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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The question presented here is whether an executive employee earning over $200,000 annually who is deemed exempt under the FLSA's HCE regulation (29 C.F.R. §541.601) nonetheless remains non-exempt because the niceties of how his handsome pay is calculated do not satisfy a separate regulation (29 C.F.R. §541.604) that imposes additional and conflicting requirements. The answer is plainly no. The HCE regulation is self-contained, structurally separate, expressly cross-references other provisions but not §541.604, and on its face allows total compensation to dwarf guaranteed salary in proportions precluded by §541.604(b)'s reasonable-relationship requirement. Moreover, superimposing §541.604 onto the HCE regulation would contradict the statutory and regulatory purposes, ignore the regulatory history, upset settled industry practices, and produce windfalls for high earners.

Respondent and the government seek to defend the judgment below by running away from the question presented. Indeed, they both literally rewrite it and insist that the dispositive issue is whether Respondent was paid on a salary basis consistent with §541.602. But Respondent pressed that same argument in his brief in opposition to no avail. For good reason: Not only does Helix satisfy §541.602, but the decision below expressly *assumed* as much. While Respondent and the government claim that Helix has "misread" the decision below, they ignore that the Fifth Circuit withdrew an earlier decision relying on §541.602 and replaced it with one that created a circuit split on the question presented: *i.e.*, whether

§541.604 applies to the streamlined exemption set forth in §541.601.

When Respondent and the government belatedly turn to that issue, they offer precious little reason why §541.604(b) should limit the HCE regulation. They claim that §541.604(b) applies by its own terms to the HCE regulation, but that ignores the HCE regulation's self-contained nature and express cross-references, and it makes a hash of the regulatory history. It also ignores that the HCE regulation affirmatively allows guaranteed salary to be less than one-fourth of total compensation, while §541.604(b) demands a two-thirds ratio. Worse still, Respondent and the government would put the HCE regulation on a collision course with the FLSA.

As Helix's *amici* have confirmed, affirmance would disrupt not only the oil patch, but numerous other industries to boot. That course has nothing to recommend it. Individuals like Respondent who concededly perform exempt functions and earn six figures, and are guaranteed far more than the weekly minimum, are the last workers who should receive a massive windfall. The Court should reverse.

ARGUMENT

I. Respondent Satisfies The HCE Regulation And Is Therefore Deemed Exempt.

This Court granted certiorari to decide whether an employee who satisfies the HCE regulation's three-part test is thereby *deemed* exempt (as the HCE regulation provides), or whether he is exempt only if he *also* satisfies the additional and conflicting requirements of §541.604(b) (which the HCE regulation never references). As Helix's certiorari-

stage filings explained, *see* Pet.22-25; Cert.Reply.2-6, this case is an excellent vehicle for review of the question presented because the first two parts of the HCE test—duties and salary level—are undisputed and the third was assumed satisfied by the court below. Respondent never mentions the first two parts, presumably because he recognizes the incongruity of demanding overtime windfalls for a conceded supervisor earning several multiples of the national average for household income.

Nonetheless, Respondent (now joined by the government) insists that "[t]his case is about the salary-basis test," *i.e.*, the third component of the HCE test. Resp.Br.1; *see* U.S.Br.3. But the question presented tells a different story, precisely because the Fifth Circuit assumed that Respondent received more than the weekly minimum on a salary basis and rested its decision on the interaction between §§541.601 and 541.604(b). If Respondent's effort to change the subject and revive the long-since-withdrawn panel opinion focusing on §541.602 sounds familiar, it should, because Respondent asserted it as his main ground for opposing certiorari. *See* BIO.12-16. "In granting certiorari," this Court "necessarily considered and rejected" those arguments. *United States v. Williams*, 504 U.S. 36, 40 (1992).

The fact that Respondent and the government nonetheless devote page after page to the salary-basis argument is a powerful testament to how little they have to say about the question presented or in defense of the actual decision below. But their salary-basis argument is wrong in all events.

The HCE regulation does *not* require an employee to receive all or even most of her compensation on a salary basis. To the contrary, the HCE regulation expressly allows workers making $100,000 in "total annual compensation" to receive as little as $455 per week—or $23,660 annually—on a salary basis, thus drawing a critical distinction between compensation and salary. Rather than require an employee to be paid principally or exclusively on a salary basis, the HCE regulation simply requires an employee's total compensation to "*include* at least" $455 "paid on a salary … basis" during any week in which an employee works. 29 C.F.R. §541.601(b)(1) (emphasis added).[1]

The expressly incorporated provisions of §541.602 likewise do not require an employee to receive all or most of her compensation on a salary basis. They provide that the employee must "[1] regularly receive[] each pay period on a weekly, or less frequent basis, [2] a predetermined amount constituting all *or part* of the employee's compensation, [3] which amount is not subject to reduction because of variations in the quality or quantity of the work performed." *Id.* §541.602(a) (emphasis added). For any week in which he worked, Respondent received a predetermined amount (his substantial daily rate of between $963 and $1,341) in paychecks received every other week, without reduction for the quality or quantity of his work. In most weeks, he received substantially more compensation because he worked more than one day, and thus received a predetermined guaranteed salary

[1] "Exempt employees need not be paid for any workweek in which they perform no work." 29 C.F.R. §541.602(a).

amount plus additional nondiscretionary compensation. But all that matters for satisfying the HCE regulation is that in every week in which he worked, he received a predetermined, non-reduceable payment well in excess of the HCE regulation's weekly minimum.

Respondent's and the government's objections to that straightforward conclusion are as incorrect as they are irrelevant to the question presented. They principally argue that because Respondent's total "paycheck … was directly tied to how much he worked," Helix violated §541.602's language explaining that "an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." Resp.Br.19; *see* U.S.Br.15, 19-20. But that argument conflates "compensation" with "salary." As noted, the two concepts are distinct, as the regulations make pellucidly clear. *See, e.g.*, 29 C.F.R. §541.602(a) (payments made on a "salary basis" may constitute "all *or part* of the employee's compensation"); *id.* §541.601(b)(1) ("'Total annual compensation' must *include* at least $455 per week paid on a salary … basis," and may "also include … other nondiscretionary compensation.") (emphases added). While the amount of Respondent's total *compensation* permissibly hinged upon how much he worked, his *salary* (*i.e.*, the amount guaranteed each week he worked) did not, and he received that "full

salary" for every week in which "he worked a single second of a day." Pet.App.41 (Jones, J., dissenting).[2]

Respondent and the government also make the text-defying claim that the phrase "*receives* each pay period on a weekly, or less frequent basis, a predetermined amount" does "not" "refer[] to the … frequency of … payment," *i.e.*, how often the worker receives her pay, but rather to the "method of calculating" the "predetermined amount"—and thus Helix impermissibly "'calculated'" his pay "'*more* frequently than weekly.'" U.S.Br.17; *see* Resp.Br.19-21. The notion that receives means calculates—and not receives—is an "absurdity … at war with the English language." *United States v. Castleman*, 572 U.S. 157, 179 (2014) (Scalia, J., concurring in part).

That reading ignores that the regulations know how to expressly reference the way pay is "computed" or calculated and do not use "receives" for that purpose. *See, e.g.,* 29 C.F.R. §541.604(b). Moreover, that reading ignores that no comma separates "receives" from the adverbial clause, but a comma *does* separate the adverbial clause from "a predetermined amount." Reading the adverbial clause as modifying a phrase from which it is separated by a comma, instead of the verb it directly follows, would trammel rules of grammar and sensible construction. Finally, that reading contradicts past Labor Department

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[2] The "full salary" language thus reinforces the requirement that salary-basis pay cannot be reduced for the "quantity of work performed." Respondent's contrary reading would cause this language to contradict the express guarantee that payment on a salary basis may constitute all *or part* of an employee's compensation.

statements, which have described §541.602, consistent with its plain meaning, as requiring employees to be "*paid* weekly or less frequently." Dep't of Labor, Opinion Letter FLSA2020-2, at 3 (Jan. 7, 2020) (emphasis added).

Simply put, nothing in the HCE regulation or §541.602 precludes employers from calculating a supervisor's generous pay based on day rates that exceed the regulatory weekly minimum. Indeed, Helix could accurately describe Respondent's day rate as a weekly guarantee (and if it did, the government's objection would seemingly disappear). A supervisor, like Respondent, whose pay is calculated based on a day rate above the weekly minimum receives more than enough on a salary basis to satisfy the HCE regulation.[3]

Respondent finishes with a plea for *Auer* deference grounded in a single sentence (never mentioned below) in the 100-plus-page preamble to the 2004 Final Rule. *See* Resp.Br.26-27 (citing *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,183 (Apr. 23, 2004)); *see also* U.S.Br.21-22. That sentence is far from clear, but deferring to it would strain *Auer* deference well past the breaking point—if *Auer* really

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[3] Respondent seeks to decouple the salary-basis test from the weekly minimum, but that does not work. The HCE regulation does not require a worker to be paid on a salary basis in the abstract. It expressly allows most compensation to be on a non-salary basis as long as it includes at least a weekly minimum on a salary basis. The HCE regulation's *only* salary-basis test is the weekly minimum.

means that regulated parties cannot rely on the plain text of the HCE regulation, which distinguishes between compensation and salary and addresses when pay is received, not how it is calculated, then *Auer* should be overruled.

Respondent and the government fleetingly claim that Helix has "misquote[d]" and "misread" the decision below.[4] Resp.Br.30 n.8; U.S.Br.23. But this dispute was fully ventilated at the certiorari stage, and the decision below is clear. When addressing Helix's argument that Helix "does not have to comply with §541.604(b) because it complies with §541.602," the majority "accept[ed] Helix's premise about §541.602"—*viz.*, that Helix had "complie[d]" with it, rendering Respondent "otherwise 'exempt'"—but proceeded to hold Respondent non-exempt anyway because Helix failed to comply with §541.604(b). Pet.App.16. That is why the majority opinion (unlike the withdrawn panel opinion) does not state its holding in terms of §541.602, but says: "[W]e hold that, when it comes to daily-rate employees like [Respondent], Helix must comply with §541.604(b)." Pet.App.5. That is why Judge Ho's concurrence says: "The court today holds that [Respondent] is not exempt from overtime … unless his employer … compensates him in accordance with 29 C.F.R. §541.604(b)." Pet.App.21. And that is why Judge Jones' dissent says: "The question before us is

[4] The government resorts to its own "misquoting" in making this argument. It *twice* uses a "citation omitted" parenthetical to suggest that the majority found §541.602 unsatisfied. U.S.Br.10, 15. But the citation omitted from the government's brief in both instances is to §541.604(b), not §541.602. *See* Pet.App.11.

whether §541.604 should apply to day rate employees who are otherwise obviously exempt under §541.601's highly compensated employee provision." Pet.App.61 (Jones, J. dissenting).

Respondent and the government downplay the majority's holding as one reached in the "alternative." U.S.Br.23-24; *see* Resp.Br.30 n.8. But the other supposed "holding" did not mention §541.602 and emphasized that "the only way" to satisfy the HCE regulation "is to comply with §541.604(b)." Pet.App.15-16. All roads lead to the question presented.

II. The Separate Requirements Of 29 C.F.R. §541.604 Do Not Apply To The HCE Regulation.

Respondent's and the government's effort to run away from the question presented is understandable: The text, structure, history, and purpose of the HCE regulation and the FLSA all confirm that §541.604's additional and conflicting requirements do not apply to the HCE regulation.

A. The Regulatory Text, Structure, and History Make Clear That §541.604 Does Not Apply to the HCE Regulation.

1. Respondent and the government claim that there is no "textual" reason why §541.604(b) should not apply to the HCE regulation. U.S.Br.26; *see* Resp.Br.29-30. There are, however, multiple textual reasons why an employee whose compensation and duties satisfy the HCE regulation's express requirements, which allow total compensation to dwarf guaranteed salary, should be "deemed exempt," 29 C.F.R. §541.601(a), without satisfying §541.604(b)'s

demand for a reasonable relationship between guaranteed salary and other compensation.

Although Respondent acknowledges that the HCE regulation "deem[s]" employees who satisfy its requirements exempt, he claims that text "does nothing for Helix because a condition for being deemed exempt is compliance with the salary basis requirement," of which §541.604(b) is purportedly a "proviso." Resp.Br.26, 34.

But the text of HCE regulation explicitly addresses the extent to which salary-basis pay is relevant, and it does not mention or cross-reference §541.604(b). Instead, the HCE regulation provides that "'[t]otal annual compensation' must include at least" the weekly regulatory minimum "on a salary … basis *as set forth in §541.602*." 29 C.F.R. §541.601(b)(1) (2020) (emphasis added).[5] Here, Respondent's day rate was well above the weekly minimum, and the Fifth Circuit assumed (correctly) that the day rate was paid on a salary basis as set forth in §541.602. That should have been the end of the matter, as there is no textual basis to go further and incorporate the conflicting requirements of §541.604(b). The HCE regulation cross-references multiple other provisions, but not §541.604. That differential treatment should be given effect. *See*

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[5] Respondent and the government observe that, before 2020, the HCE regulation did not expressly cross-reference §541.602. *See* Resp.Br.34; U.S.Br.27. But as the government concedes, the addition of the express cross-reference "did not materially alter" the pre-2020 version, U.S.Br.3 n.1, 27, but clarified that it always incorporated §541.602's requirements. No version—pre- or post-2020–cross-references §541.604(b).

Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 107-11 (2012). Equally telling, when a subsection of an expressly cross-referenced provision could frustrate the simplicity or flexibility authorized by the HCE regulation—as with §541.602(a)(3)'s limited authorization for discretionary bonuses and different approach to year-end payments—the problematic subsection is expressly carved out. It makes no sense to incorporate §541.604(b), which poses a far greater conflict with the HCE regulation, in the absence of any cross-reference.

Moreover, §541.602 itself provides no textual basis for incorporating §541.604(b). Not only were §541.604(b)'s provisions separated out from §541.602 at the precise moment the HCE regulation was promulgated, *see infra*, but §541.602 includes an exhaustive list of "exceptions" to the "salary-basis requirement," 29 C.F.R. §541.602(b), and that list never mentions or cross-references §541.604(b).

Respondent and the government nevertheless claim that "no express cross-reference … is necessary" because §541.604(b) applies to the HCE regulation "by its own terms," just as it applies to "the standard EAP regulations." U.S.Br.27-28; *see* Resp.Br.34. But that theory ignores that the HCE regulation speaks directly to the relationship between guaranteed salary and total compensation, and expressly allows total compensation to dwarf the guaranteed salary in ways that could never satisfy §541.604(b)'s reasonable-relationship test. There is no comparable language expressly authorizing an "unreasonable relationship" in the standard EAP regulations. Moreover, the standard EAP regulations lack the "deemed exempt"

language that underscores the HCE regulation's stand-alone nature.

Respondent and the government completely ignore the regulatory text explaining that §541.604(b) applies only to *non*-highly compensated employees. As Judge Jones emphasized below, *see* Pet.App.45-46, 53-54 (Jones, J. dissenting), the introductory statement to Part 541—§541.0—enumerates the different exemptions that potentially apply to *non*-highly compensated employees, and it expressly states that the provisions in "Subpart G" (which includes §541.604(b)) are generally "applicable" to them. 29 C.F.R. §541.0(b). But §541.0 *then* states that Subpart G "*also* contains" an entirely *separate* "provision for exempting certain highly compensated employees," *id.* (emphasis added), and it never hints that the restrictions in §541.604(b) apply to that separate provision. Respondent and the government have literally no response.

Instead, Respondent (and the government in passing) emphasize the absence of a cross-reference to §541.603—a provision that they claim "indisputably" applies to the HCE regulation. Resp.Br.16, 34; *see* U.S.Br.28 n.3. But neither cites any actual authority for that supposedly indisputable proposition, and no one (not the parties or any of the 18 Fifth Circuit judges) ever mentioned this provision below. No wonder: The HCE regulation and §541.604 cover the same ground—how an employee *qualifies* for exempt status—in duplicative and contradictory terms. Section 541.604(a) is duplicative (the HCE regulation itself makes clear that additional compensation is not disqualifying), and §541.604(b) is contradictory (the

HCE regulation authorizes relationships between total compensation and guaranteed salary that §541.604(b) treats as unreasonable). The absence of a cross-reference in those circumstances is significant. Section 541.603, in contrast, addresses an issue not in dispute here on which the HCE regulation is silent: namely, how an employer can lose an exemption by making improper deductions.[6] Thus, even if §541.603 applies to highly compensated employees (which seems plausible, but not indisputable), it produces neither duplication nor contradiction (nor the absurd result of denying exemptions to executives making six figures and guaranteed well in excess of the weekly minimum).

While Respondent and the government deny that the HCE regulation is self-contained, they cannot explain its subsection (d), which replicates §541.3 in providing that blue-collar workers remain non-exempt. *Compare* 29 C.F.R. §541.601(d) *with id.* §541.3(a). The government does not even try, essentially conceding that its view renders an entire subsection and over 70 words of regulatory text superfluous. Respondent protests that the two provisions "address different issues" and are in "different subparts." Resp.Br.36-37. But the issue—exemption—is the same, the workers are the same, and §541.3(a) expressly states that it applies to "this part"—*i.e.*, Part 541, which includes the HCE regulation. Even so, the agency felt compelled to include a materially identical provision in §541.601(d). That was either wholly redundant or powerful

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[6] Helix never made any improper deductions, and Respondent never suggests otherwise.

evidence that the HCE regulation is a self-contained provision that deems employees exempt if they comply with the requirements of that standalone and streamlined exemption.[7]

2. The HCE regulation's textual clues are powerfully reinforced by its regulatory history. The salary-basis provision was previously codified in a regulatory section that included a subsection entitled "[m]inimum guarantee plus extras"—*i.e.*, what is now §541.604(a). But when the Labor Department created the HCE regulation in 2004 (with its own discussion of minimums and extras plus an express authorization for extras that dwarf the minimum guarantee), it spun off the minimum-guarantee-plus-extras subsection into its own separate section, while adding language expressly codifying the reasonable-relationship test, which previously was discussed only in a field handbook. *See* Pet'r.Br.11 n.4. It simultaneously crafted an HCE regulation that expressly referenced *only* the salary-basis test of §541.602, and said nothing of the newly separated §541.604 or its duplicative and contradictory provisions.

The government ignores this regulatory history altogether, and provides no explanation to detract from the obvious inference that §541.604 was carved out precisely so that the HCE regulation could incorporate the basic test of §541.602 without the duplicative and contradictory baggage of §541.604. Respondent's attempts to ignore this obvious inference are unavailing. He first emphasizes that §541.603

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[7] The HCE regulation's self-contained nature is reinforced by its repeated references to employees "qualify[ing]" for its exemption and being "exempt under this section."

was carved out and separately codified at the same time, and Helix's argument "cannot account for §541.603." Resp.Br.38. But of course it can: The agency plainly wanted to isolate the relevant salary-basis provisions so that they could be expressly incorporated into the HCE regulation while carving out provisions that addressed inapposite subjects (*e.g.*, §541.603) or addressed the same ground in duplicative and conflicting ways (*e.g.*, §541.604).

Respondent retreats to the suggestion that this was all just a "reorganization" signifying nothing. Resp.Br.38-39. But the HCE regulation was the obvious reason for this reorganization. That said, the point of this exegesis is not to distract from the regulatory text but to reinforce it. The HCE regulation is a standalone provision that deems employees exempt and affirmatively authorizes relationships between guaranteed salary and total compensation that §541.604(b) would treat as unreasonable. The HCE regulation likewise expressly cross-references §541.602 but not §541.604(b). All that text should be given effect no matter the regulatory history. The fact that the agency broke apart the two sections at the precise moment it incorporated one but not the other is just icing on the cake that removes all doubt about the plain text.

3. Respondent and the government have no adequate answer to the reality that §541.604(b)'s reasonable-relationship requirement contradicts the HCE regulation's promise that when it comes to highly compensated employees, total compensation may permissibly dwarf guaranteed salary. What the HCE regulation deems permissible, §541.604(b) classifies

as unreasonable. At least three manifestations of this basic conflict arise: (1) the HCE regulation permits one-fourth or far less of a highly compensated supervisor's overall compensation to come from a weekly guarantee, while §541.604(b) requires two-thirds of compensation to be guaranteed salary; (2) §541.604(b) limits "extras" to 50% of an employee's guaranteed weekly pay, which given the HCE regulation's high *annual* compensation threshold, would translate to a weekly minimum guarantee nearly triple the minimum weekly guarantee the HCE regulation expressly sets forth; and (3) requiring compliance with §541.604(b)'s two-thirds ratio would make it impossible to take advantage of the year-end catch-up payments expressly authorized in the HCE regulation.

Respondent claims that "[n]one of this is right." Resp.Br.40. But Respondent never actually disputes either the math or that this is *exactly* right for every employee like himself who is the subject of the circuit split. Indeed, he merely insists that these conflicts will disappear if a highly compensated employee's salary is calculated "weekly," Resp.Br.40—which concedes that these conflicts are real (and the HCE regulation will have to give way to the conflicting demands of §541.604(b)) unless employers change their practices and calculate their high-paid executives' pay on a weekly basis. *See Anani v. CVS RX Servs., Inc.*, 730 F.3d 146, 149 (2d Cir. 2013) (superimposing §541.604(b) renders §541.601 "essentially meaningless"). Moreover, Respondent never explains why it would make any sense to demand a reasonable relationship for a highly compensated worker guaranteed $1000 per-day, but

not for one guaranteed only $700 per-week (or $700 per-project, as §541.605's fee-based provision lacks a reasonable-relationship requirement).

The government concedes (with considerable understatement) that the percentage of guaranteed weekly pay required under the HCE regulation and §541.604(b) are "distinct ratios" and that only the latter requires a reasonable relationship, but it claims that the provisions are not actually "inconsistent." U.S.Br.28-29. In fact, they are "consistent" only in the sense that the employer can always comply with the more demanding ratio. But that renders the HCE regulation's promise of flexibility and simplicity illusory for employees like Respondent. And, like Respondent, the government never explains why a reasonable relationship is indispensable for a highly paid executive guaranteed $1000 a day, but entirely optional for one guaranteed only $700 a week.

The government also declares that §541.604(b)'s "requirement that the weekly guarantee be at least two-thirds of the employee's typical time-based compensation … has no connection" to the "nondiscretionary non-salary 'extras'" that the HCE regulation "includes within total annual compensation." U.S.Br.29-30 (emphases omitted). Wrong again: Under the HCE regulation, nondiscretionary extras "can take any form," including "daily" payments. Pet.App.51 (Jones, J., dissenting). Section 541.604(b) permits "daily" payments too, but subjects them to the reasonable-relationship requirement. 29 C.F.R. §541.604(b). Accordingly, when an employer guarantees a day-rate employee at least $455 each week on a salary basis

(which is all the HCE regulation requires) and makes additional nondiscretionary daily payments such that she earns $100,000 annually, imposing §541.604(b)'s two-thirds requirement would require the employer to increase the guaranteed weekly salary to $1,282.05 ($66,666.67 annually) to maintain the exemption, despite the HCE regulation's express promise that a $455 weekly guarantee suffices.

Finally, the government dismisses the "purported conflict[]" between the HCE regulation's year-end catch-up-payment provision and §541.604(b) as "nonexistent." U.S.Br.29. But it then concedes that an employer "may" make a supplemental payment during the final pay period to meet the HCE regulation's annual compensation threshold while an employer "may not" make any such payment under §541.604(b). U.S.Br.29. That is a conflict. Once again, the government avoids "inconsistency" only by allowing §541.604(b) to trump the HCE regulation and its promise of flexibility in making catch-up payments.

B. Respondent's View Undermines the Regulatory Purpose.

1. Respondent's problems do not end there, as his position undermines the basic function of both the HCE regulation and §541.604(b) in the regulatory scheme. In promulgating the HCE regulation, the Labor Department promised a "simplified," "short-cut test" for executives in the enviable position of bringing home over six-figures annually. 2004 Final Rule at 22,173, 22,175. But §541.604(b) adds considerable complexity and uncertainty, as its reasonable-relationship requirement went undefined until 2018.

Respondent suggests the added complexity bedevils only employers who calculate pay "by the hour, day, or shift." Resp.Br.42. But the agency promised employers a "straightforward and easy" rule for highly compensated employees as a "group," 2004 Final Rule at 22,175, and the HCE regulation says not one word about raising special hurdles for employers paying day rates, especially day rates above the weekly minimum.

Respondent and the government insist that the HCE regulation sought to streamline only the "duties standard." Resp.Br.43-44; U.S.Br.26. But that is demonstrably wrong. *See Anani*, 730 F.3d at 150. The HCE regulation deems employees exempt based on their duties *and* on annual compensation and weekly salary thresholds and went out of its way to streamline the calculation of those thresholds, excluding even relatively straightforward sums-certain like health benefits to foster simplicity. 2004 Final Rule at 22,175. The notion that the agency would nonetheless impose a complicated and undefined reasonable-relationship calculation blinks reality.

2. While the HCE regulation promises simplicity when supervisors earn six-figures and above, the focus of §541.604(b) is quite different. It is targeted to employees with relatively modest annual compensation (below the HCE regulation's annual threshold) and relatively modest hourly, day, or shift rates (below its weekly minimum), and it provides a pathway for exemption even to those workers if the employer "also includes" a weekly guarantee. Respondent and the government insist that

§541.604(b) "applies without qualification to all employees whose pay is 'computed on an hourly, a daily, or a shift basis.'" Resp.Br.28; *see* U.S.Br.24-26. But that is question-begging and ignores that an employer who pays a day rate above the weekly minimum satisfies the terms of the HCE regulation (and §541.602) without the need to give any *additional* guarantee of weekly income. They also fail to account for §541.604(b)'s permissive "may" language, which they improperly convert into "may not unless," or that the only textual example in the subsection addresses a worker who could not satisfy the weekly minimum based on his shift rate without a separate minimum guarantee.

Respondent and the government thus are dead wrong to suggest that Helix's interpretation renders §541.604(b) "surplusage." Resp.Br.28; *see* U.S.Br.18-19. Section 541.602 standing alone provides no possibility for an employee to be treated as exempt if her hourly, daily, or shift rate is below the weekly regulatory minimum. *See* 29 C.F.R. §541.602; *id.* §541.600. By providing a path for treating those otherwise-non-exempt employees as exempt if the employer provides a separate minimum weekly guarantee, §541.604(b) plays a significant role. *See Litz v. Saint Consulting Grp., Inc.*, 772 F.3d 1, 5 (1st Cir. 2014).

C. Requiring Overtime Pay for Highly Compensated Supervisors Would Divorce the Regulations From the Statute.

If any doubt remained about the interaction between the HCE regulation and §541.604, the FLSA's

text would eliminate it. The FLSA broadly exempts "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1). As much as Respondent would like to convert the inquiry into whether a worker receives "a bona fide salary," Resp.Br.4-5, the statutory text focuses on "duties not dollars," Pet.App.55 (Jones, J., dissenting). Salary details may be useful in ensuring that relatively low-paid workers are bona fide executives, *see* Pet'r.Br.42, but nothing in the statute authorizes denying exemptions to well-paid supervisors performing concededly exempt functions based on trivial details about the calculation of their six-figure pay.

Respondent's lead response is that Helix has somehow "waived" its right to avert to the statutory text. Resp.Br.44. The government does not join in that "waiver" argument for good reason. In a dispute about the scope of a regulation, neither party can waive the right to contend that its interpretation is more consonant with the statute. That is just an additional argument, not a new claim or defense. *See Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992). Moreover, this argument is not new; it was both pressed and passed upon below. *See, e.g.*, CA5.Appellees'.Supp.En.Banc.Br.10 ("[T]he FLSA's statutory text contain[s] no salary requirement."); CA5.En.Banc.Oral.Arg.37:26-39[8] ("These regulations should be harmonized with the statute. The statute does not require any element of compensation to be shown if people are otherwise performing exempt

[8] https://bit.ly/3q66b83.

duties."); Pet.App.18-20; Pet.App.21-23 (Ho, J., concurring); Pet.App.55-61 (Jones, J., dissenting).

Respondent dismisses Helix's argument as "unserious," in part because it "do[es] not address … *Chevron*." Resp.Br.4, 45. But the same criticism could be leveled at the government, which does not invoke *Chevron*. The reason for the omission is obvious: Even during its salad days, *Chevron* did not empower agencies to take text that mentions only capacity, not salary-calculation details, and deny exemptions to individuals in exempt capacities based on the minutiae of their salary calculations. This is not a step-one or step-two case, but an agency effort to fixate on salary details when the statutory text promises an exemption to *any* employee operating in an executive capacity. The yawning gap Respondent's position creates between the statute and the regulatory rule is thus deadly serious. Indeed, even Judge Ho, who authored the opinion below, acknowledged that the statutory text supports an exemption. *See* BIO.App.25a ("If we were limited to the statutes enacted by Congress, we might very well have ruled for Helix in this matter.").

Respondent and the government suggest that the word "capacity" in §213(a)(1) empowers the agency to dictate how highly compensated workers' six-figure pay is calculated. *See* Resp.Br.46; U.S.Br.31. But the Labor Department previously (and recently) held a different view: "[T]he exemption should turn on an analysis of their actual functions, not their salaries, as Congress instructed." *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*,

84 Fed. Reg. 51,230, 51,238 (Sept. 27, 2019). The agency had it right then, as "Congress unambiguously directed the Department to exempt from overtime pay employees who perform 'bona fide executive, administrative, or professional capacity' *duties*." *Nevada v. Dep't of Lab.*, 275 F.Supp.3d 795, 806 (E.D. Tex. 2017) (emphasis added).

Notwithstanding its prior statements, the government declares that Congress "ratified the salary-basis requirement" in 1949. U.S.Br.31. That ratification argument has at least two fatal flaws. First, the question here is whether superimposing the relationship-relationship test onto the HCE regulation would divorce the latter regulation from the statutory text. Congress could not have ratified a 2004 regulation in 1949 amendments without a time machine. Second, this ratification argument is entirely circular. As this Court noted, "[w]hen Congress amended the [FLSA] in 1949 it provided that pre-1949 rulings and interpretations by the Administrator should remain in effect *unless inconsistent with the statute as amended*." *Mitchell v. Ky. Fin. Co.*, 359 U.S. 290, 292 (1959) (emphasis added). Thus, ratification is no answer to the argument that the regulation is divorced from and inconsistent with the statute.

Respondent's position also contradicts the FLSA's purpose more broadly, which is to help underpaid and overworked blue-collar employees, not to entitle well-paid supervisors to windfalls based on payment-calculation details. Respondent dismisses the statutory concern for "substandard wages" as "unenumerated," Resp.Br.46, but the FLSA itself

"declare[s]" that its purpose is to provide "the minimum standard of living necessary for health, efficiency, and general well-being of workers," 29 U.S.C. §202. And this Court recognized as much in the context of workers making $70,000, a fraction of Respondent's pay. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 147 (2012). Finally, the FLSA decidedly did not seek to "spread employment" among those performing bona fide executive duties, which is why it exempted them from the overtime provisions. *Contra* Resp.Br.46.

III. If Allowed To Stand, The Fifth Circuit's Decision Will Upset Longstanding Practices And Provide Windfalls For High Earners.

Affirming the decision below would have far-reaching deleterious consequences across multiple industries. The details of how supervisors' six-figure pay is calculated have no relevance to the statutory text or legitimate regulatory purposes, but they do matter to workers and employers in a wide range of industries where on-the-ground realities have long prompted employers to calculate handsome compensation in ways that do not conform to the government's apparent preference for weekly salaries. To start, affirmance "will drive up oil and gas production costs, potentially slow down production, and threaten consultant jobs nationwide." TXOGA-API.Amicus.Br.30. The resource exploration and production industry could not easily mitigate such disruptions because its "economic model … centers around the daily costs of operations." IPAA.Amicus.Br.3. The problems run deeper, as a variety of different industries have adapted their pay

practices to the peculiarities of their work settings. It is no accident that other circuits have confronted the question presented in contexts far removed from the oil patch. Chamber.Amicus.Br.13-15.

Respondent characterizes these concerns as "irrelevant policy arguments." Resp.Br.18, 48-49. But this Court has routinely considered longstanding industry practices in construing the FLSA. *See, e.g.*, *Christopher*, 567 U.S. at 158 ("[W]hile it may be 'possible for an entire industry to be in violation of the [FLSA] for a long time'" with no one noticing, "the 'more plausible hypothesis' is that … the industry's practice" is not "unlawful."). That sound practice is no departure from textualism, as the understanding of the regulated community, which does not lightly court the draconian consequences of FLSA non-compliance, provides powerful evidence of the public meaning of the regulatory text.

Respondent and the government suggest that at least the resource industry was on notice based on "various lower court opinions" in private-plaintiff litigation. Resp.Br.50; *see* U.S.Br.33. But they do not point to any prior enforcement actions, and none of those lower-court opinions resolved the question presented; indeed, many never even mentioned the HCE regulation. *See* Pet.App.13-15 & n.3.

The government promises that Helix and others in the resource industry have "several options" to retool the compensation "'custom[s] … prevalent in the industry.'" U.S.Br.33-34; *accord* Resp.Br.52-53. Of course, that argument underscores that affirmance would upend longstanding practices. And those "options"—*e.g.*, raising the guaranteed weekly salary

to "$4,667" or "hir[ing] one or more additional toolpushers," U.S.Br.33-34; Resp.Br.52—would increase costs and ignore the practical realities of the industry. There is only so much room for idle employees on a rig, and multi-day off-shore hitches do not neatly map on to the calendar week. Simply put, there are good practical reasons why virtually everything in the offshore world is calculated by the day.

Finally, Respondent laments that Helix's view could have negative consequences for other employees. Resp.Br.41. But if those employees' hourly, day, or shift rates meet or exceed the weekly regulatory minimum, if they perform executive duties, and if they earn six-figures annually, there is nothing unusual about classifying them as exempt. Indeed, most workers would welcome those "negative" consequences.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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