No. __

In The

Supreme Court of the United States

MARK WILSON,

Petitioner,

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fair Labor Standards Act, 29 U.S.C. 201, *et seq.* ("FLSA") requires the payment of overtime wages to the vast majority of American workers, unless those workers fall under an applicable exemption. The exemption alleged to apply to Petitioner Wilson requires that he be paid on a "salary basis." Pursuant to the legislative rulemaking authority delegated to it by Congress, the Department of Labor set forth the very limited circumstances when an employer can pay additional compensation to salaried employees without violating the "salary basis" test. 29 C.F.R. §541.602(a)-(b).

Mr. Wilson was paid on a salary plus day rate basis, but the amount of his "salary" is just 28.5% ($28,812.90) of his compensation while the daily pay is 71.5% ($72,150) of his total compensation ($100,962.90) (a ratio of 1 to 3.5).

The questions presented are:

1. Whether an employer who pays an employee a guaranteed weekly amount that exceeds the salary level test and who is also paid additional compensation on an hourly, daily or per shift basis must meet the "reasonable relationship" test of 29 C.F.R. § 541.604(b) to be paid on a salary basis for purposes of the executive, administrative, or professional exemptions to the FLSA and its implementing regulations, where that additional compensation's relationship to the guaranteed weekly pay exceeds a ratio of 3:1?

2. Whether payment of additional compensation which is based on hours, days, or shifts meets the salary basis test where those payments are for work performed during the employee's normal workweek and not for work beyond the employee's normal workweek as required in 29 C.F.R. § 541.604(a)?

PARTIES TO THE PROCEEDING

Petitioner Mark Wilson was the appellee in the court below.

Respondent Schlumberger Technology Corporation was the appellant in the court below.

RELATED CASES

Hebert v. FMC *Techs., Inc.*, No. 22-20562, 2023 WL 4105427, at *2 (5th Cir. June 21, 2023). This case presents the same issues as the present matter and a petition for writ of certiorari is on file with the Court.

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The 10th Circuit's opinion is available at 80 F.4th 1170 (10th Cir. 2023). The district court's opinion is available at 2021 WL 2311667, (D. Colo. June 7, 2021), vacated and remanded, 80 F.4th 1170 (10th Cir. 2023).

JURISDICTION

The Tenth Circuit entered its decision on judgment on September 11, 2023. The last ruling on all timely filed petitions for rehearing was on October 27, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the appendix.

STATEMENT OF THE CASE

A. Statutory Background

Under the FLSA, "no employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of [forty] hours ... at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). Certain employees, however, are exempt from the overtime requirements of the Act. Exemptions are affirmative defenses, and the burden of establishing them rests squarely on the employer. *Corning Glass Works v.*

Brennan, 417 U.S. 188, 196-97 (1974).

One of the exemptions excuses an employer from its obligation to pay overtime to "any employee employed in a bona fide ... administrative capacity ...." 29 U.S.C. § 213(a)(1). To qualify for the administrative exemption, an employer must show, among other things, that it paid the employee on a salary basis. 29 C.F.R § 541.300(a) (1). The FLSA's salary-basis regulations are codified at 29 C.F.R § 541.600-541.606. The general rule, 29 C.F.R § 541.602(a), is that an employee is paid on a salary basis if he is paid *without* regard to the number of hours or days he works. *See*, 29 C.F.R § 541.602(a). If, though, the employee receives nonguaranteed extras on an hourly, daily or per-shift basis, the employer must comply with 29 C.F.R § 541.604(b) (appropriately titled, "Minimum guarantees plus extras"). Under that section, the employee's salary must bear a "reasonable relationship" to the amount he actually earns. The Labor Department has explained that this test is satisfied where "the ratio of actual earnings to guaranteed weekly salary" is no more than 1.5:1. U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2018-25 (Nov. 8, 2018).

B. Facts and Procedural History

Respondent STC is an oil and gas equipment and service company. Wilson was employed as a Measurement While Drilling Operator ("MWD"). (Aplt. App. Vol. 2 at 237-238.) He supported STC's customers, oil exploration companies drilling wells to produce gas and oil, by providing them surveys and logs transmitted from "down-hole" sensors at the rig site. To perform his job, Wilson was required to be at

the rig to assemble the units for deployment down-hole and to monitor the readings. The surveys provide information to the customer regarding the exact location of the drill along the desired drill path.

STC paid Wilson a guaranteed weekly amount in excess of $455 per week plus additional compensation based on the number of days Wilson worked on the rig. It is uncontested that Wilson's extra compensation was paid on a day rate basis. His testimony is replete with references to the day rate he received. (*See e.g.,* App. pp. Vol. 2, 275-277, 386-387). STC's own documents call the payment for working on a rig for a day the "Rig-Site **Day Rate** Bonus." (App. Vol. 1 at 72-76.) The bonus is paid to crew who report to the rig and work the assigned tour. *Id.* It is also referred to as a "day rate" on Wilson's pay statements, (Supp. App., Vol 1, pp., 1-45. When STC computed Wilson's actual pay, it was computed based on the number of days he worked for the day rate portion of his pay. (Supp. App., Vol. 1, pp. 1-45). Notably, Wilson's day rate pay was pay for work performed within the course of his normal workweek. STC did not pay the additional day rate amount for hours worked beyond the normal workweek. As Wilson's paychecks reflect, he received a guaranteed weekly amount and he also received day rate pay for the same work. Because Wilson's pay was computed based on the number of days worked § 541.604(b) applies. Thus, the question is "whether [his] guaranteed weekly salary … has a "reasonable relationship" with this 'usual earnings' for the purposes of determining whether [he] is paid a salary[.]" Opinion Letter Fair Labor Standards Act (FLSA), 2018 WL 5921453, at *1.

Wilson filed suit alleging the FLSA entitled him to overtime pay. Defendants asserted Wilson was exempt under the administrative exemption. The case was tried to a jury from October 5-9, 2020. The jury unanimously found for Wilson on the basis of Instruction No. 10 which set forth the requirement that Wilson's guaranteed weekly amount must bear a "reasonable relationship" to the amount he actually earned. In short, the jury found STC did not pay Wilson on a salary basis - or *without* regard to the number of hours or days he worked, 29 C.F.R §§ 541.300(a)(1), 541.602(b) - an essential element of the administrative exemption defense. *Id.*

STC appealed to the 10th Circuit. The Panel found that STC's guaranteed weekly pay plus day rate pay system fell under 29 C.F.R. § 604(a) rather than § 604(b) and determined that Instruction 10 should not have been given. The panel found that that it is only when an employee's "**base** compensation is computed on an hourly, daily, or shift" basis that § 604(b) is applicable *Wilson v. Schlumberger Tech. Corp.*, 80 F.4th 1170, 1176 (10th Cir. 2023)

Wilson petitioned for rehearing *en banc.* The petition for rehearing was denied on October 25, 2023.

REASONS FOR GRANTING THE PETITION

This case presents a clear circuit split on an important and recurring question concerning whether an employee is paid on a salary basis for purposes of the FLSA's executive, administrative, or professional "EAP") exemptions and its implementing regulations, 29 C.F.R. § 541.604(b), if, in addition to his guaranteed weekly pay-or "salary"-the employee also

earns nonguaranteed extras on an hourly, daily or per-shift basis that are over three times the guaranteed weekly amount. Four circuits have now squarely addressed that question and provided contradictory answers. The Third and Sixth Circuits have answered it in the negative. The Tenth and the Fifth Circuits have answered it in the affirmative. The courts of appeals are plainly divided on how to apply this regulatory provision, warranting this Court's intervention.

The Tenth Circuit's decision is incorrect for several reasons. Among other things, this Court specifically said in *Helix* that § 541.602(a) - on which the Tenth Circuit relied to determine that Wilson was paid on a salary basis "applies *solely* to employees paid by the week (or longer) [,]" *Helix Energy Sols. Grp., Inc. v. Hewitt*, 143 S. Ct. 677, 685 (2023) (emphasis added). But since Wilson was not paid *"solely"* by the week, § 541.602(a) does not apply. Further, the additional day rate payments made by STC were for work that was within the normal workweek and § 602(a) only permits payments on an hourly, daily, or shift basis when those payments are for work that is beyond the normal workweek. The Tenth Circuit's decision also plainly conflicts with authority promulgated by the Labor Department. Whether and how § 541.604(b) and its "reasonable relationship" requirement apply when determining whether executive, administrative and professional employees are exempt, are important and recurring issues. If allowed to stand, the Tenth Circuit's interpretation would deprive workers at the heartland of the FLSA's protection the overtime pay to which they are lawfully entitled. The Court should consider and definitively resolve these

issues by granting plenary review and reversing.

I. The Tenth Circuit's Decision Reflects an Existing Circuit Split Regarding the Application of the "Reasonable Relationship" Test.

The Tenth Circuit held that an employee can be an exempt from the FLSA's overtime-pay requirements under 29 U.S.C. § 213(a)(1) even though the amount he actually earns is not reasonably related to his salary. See, 29 C.F.R. § 541.604(b) ("The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek."). That determination markedly departs from this Court's decision in *Helix* and two other courts of appeals to squarely address the issue and authority promulgated by the Labor Department.

In *Helix*, an offshore oilfield worker sued for unpaid overtime under the FLSA. 143 S.Ct. at 684. In response, the employer claimed the employee was "exempt from the FLSA because he qualified as a bona fide executive." *Id.* Like in this case, the dispute in *Helix* "turned solely on whether [the employee] was paid on a salary basis." *Id.* This Court analyzed the relevant regulatory provisions, 29 C.F.R §§ 541.602(a), 541.604(b), and ultimately concluded that an employee is not paid on a salary basis for purposes the EAP exemptions unless his salary

> bear[s] a reasonable relationship to the amount actually earned in a typical week-more specifically[, it] must be roughly equivalent to the employee's usual

> earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek. Those conditions create a compensation system functioning much like a true salary-a steady stream of pay, which the employer cannot much vary and the employee may thus rely on week after week.

Helix, 143 S.Ct. at 684 (internal citations and quotations omitted). Therefore, Tenth Circuit's decision to ignore the part of Wilson's pay that was calculated on a daily basis and that comprised a significant portion of his total compensation-and to ignore § 541.604 (b)-conflicts with *Helix*. App. 4a-6a.

In *Hughes v. Gulf Interstate Field Servs.*, 878 F.3d 183 (6th Cir. 2017), two oilfield workers sued for unpaid overtime under the FLSA. *Id.* at 185. Those employees seemed to receive a "steady stream of pay, which the employer cannot much vary[,]" *Helix*, 143 S.Ct. at 684, but it was not exactly clear because they, from time to time, received additional compensation for days spent working *12 beyond their normal workweek. *Hughes*, 878 F.3d at 186-87 ("During the months that they worked, ... there does not appear to have been a week during which [the employees] did not receive pay consistent with a guarantee of a weekly salary equivalent to six days of work at ten hours per day."); *see also, id.* at 185-86. The Sixth Circuit held that because the employees' pay varied and they did "not (sic) clearly" receive a salary calculated on weekly basis without regard to the number of hours or days worked, *id.* at 189, the employer had to establish that a reasonable

relationship existed between the salary amount "and the amount actually earned [,]" *id.* (citing 29 C.F.R § 541.604(b)).

In *Brock v. Claridge Hotel & Casino*, 846 F.3d 180 (3d Cir. 1988), the Secretary of Labor sued for unpaid overtime on behalf of certain casino employees who were guaranteed a $250 weekly salary but also received additional compensation "paid by the hour[]" for time spent working beyond their normal workweek. *Id.* at 181-82. The Secretary conceded that the workers met the duties test for the FLSA's EAP exemptions but argued that the employees were still entitled to overtime pay because they failed the salary-basis test. *Id.* at 184. The Third Circuit agreed, explaining that the employer's argument that any wages paid above the guaranteed salary were permissible "additional compensation[,]" 29 C.F.R. § 541.604(a), was a "fundamentally incoherent" concept. *Claridge Hotel & Casino*, 846 F.3d at 184. It correctly found that where an "employee's usual weekly income far exceeds the 'salary' guarantee," he was not exempt regardless of what his duties were. *Id.* at 185.

The Tenth Circuit's decision vis-a-vis 29 C.F.R § 541.604(b)'s reasonable relationship test, App. 4a-6a, also conflicts with authority promulgated by the Department of Labor. See, U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2003-5 (ul. 9, 2003); see also, U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2018-25 (Nov. 8, 2018) (explaining that reasonable relationship applies where employee is guaranteed a weekly salary but receives additional compensation based on the quantity of work); see also,

U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2020-13 (Aug. 31, 2020) (discussing applicability of professional exemption to employees who are paid a day rate with additional hourly compensation).

In fact, just last year the Labor Department told this Court that "if a $455 weekly guarantee accompanying hourly-, daily-, or shift-based pay itself sufficed to satisfy Section 541.602(a)'s salary-basis test, Section 541.604(b)'s detailed provisions governing the type of guarantee needed-and, specifically, the reasonable-relationship requirement-would be rendered superfluous." Br. of United States at 18-19, Helix *Energy Sols. Gp., Inc. v. Hewitt*, No. 21-984 (U.S. Sep. 7, 2022); see also, *id.* at 20 ("Notably, the only 'additional compensation' that may be paid based on the time that an employee actually works is pay for 'work [performed] **beyond the normal workweek**,' 29 C.F.R. § 541.604(a) (emphasis added), not for days of work within the normal workweek.").

Clearly the Court should take this case under review to resolve the circuit split.

II. The 10th Circuit's Interpretation of the "Salary Basis" Regulations Conflicts with *Helix*, the DOL's Formal Guidance, and the Language of the Regulations.

A. The Panel Decision is in Direct Conflict with *Helix.*

The Panel's decision conflicts with *Helix* in a striking way. The Supreme Court held that § 604(b) is designed to ensure exempt employees (who enjoy neither minimum wage or overtime protections) are at least paid a "true salary," a "weekly payment

approximating what the employee usually earns." *Helix*, 598 U.S. at 55–56. In contrast, the Panel held any employee who is guaranteed at least the minimum weekly amount can have all remaining pay tied directly to the number of hours worked—even it bears no reasonable relationship to the amount they typically earn.

As a result, the Panel determined Appellee is paid on a "salary basis," not based on daily rates, even though the "salary" is just 28.5% ($28,812.90) of his compensation while the daily pay is 71.5%($72,150) of his total compensation ($100,962.90) (a ratio of 1 to 3.5). Based on *Helix*, this Court disagrees.

Helix involved individuals who were only paid a day rate and thus did not meet the salary basis test. This Court set forth how Helix could fix its pay scheme and be compliant with the FLSA's salary basis test. *Helix* at p. 60. Specifically, this Court noted Helix "could add to Hewitt's per-day rate a weekly guarantee that satisfies § 604(b)'s conditions." *Id.* A weekly guaranteed salary plus day rate pay is precisely the plan Wilson worked under at STC and at issue here. **And, this Court said last year that such a plan must satisfy § 604(b)'s conditions, including the reasonable relationship test.** The Panel decision says the opposite—indeed, it states Helix could just rename one day's pay a weekly "salary." So, while this Court says that a pay plan which pays a guaranteed weekly amount plus a day rate falls under § 604(b), the Panel decision effectively overturns this language.

The Panel held that because Wilson was paid a guaranteed weekly amount that was not subject to reduction based on number of days worked, then the

Court need look no further than 29 C.F.R. § 602(a) and § 604(a). In doing so, the Panel ignores that the vast majority of Wilson's actual pay is tied to this extra compensation which is paid based on the number of days worked.[1] The Panel cannot be correct about its position that if one component of the plan meets § 602(a), the discussion is over. If that were the case, when explaining that Helix could come into compliance if its plan added a weekly guarantee, this Court would not have also stated that the requirements of § 604(b) must also be met.

This Court's identified fix of combining a weekly guarantee with additional day rate payments also makes clear that § 604(b) cannot be read as applying "only to employees whose **base** compensation is computed on an hourly, daily, or shift basis" as the Panel decision holds. *Wilson v. Schlumberger Tech. Corp.*, No. 21-1231, 2023 WL 5839557, at *4 (10th Cir. Sept. 11, 2023) (emphasis added). Section 604(b) applies when an employee's "**earnings** [are] **computed** on an hourly, daily, or shift basis…." The Panel wholly substitutes the word "earnings" with "base compensation." The Panel defines "base compensation" as the guaranteed weekly amount or salary, thus rewriting the regulation to apply only when an employee's "salary" is computed on an hourly, daily, or shift basis.

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[1] As discussed *infra*., the day rates are not compensation for "hours worked beyond the normal workweek" as required by § 604(a). The day rate was paid for any day Wilson worked on a Rig without regard for whether those hours were beyond the normal workweek, thus putting STC's pay plan outside the scope § 604(a).

The term "earnings" is obviously NOT the term "salary." It is the "the amount actually earned" as compared to the "guaranteed amount" (a.k.a. the "salary"), also referred to in the same sentence. If there is any question that there is a distinction between "salary" and "earnings" that is intended by the regulation, one only need compare the version of the sentence included in the Notice of Proposed Rulemaking issued on March 31, 2003, with the final version of the regulation issued on April 23, 2004. The proposed language, *which was rejected,* said, "An exempt employee's **salary** may be **computed** on an hourly, a daily or a shift basis, consistent with the exemption and the salary basis requirement…." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 68 FR 15560-01, 2003 WL 1617356. The Panel decision substitutes the term "earnings" with "salary" which was specifically rejected by the DOL. STC computed Wilson's earnings ("the amount actually earned") by adding the weekly salary and the day rates based on the number of days worked. STC could not issue Wilson a paycheck without counting the number of days he worked. Thus his "earnings" were "computed" on a day rate basis for the overwhelming majority of the pay he received.

The Panel's reading of the regulations would mean the hybrid salary plus day rate plan this Court said would make Helix's plan compliant under § 604(b) if it met the conditions in the regulation could never even be considered under § 604(b). The Panel's decision thus creates an impermissible conflict with the *Helix* decision

B. The Panel's Definition of "Actual Pay" Conflicts with *Helix*.

In *Helix*, the Supreme Court stated the "amount actually earned" means "the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek." *Helix*, 598 U.S. at 47. But the Panel determined the terms "actual pay" and "actual compensation" do **not** refer to what employees are actually paid, but rather only to what the employer labels as "salary." *Wilson*, 2023 WL 5839557, at *5. Appellee respectfully submits "actual pay" (and "actual compensation") mean what an employee is "actually paid."

C. The Panel's Decision Ignores Important Text and Conflicts with the Department of Labor's Interpretation.

The Panel held "Mr. Wilson's rig-rate bonus fits within § 541.604(a) because the regulation expressly states that "additional compensation may be paid on any basis," including as a "flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis." § 541.604(a) (emphasis added)." But, respectfully, the Panel discounts, or simply ignores, key words that provide a world of context.

For example, the Department of Labor has confirmed (repeatedly) that § 604(a) means exactly what it says: Additional compensation "based on hours worked" must be "for work ***beyond*** **the normal workweek**." *See* 29 C.F.R. § 541.604(a). As the DOL told the Supreme Court in *Helix*:

> The quoted language reflects that an employee's total compensation may include

> "additional compensation"— such as a "commission" or a percentage of "sales or profits"—supplementing his full-week salary. 29 C.F.R. 541.604(a). **And the only permissible "additional" compensation that can be based on the amount of time worked is that for work "beyond the normal workweek."** *Ibid.*

See Appendix D, Brief of the United States as *Amicus Curiae* at p. 12; see also, *Helix*, 598 U.S. at 20 (2023). It also confirmed this applied to "daily" pay:

> …cussing proposed rule). *Notably, the only "additional compensation" that may be paid based on the time that an employee actually works is pay for "work [performed]* beyond *the normal workweek," 29 C.R.F. 541.604(a) (emphasis added), not for days of work* within *the normal workweek*. In short, the view that…

Id. at 20. In *Gentry v. Hamilton-Ryker IT Sols., L.L.C.*, No. 22-40219, 2023 WL 4704115 (5th Cir. July 24, 2023), the DOL again confirmed why this belief is inconsistent with the regulations and *Helix*:

> First, the employer may pay the employee a predetermined amount that is no less than the employee's full salary for a week, month, year, or more, without regard to the amount of time the employee actually works. The employer may pay the employee, on top of this full salary, additional hourly compensation for hours worked *beyond* their normal workweek,

> **but may not pay them hourly compensation for hours worked within their normal workweek**. Alternatively, the employer may compute the employee's pay on an hourly (or daily or shift) basis for hours within the normal workweek and still satisfy the salary basis requirement, but only if the employer provides a guarantee resembling a full salary—one roughly equivalent to pay for the employee's normal workweek. (footnote omitted)

DOL *Amicus* in *Gentry* at 2. Nonetheless, the Panel thought it was "not clear that § 541.604(a) only applies to 'additional compensation based on hours worked for work beyond the normal workweek.'" *Wilson*, 2023 WL 5839557, at *6.

While tucked away in a footnote, the Panel admits that under Appellant's pay plan the "additional compensation is calculated hourly but **not** beyond the 40-hour workweek[.]" *Wilson*, 2023 WL 5839557, at fn. 4. In other words, the Panel reads "additional compensation based on hours worked for work beyond the normal workweek" to be the legal equivalent of "additional compensation based on hours worked for work beyond the normal workweek." In addition to rendering the phrase "for work beyond the normal workweek" pure surplusage, and conflicting with the explicit guidance from the Department of Labor, this expansive interpretation makes little sense.

If § 604(a) truly permits "additional compensation" on "*any other basis*" if it is "in addition to [a] base salary," *Wilson*, 2023 WL 5839557, at *2 (emphasis original),

why doesn't the regulation just say that? "A short sentence would have done the trick. The familiar 'easy-to-say-so-if-that-is-what-was-meant' rule of statutory interpretation has full force here." *Comm'r of Internal Revenue v. Beck's Est.*, 129 F.2d 243, 245 (2d Cir. 1942); *see also Amazon.com, Inc. v. C.I.R.*, 934 F.3d 976, 991 (9th Cir. 2019) (agency's express use of certain language in one provision showed that it "clearly knew how to write its regulations" to accomplish a certain goal, and supported a conclusion that the language did not apply to provisions from which it was absent)).

Instead, the DOL devotes two full sentences to explaining when "additional compensation" based on time worked is permissible:

> Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $684 each week paid on a salary basis also receives additional compensation based on hours worked **for work beyond the normal workweek. Such additional compensation** may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

29 C.F.R. § 541.604(a). But other than when it quotes the regulation in full, the Panel opinion ignores the fact the second sentence starts with: "***Such*** additional compensation …" *Id.*; *Wilson*, 2023 WL 5839557, at *2 & *5 (omitting reference to the adjective "such"). This is relevant because "such" refers to the kind of additional compensation referenced in the prior sentence—"additional compensation based on hours worked for work beyond the normal workweek."

The remainder of § 604(a)'s final sentence confirms that "*such* additional compensation" refers to time-based pay in the preceding sentence, not the earlier examples. Indeed, neither a "one percent commission on sales" nor a "percentage of sales or profits" requires further explanation of the "basis" upon which they can be paid. They are self-contained explanations. In contrast, the additional pay for hours worked "beyond that the normal workweek" requires explanation since it might be paid as a "flat sum, bonus payment, straight-time hourly amount, [or as] time and one-half[.]" 29 C.F.R. § 541.604(a).

And § 604(b) is completely consistent with § 604(a)'s limitation on time-based pay (pay "based on hours worked for work beyond the normal workweek") but *not* on performance-based pay. 29 C.F.R. § 541.604(b). It expressly notes the "reasonable relationship test" does not apply to an exempt employe "who *also* receives [i.e., in *addition* to their salary] a commission of one-half percent of all sales in the store or five percent of the store's profits," even if those payments exceed the salary. Instead, the "reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily or shift basis." *Id.*

To apply the law as written, we must consider all its text. "[R]espect for text forbids us from ignoring text." *Hewitt v. Helix Energy Sols. Grp., Inc.*, 15 F.4th 289, 292 (5th Cir. 2021) *aff'd*, 598 U.S. 39 (2023). Respectfully, the Panel's decision "subvert[s] § 604(b)'s strict conditions on when [a salary plus hourly, daily, or shift pay] pay counts as a 'salary.'" *Helix*, 598 U.S. at 56.

The Panel decision cites several cases that have no application here. For example, in *Higgins v. Bayada Home Health*, the Third Circuit never mentioned § 541.604 ("Minimum Guarantee Plus Extras") at all. *See* 62 F.4th 755. And it is easy to see way, the "Plaintiffs have not alleged, and the court does not discern, that the reasonable relationship test has not been satisfied. Therefore, the court finds that Bayada's computation of its employees' earnings on an hourly basis does not void its exemption." *Higgins v. Bayada Home Health Care, Inc*. No. 3:16-CV-02382, 2021 WL 4306125, at *10 (M.D. Pa. Sept. 22, 2021), aff'd, 62 F.4th 755 (3d Cir. 2023).[2]

Similarly, in *Bell v. Callaway Partners, LLC*, 394 F. App'x 632, 634 (11th Cir. 2010), the "additional compensation" was paid for hours worked after 40 in a workweek-i.e., beyond the normal workweek. As the DOL noted in *Helix* and *Gentry*, such a pay plan is consistent with the "minimum guarantee plus extras" regulation. Thus, it offers no guidance for a circumstance such as this one (and in *Gentry*) where the payments are *not* for time worked "beyond the normal workweek."

[2] At the Third Circuit, the plaintiffs flatly denied any reliance on 29 C.F.R. § 541.604.

III. As Supreme Court Acknowledged in *Helix*, the Panel's Interpretation Will "Create Disturbing Consequences" By Depriving Even Workers in The Heartland of the FLSA's Protection of Overtime Pay.

The Supreme Court warned that, without the reasonable relationship test, employers could evade both the salary basis test and the FLSA's overtime protections by including a small "salary" along with its employee's time-based pay. Indeed, Appellant's tiny "salary" proves the Supreme Court's point—Appellant would guarantee Appellee a weekly salary of $462 "in a heartbeat if doing so eliminated the need to pay overtime." *Helix*, 598 U.S. at 61. But "the whole point of the salary-basis test is to preclude employers from paying workers neither a true salary nor overtime." *Id.* at 39 (syllabus). While the salary needn't reflect everything paid to an employee, a "true salary" must reflect the actual, "full salary" for the week, not just a small portion of his usual pay with the reminder depending on the number of hours or days worked. *Id.* at 51. Respectfully, the Panel's decision endorses the very position that *Helix* rejected because it "would create disturbing consequences, by depriving … workers at the heartland of the FLSA's protection … of overtime pay." *Id.* at 61.

In fact, the Panel's opinion conflicts with what the Department of Labor told interested stakeholders when the regulations were adopted in 2004. For example, the United American Nurses, AFL-CIO (UAN) expressed concern that § 604 would allow employers to cut off a nurse's right to overtime pay by simply paying a modest salary and then classifying the remaining amounts as "additional" time-based

pay. The DOL stated this could not happen under § 604:

> **AFL-CIO Distortion #22: Registered Nurses will lose overtime pay**
>
> The Department's final rules will exempt hourly registered nurses from overtime coverage.
>
> **The Facts: No change from current law on scope of RN overtime protection**
>
> The final rules make no change to current law regarding overtime protection for RNs. RNs paid on an hourly basis are entitled to overtime pay under the final rules. RNs who receive overtime pursuant to a collective bargaining agreement are expressly protected under the final rules. In general, RNs have been viewed as learned professionals exempt from overtime *since 1971* – a position reflected in existing rule § 541.301(e)(1). New § 541.301(e)(2) reiterates the longstanding view that RNs satisfy the duties test for learned professional employers while licensed practical nurses and other similar health workers generally do not, regardless of work experience and training – because possession of a specialized advanced academic degree is not standard prerequisite for entry into such

occupations.

> The final rule also preserves the requirement that RNs be paid on a salary basis to be treated as exempt from overtime. **Under final rule § 541.604, an employer may pay an exempt employee additional amounts beyond the required salary, but there must be a "reasonable relationship" between the guaranteed amount and what is actually received.** *T*his "reasonable relationship" requirement codifies the Wage and Hour Division's long-standing interpretation of the existing salary basis test (*see* Field Operations Handbook sec. 22b03)m which has been upheld in leading federal court decisions. *See, e.g. Brock v. Claridge Hotel & Casino,* 846 F.2d 180 (3d Cir.) cert. *denied*, 488 U.S. 925 (1988). The preamble to the final rule points out how the reasonable relationship standard would protect nurses who might be paid on an hourly or shift basis; *see* 69 Fed. Reg. at 22184.

See Assessing the Impact of the Labor Department's Final Overtime Regulations on Workers and Employers, H.R. Rep. No. 108-54, at *85 (April 28, 2004).

It is no exaggeration to say that millions of America's workers rely on the FLSA's salary basis test to protect their weekly earnings. The Panel's ruling proves out

the concern that employers will attempt to buy out their workers' overtime rights on the cheap if they can. Just this year, the Supreme Court held it "is difficult, if not impossible, to reconcile with the FLSA's design." *Helix*, 598 U.S. at 61.

Consider the real-world impact on a "salaried" employee who misses one or more days for jury duty, to serve as a witness, or for temporary military leave. For decades, the regulations protected an exempt employee from suffering a reduction in pay while performing these civic duties. *See* 29 C.F.R. § 541.602(b)(3) ("an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave") & § 541.03 ("Effect of improper deductions from salary"). But under the Panel's rule, employees like Appellee could easily lose more than half their weekly pay.

To illustrate, let's assume Appellee normally worked on a rig for 7 days in a week, but had to serve on a jury (or take temporary military leave) for 5 days. Had he worked as expected, Appellee's pay would have been calculated as follows:

$462 "salary" + $1,025 ($205/day rate x 7 days)
= $1,897 expected pay

But because this "day rate" need not be considered under the Panel's rule, he would not be entitled to his day rate for days missed for jury (or military) duty. Therefore, Appellant would calculate this pay as follows:

$462 "salary" + $205 ($205/day rate x 2 days)
= $872 actual pay

In other words, the Panel's rule permits Appellant to effectively dock *more than half* of Appellee's pay based on time missed for jury duty (to serve as a witness, or for temporary military leave). Such a result is "difficult, if not impossible, to reconcile with the FLSA's design." *Helix*, 598 U.S. at 61.

The presence of a weekly salary meeting the "salary basis test" cannot distinguish § 602(a)'s path from § 604(b)'s path. Section 604(b) (like § 602(a)) expressly requires "a guarantee of at least the minimum weekly required amount paid on a salary basis[.]" 29 C.F.R. § 541.604(b). Because both § 602(a) and § 604(b) require a "salary," that cannot distinguish between § 602(a) and § 604(b)'s "independent" paths. *Helix*, 143 S. Ct. at 689. Instead, what distinguishes § 602(a) from § 604(b) is whether, in addition to the "salary," there are "extra" payments calculated on "an hourly, a daily, or a shift basis." 29 C.F.R. § 541.604.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,

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