that a nurse would experience burnout and job dissatisfaction were two and a half times greater for RNs who worked longer shifts than they were for RNs who worked 8 to 9 hours.[49] In hospitals where a greater fraction of nurses reported working more than 13 hours in their last shift, a greater number of patients found their treatment wanting. Patients in these hospitals reported increased rates of inadequate pain management, difficulty receiving help when needed, and that they would not recommend the hospital to friends or family.[50] It is not surprising the wellness of nurses is connected to patient satisfaction; extreme hours compromise the wellbeing of both nurses and the public.

An extensive review of 96 independent studies of the relationship between nurse staffing levels and hospital performance found strong evidence that higher nurse-to-patient ratios are associated with positive treatment

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47. Id. at 5-6.

48. Id. at 7.

49. Id. at 5.

50. Id. at 6-7.

outcomes.[51] Greater intensity of RN staffing was strongly linked to decreased mortality rates. The authors' analysis of the data allowed them to reasonably estimate that an increase in staffing by one nurse "would save 5 lives per 1000 hospitalized patients in ICUs, 5 lives per 1000 medical patients, and 6 per 1000 surgical patients."[52] Where surgical patients were concerned, the chances of death decreased by 38% when one nurse cared for two or fewer patients per shift as opposed to more than five.[53] Higher nurse-to-patient ratios were also linked with a "significant and consistent reduction of hospital-acquired pneumonia."[54] Greater staffing was also associated with 60% lower odds of respiratory failure and a 28% decrease in the chances of cardiac arrest.[55] The study concluded: "the available evidence indicates that there is a statistically and clinically significant association between RN staffing and adjusted odds ratio of hospital-related mortality, failure to rescue, and other patient outcomes."[56] The dangerous consequences of RN overwork show that hospitals cannot safely compensate for inadequate staffing by demanding that nurses work longer shifts.

In MNA's 2022 State of Nursing survey, 55% of respondents answered that understaffing was the greatest

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51. Robert L. Kane, MD, Tatyana A. Shamliyan, MD, MS, Christine Mueller, PHD, RN, Sue Duval, PhD, Timothy J Wilt, MD, MPH, The Association of Registered Nurse Staffing Levels and Patient Outcomes, 45 Medical Care 1195 (2007).

52. Id. at 1197.

53. Id.

54. Id.

55. Id.

56. Id. at 1202.

obstacle to quality patient care.[57] A concerning 71% of RNs indicated that they do not have time to give adequate attention to each patient.[58] Surely, this lack of time for patient care is directly related to the survey's most alarming result: 83% of respondents answered that the quality of care in Massachusetts has deteriorated over the past year.[59]

Higher nurse-to-patient ratios are also associated with lower rates of burnout and job dissatisfaction amongst RNs. One study examined survey responses from nurses across 168 hospitals to discern the association between staffing ratios and RNs' perceptions of their quality of life at work.[60] The paper found that: "[h]igher emotional exhaustion and greater job dissatisfaction in nurses were strongly and significantly associated with patient-to-nurse ratios."[61] The study concluded that enhanced nurse-to-patient ratios could represent a powerful tool for increasing RN retention.[62] The Office of the Surgeon General recognized this fact in its recent advisory on

57. Massachusetts Nurses Association, Massachusetts Nurses Warn of Rapidly Deteriorating Patient Care Quality and Widespread Unsafe Conditions as they Call for Improvements to Staffing, Pay and Benefits in Latest 'State of Nursing' Survey Released for National Nurses Week, https://www.massnurses.org/news-and-events/p/openItem/12421, (last visited August 30, 2022).

58. Id.

59. Id.

60. Linda H. Aiken, PhD, RN, Sean P. Clarke, PhD, RN, Douglas M. Sloane, PhD, Julie Sochalski, PhD, RN, Jeffrey H, MD, Phd, Hospital Nurse Staffing and Patient Mortality, Nurse Burnout, and Job Dissatisfaction, 288 JAMA 1987, 1988 (2002).

61. Id. at 1990.

62. Id. at 1192-93.

healthcare worker burnout out where it observed that adequate staffing is "critical to protect and sustain health workers and communities."[63]

It should be uncontroversial that RN staffing levels are causally related to the well-being of both nurses and their patients. Without enough fellow nurses on a shift, RNs cannot possibly devote the unwavering focus to patients that their time-sensitive, detail-oriented work requires. The US already faces pervasive RN understaffing, a problem that has been aggravated by the Covid-19 pandemic. Both the American Association of Colleges of Nursing and the American Nursing Association have warned that there are simply not enough nurses remaining in or entering the profession; indeed the latter organization has publicly urged US Department of Health and Human Services to designate the RN shortage a national crisis.[64] The Bureau of Labor and Statistics predicts 194,500 RN job openings each year until 2029.[65] Eliminating overtime pay for more

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63. U.S. Surgeon General, Addressing Health Worker Burnout (2022) at 35, https://www.hhs.gov/sites/default/files/health-worker-wellbeing-advisory.pdf, (last visited August 30, 2022).

64. American Association of Colleges of Nursing, Nursing Shortage, https://www.aacnnursing.org/news-information/fact-sheets/nursing-shortage, (last visited August 30, 2022); American Nursing Association, ANA Urges US Department of Health and Human Services to Declare Nurse Staffing Shortage a National Crisis, https://www.nursingworld.org/news/news-releases/2021/ana-urges-us-department-of-health-and-human-services-to-declare-nurse-staffing-shortage-a-national-crisis/(last visited August 30, 2022).

65. U.S. Bureau of Labor Statistics, Occupational Outlook Handbook: Registered Nurses, https://www.bls.gov/ooh/healthcare/registered-nurses.htm, (last visited August 30, 2022).

experienced nurses would surely intensify this problem by driving attrition and rendering the profession less attractive to potential hires. Moreover, without overtime's financial disincentive to overworking current employees, hospitals would be even less likely to redress staffing issues by hiring additional RNs.

CONCLUSION

The text of the regulations is unambiguous; Hewitt cannot be exempt because he was not compensated on a salary basis. Even if the Court does look to the FLSA's underlying purpose, the historical context reveals that the overtime provision was intended to promote national wellbeing by discouraging overwork. The petitioners' reading of the HCE exemption would financially devastate nurses and imperil the health of patients. For the foregoing reasons, the decision of the Fifth Circuit should be affirmed.

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Respectfully submitted,

Nicholas D. Wanger
Counsel of Record
McDonald Lamond Canzoneri
352 Turnpike Road, Suite 210
Southborough, Massachusetts 01772
(508) 485-6600
nwanger@masslaborlawyers.com

Counsel for Amicus Curiae