NO. 23-1077

In the Supreme Court of the United States

MARK WILSON,

Petitioner,

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Schlumberger Technology Corporation is a wholly owned indirect subsidiary of Schlumberger Limited (also known as Schlumberger N.V.), also referred to by the tradename SLB. SLB is a publicly traded company, traded on the NYSE under the ticker symbol "SLB". SLB is also traded on the Euronext Paris.

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INTRODUCTION

There is no compelling reason to grant *certiorari* in this case. It is undisputed that Petitioner was paid a "true" bi-weekly salary of $924, exceeding the $455 per week threshold for exempt employees under the Fair Labor Standards Act ("FLSA"). *Wilson v. Schlumberger Tech. Corp.*, 80 F.4th 1170, 1173 (10th Cir. 2023). But Petitioner attempts to cast himself as a "day rate" employee to claim overtime to which he is not entitled. The fact that Petitioner was also paid bonuses in addition to his salary does not change his exempt status. In attempting to overcome these facts, Petitioner misconstrues case law and quotes phrases out of context to conform their meaning to his desired end. But quotes untethered from their moorings so as to differ from the original text do not warrant granting *certiorari*.

Petitioner's mischaracterizations aside, the Tenth Circuit faithfully followed this Court's guidance in *Helix Energy Sys., Inc. v. Hewitt*, 598 U.S 39, 143 S.Ct. 677, 214 L.Ed.2d (2023), the decisions of the Courts of Appeals applying *Helix*, and the Department of Labor ("DOL") regulations pertaining to the salary basis test for the white-collar exemptions. More particularly, Petitioner's biweekly salary met the 29 C.F.R. § 541.602(a) ("§ 602(a)") threshold for the salary basis test for exempt employees. Section 602(a) specifically provides that the "predetermined amount" may be only a part of the total compensation. The Tenth Circuit cited the Fifth Circuit's recent opinion in *Hebert v. FMC Tech., Inc.*, No. 22-20562, 2023 WL 4105427 (5th Cir. June 21, 2023), as support for its conclusion that an exempt employee with a guaranteed salary was not converted

to non-exempt by virtue of receiving additional compensation where the employee's salary satisfies § 602 (a). *Wilson*, 80 F.4th at 1178.

The Tenth Circuit also analyzed 29 C.F.R. § 541.604 in detail. It first noted a significant difference between § 541.604(a) ("§ 604(a)") and § 541.604(b) ("§ 604(b)"). Section 604(a) applies to employees who receive "additional compensation" above their base salary and that additional amount may be paid on any basis. *Wilson*, 80 F.4th at 1176. Section 604(b) "applies only if the employee's *pay* is computed on an hourly, daily or shift basis" and none of § 604(b)'s examples of its application involved additional compensation. *Id.*

The Tenth Circuit determined that STC's contingent bonuses, such as the rig bonus, fell squarely under § 604(a) as additional compensation paid to a salaried employee. Specifically, the Tenth Circuit stated:

> Wilson was paid the same salary every two weeks. Everything else was additional compensation. This differentiates Mr. Wilson from the employee described in § 541.604(b) whose actual pay varies from week to week based upon how many shifts he works.

Id. at 1177.

This comports with *Helix*'s statements on the relationship between § 602(a) and § 604(b). Per *Helix*, § 604(b) and § 602(a) "are independent routes for satisfying the . . . salary-basis component." 598 U.S. at 50 n.3. "Recall that § 604(b) lays out a second path—apart from § 602(a) . . . . Whereas § 602(a) addresses payments on 'a weekly [ ] or less frequent basis,' § 604 (b) concerns payments 'on an hourly, a daily or a shift basis.'" *Id.* at 55. "*By contrast, when § 602(a) is limited*

to weekly-rate employees, it works in tandem with § 604(b). The two then offer non-overlapping paths to satisfy the salary-basis requirement, with § 604(b) taking over where § 602(a) leaves off." *Id.* at 56 (emphasis added).

Helix makes clear that an exempt employee's salary basis analysis falls under *either* § 602(a) or § 604(b), you cannot look at part of an employee's compensation under one section and part under the other. Further, the analysis begins under § 602(a). *Id.* at 56. If the employee's compensation includes a "predetermined amount" (a true salary), § 602(a) controls even if the predetermined amount is "only part of the total compensation." *Id.* at 46. And, as § 604(b) only takes over "where § 602(a) leaves off," § 604(b) is never reached for employees who satisfy § 602(a). *Wilson* complies with *Helix*, as it determined that § 602(a) was satisfied, and the additional compensation fell under § 604(a), so § 604(b) was not applicable.

Further, contrary to Petitioner's representation, there is no circuit split. All the appellate courts that have ruled on FLSA cases involving exempt employees paid a true salary have found that an employer is free to provide additional compensation or other benefits as it sees fit, without regard to the reasonable relationship test. The Tenth Circuit's opinion strictly complies with this Court's guidance in *Helix*. Thus, Petitioner has not met any of the Supreme Court's Rule 10 considerations for granting *certiorari*.

REASONS FOR DENYING THE PETITION

I. PETITIONER DOES NOT MEET ANY RULE 10 COMPELLING REASONS FOR GRANTING *CERTIORARI*.

Supreme Court Rule 10 states that *certiorari* will be granted only for compelling reasons. It then identifies three categories of cases that may meet this criterion. They are: (1) a Court of Appeals decision conflicts with a decision of another Court of Appeals on the same important matter; (2) a state court of last resort has entered a decision that conflicts with a decision of another state court of last resort or of a United States Court of Appeals; or (3) a state court or United States Court of Appeals has decided an important question that should be settled by the Supreme Court, or has decided an important federal question in a way that conflicts with a relevant decision of the Supreme Court. Sup. Ct. R. 10. The Petition does not meet any of these criteria.

As to the first category, Petitioner asserts that the Third Circuit's decision in *Brock v. Claridge Hotel & Casino*, 846 F.2d 180 (3rd Cir. 1988), and the Sixth Circuit's decision in *Hughes v. Gulf Interstate Field Servs.*, 878 F.3d 183 (6th Cir. 2017), conflict with the Fifth Circuit's decision in *Hebert v. FMC Tech., Inc*, and the Tenth Circuit's decision at issue here. Petitioner further argues that the Tenth Circuit did not follow *Helix*. Neither argument has merit.

A. There Is No Circuit Split.

The cases noted by Petitioner are easily distinguished and do not reflect a circuit split. As this Court pointed out in *Helix*, § 602(a) and § 604(b) represent separate, distinct, and mutually exclusive paths to meeting the salary basis test for the FLSA's exemptions. The *Brock* and *Hughes* cases cited by Petitioner both involved plaintiffs who were paid exclusively on an hourly or day rate basis. Further, neither of those cases involved a § 604(b) analysis. In both cases, the additional compensation was just a continuation of the base hourly or day-rate, just like the facts in *Helix*.

In *Brock*, the plaintiffs were paid an hourly rate with a guaranteed weekly minimum, and that same hourly amount for additional hours. 846 F.2d at 182. After finding that there were only twelve instances in which the guarantee was actually paid and "the lack of a 'mechanism to ensure that the guarantee was provided,'" the trial court concluded that the supervisors were hourly employees. *Id.* at 183. The Third Circuit held that the trial court's finding was not clearly erroneous because the payroll records "would show that a [plaintiff's] wage can be calculated by multiplying an hourly wage by the number of hours worked." *Id.* at 184.

Hughes involved straight day-rate employees. The district court granted the defendant's motion for summary judgment based upon the employer's assertion that employees were guaranteed payment for six days of work per week and the district court's determination that the actual practice complied with the FLSA. 878 F.3d at 186-87. The Sixth Circuit reversed as it found there was a factual question as to whether there was an actual guarantee. *Id.* at 193.

Those cases are materially different from *Wilson* and *Hebert*, where it is undisputed that the plaintiffs in both were paid a true base salary that met the requirements of § 602(a). In both *Hebert* and *Wilson*, the plaintiffs were also eligible for, but not guaranteed, additional compensation.

In *Hebert,* the plaintiff received a base salary of $90,000 per year, satisfying § 602(a). 2023 WL 4105427 at *2 n.2. Plaintiff also received a field service premium for each day spent at an offshore rig (which amounted to over 100 days per year). *Id.* The plaintiff argued that the additional bonus payments, based on days in the field, converted him to a day-rate employee and that he was entitled to overtime as the additional payments did not comply with § 604(b)'s reasonable relationship test. *Id.* at *2 n.5. The Fifth Circuit disagreed, stating "[t]he regulations foreclose that assertion. Hebert does not lose his status as an employee paid on a salary basis just because he is also paid a bonus on top of the salary that the record has established was guaranteed to him." *Id*. at *2 (citing § 604(a)).

In *Wilson*, the additional compensation is part of a separate bonus policy that provided bonuses for each day billable to a customer, and the total bonus varied based on the nature of the service provided. 80 F.4th at 1173. Further, the bonuses were contingent and could be denied or withdrawn due to customer service or serious safety issues.[1] The Tenth Circuit followed

[1] These bonuses are clearly different from traditional day-rates where the amounts are part of the employee's base compensation and guaranteed so long as an employee performs at least some work that day.

this Court's guidance in *Helix*, that salaried employees follow a different path from day rate employees, and the Fifth Circuit's decision in *Hebert*, to reach the same conclusion as *Hebert*—that the salary complied with § 602(a) and that the employer was free to provide additional compensation without impacting exempt status. 80 F.4th at 1178. Thus, there is no conflict between these decisions and those in *Brock* and *Hughes*, which involved entirely different facts and application of a different regulation.

Moreover, every Court of Appeals that has decided a case involving employees paid a true base salary compliant with § 602(a) has concluded that the employer satisfied the salary basis requirement for the exemptions and is free to pay additional amounts, or not pay additional amounts, without impacting the employee's exempt status. *Accord, Litz v. The Saint Consulting Grp., Inc.*, 772 F.3d 1, 2, 5 (1st Cir. 2014) (finding it need not reach plaintiff's reasonable relationship argument as plaintiff was paid a $1,000 per week salary whether she billed any hours or not); *Higgins v. Bayada Home Health Care, Inc.*, 62 F.4th 755, 760-61 (3d Cir. 2023) (finding that plaintiff's salary satisfied § 602(a) and whether the employer made deductions from her paid time off account was immaterial);[2] *Bell v. Callaway Partners, LLC*, 394 F. App'x.

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[2] The Tenth Circuit cited *Higgins* as support for its *Wilson* decision. Petitioner dismisses that citation arguing *Higgins* does not address the reasonable relationship test. (Petition at 18.) Instead, Petitioner cites *Brock* as the law of the Third Circuit. *Brock* is a 1988 Third Circuit decision that is pre-*Encino Motor Cars v. Navarro*, 584 U.S. 79, 138 S.Ct. 1134, 200 L.Ed.2d 433 (2018), decided under a prior and superseded set of DOL regulations, and does not involve the reasonable relationship test.

632, 634 (11th Cir. Aug. 26, 2010) (finding the fluctuating bonuses due to the hours of work did not violate the salary basis test).

B. *Wilson* Does Not Conflict with *Helix*.

Petitioner does not and cannot show that the Tenth Circuit's decision conflicts with any guidance from this Court. Petitioner's only support for this assertion consists of misquotes and misapplication of *Helix*'s analysis.

Helix dealt with a day-rate employee who received no other compensation besides his day-rate. 598 U.S. at 37. Thus, most of the *Helix* opinion is focused on day-rates and day-rate employees. However, the Court did give clear guidance on the interaction between § 602(a) and § 604(b). Further, *Helix* recognizes that § 602(a) applies when at least *part* of an employee's compensation is a traditional salary, and that the traditional salary need not be the only compensation. 598 U.S. at 46.

As previously noted, the Court specifically stated that § 602(a) and § 604(b) are separate, distinct, and mutually exclusive means of establishing a salary basis test. *Helix*, 598 U.S. at 50 n.3. Further, § 541.604 (b) only comes into play where § 541.602(a) leaves off. *Id*. at 56. The only reasonable way to construe these statements in relation to each other is to conclude that § 604(b) only applies to those who do not have a true salary *as part of* an employee's compensation. *Wilson* reached this same conclusion and, as such, *Wilson* does not conflict with *Helix*.

Moreover, this Court recently rejected a Petition for Writ of Certiorari founded on the same alleged circuit

split in a case that involved the identical issue and essentially the same fact pattern as this case (*Hebert v. FMC Tech., Inc.*, No. 23-706). Petitioner merely repeats the same arguments the Court was presented with and rejected in *Hebert*. This is further evidence that there is no conflict between *Wilson* and *Helix*. Accordingly, the Court should reject the same arguments again.

II. THE TENTH CIRCUIT'S ANALYSIS WAS CORRECT.

The Tenth Circuit's treatment of the issue was completely in accordance with the Supreme Court's guidance in *Helix*. This is confirmed by both an examination of the *Wilson* opinion and the Court's analysis in *Helix*.

It is undisputed that Petitioner was paid a true biweekly salary of $924. *Wilson*, 80 F.4th at 1175. Because of this, the Tenth Circuit concluded that the salary complied with § 602(a), which states that the salary basis is satisfied if "the employee regularly receives each pay period on a weekly, or on a less frequent basis, a pre-determined amount constituting all or part of the employee's compensation. . . . " *Id.* at 1176.

As Petitioner was paid additional compensation, the Tenth Circuit also looked at § 604 and determined that § 604(a) applied to this situation. Quoting § 604(a), the Tenth Circuit noted that:

> [An] employer [may] pay an exempt employee compensation in addition to their base salary, without losing the exemption, if the employee is guaranteed "at least the minimum weekly-required amount paid on a salary

> basis." § 541.604(a). The additional compensation covered by sub-section (a) "may be paid on any basis. . . . "

Id. at 1174.

Wilson confirmed this conclusion by looking to *Helix*:

> The Court's discussion of § 541.604 makes clear that subsection (b), and its reasonable-relationship requirement, is only appropriate for workers compensated on an hourly, daily or shift basis, not workers whose compensation is calculated on a weekly or less frequent basis. As the Court explained, *additional* compensation—even if computed on an hourly, daily or shift basis—that is added to a fixed salary computed on a weekly or less frequent basis, would not fall under the aegis of § 541.604(b).

Id. at 1178 (internal citations omitted and emphasis in original). As this demonstrates, *Wilson* faithfully followed *Helix*.

In *Helix,* the Supreme Court began its analysis with § 602(a). The Supreme Court first quoted the regulation including the portion that an employee is paid on a salary basis "if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting *all or part of the employee's compensation, which amount is not subject to reduction because of the quality or quantity of the work performed.*" *Helix*, 598 U.S. at 46 (emphasis added). The Court continued: "The rule thus ensures that the employee will get at least part of his compensation for

a preset weekly (or less frequent) salary, not subject to reduction." *Id.*

Thus, contrary to Petitioner's argument, this Court specifically held that if an employee has a traditional salary, like Petitioner, the employee meets the salary basis requirement of the exemption under § 602(a), even if the employee receives additional compensation.

Helix then distinguished § 604(b) from § 602(a). Section 604(b) applies to employees paid on an hourly, daily or shift rate, which is an alternate means to satisfy the salary basis test "so long as two conditions are met." *Id.* at 47. The conditions that must be met in order for such pay schemes to satisfy the salary basis test are a guarantee and meeting the reasonable relationship test. *Id.* The Court stated, "those conditions create a compensation system functioning much like a true salary." *Id.* Once again, the Court distinguished employees falling under § 604(b) from those receiving a *true salary* as required by § 602(a), stating "[n]othing in that description fits a daily-rate worker, who by definition is paid for each day he works and no others." *Id.* at 49.

Finally, in *Helix*, the Supreme Court discussed the broader regulatory structure (*i.e.*, how § 602(a) and § 604(b) interrelate):

> Recall that § 604(b) lays out a second path—apart from § 541.602(a)—enabling a compensation scheme to meet the salary-basis requirement. . . . And that second route is all about daily, hourly or shift rates. . . . By contrast, when § 602(a) is limited to weekly-rate employees, it works in tandem with § 604(b). The two then offer non-overlapping paths to

> satisfy the salary basis requirement, *with § 604(b) taking over where § 602(a) leaves off*.

Id. at 55-56 (emphasis added).

Thus, the Court made clear that § 602(a) applies to employees whose compensation is calculated on a weekly basis, even if they receive additional compensation in addition to their "predetermined amount," and the only way other employees, such as day rate employees, can qualify for the exemption is through § 604(b).

The Tenth Circuit's analysis comports perfectly with *Helix* in these regards.

III. PETITIONER'S ARGUMENT DEPENDS UPON MISCHARACTERIZATIONS.

Petitioner's entire argument is dependent upon selective partial quotes mixed with Petitioner's own word choice that alter the actual *Helix* analysis. Petitioner supports his argument with unsupported supposition rather than authority and mischaracterizes not only this Court's analysis and other case law, but also the underlying facts in *Wilson*.[3]

A. Petitioner Mischaracterizes *Helix*.

Petitioner relies heavily on an incomplete quote from *Helix*: "[Section 602(a)] applies solely to employees

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[3] Petitioner even presents a skewed view of Petitioner's duties as the only job task he describes related to the provision of surveys and data to customers is that "Wilson was required to be at the rig to assemble the units for deployment downhole and monitor the readings." (Petition at 2.) By comparison, the Tenth Circuit found "these surveys provide the exact location of the bottom part of the drill string, which is typically thousands of feet deep in the well. The survey also tells the customer whether

paid by the week (or longer)." (Petition at 5.) He uses that excerpt to argue that because Petitioner was not paid *solely* by the week, § 602(a) does not apply.

When considered in context, it is clear that the Court was not excluding salaried employees receiving additional compensation from coverage under § 602(a). Rather, the Court was excluding anyone who did not have a true salary *component* to their compensation from § 602(a) (*i.e.*, only those employees receiving "a predetermined amount constituting all or part of their compensation" can fall under § 602(a), pure day rate employees no matter how high the day rate, do not fall under § 602(a)).

A review of the full quote, along with the Court's full opinion and the underlying facts, supports this conclusion. The full quote is:

> Helix did not pay Hewitt on a salary basis as defined in § 602(a). That section applies solely to employees paid by the week (or longer); it is not met when an employer pays an employee by the day, as Helix paid Hewitt. Daily-rate workers, of whatever income level are paid on a salary basis only through the test set out in § 604(b).

Helix, 598 U.S. at 49. Further, only two pages earlier, the Court recognized that § 602(a) states that the

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the drilling is proceeding according to the preplanned drill path or if it has deviated. Wilson's job was to review this data, make judgments as to its accuracy by such techniques as comparing results to the plan, trend analysis, and correlation with other data, then mark or correct data if necessary, and provide it to the customer." 80 F.4th at 1173.

"predetermined amount" only needed to be *part* of the total compensation:

> "An employee will be considered to be paid on a 'salary basis' . . . if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which is not subject to a reduction. . . . "
>
> The rule thus ensures that the employee will get at least part of his compensation through a preset weekly (or less frequent) salary, not subject to reduction. . . .

Id. at 46 (quoting § 602(a)).

When considered in its entirety and in context, the meaning of the Court's statement is clear: § 602(a) specifically excludes employees who are paid on a day-rate only. Section 602(a) applies only to employees whose compensation includes, at least in part, a true salary.

Thus, the heart of Petitioner's argument is based upon a sentence fragment taken out of context in an attempt to have it stand for something it does not.

Petitioner takes another excerpt from *Helix* and introduces it with his own self-serving language to change its meaning. The Petitioner represents that *Helix* states:

> [A]n employee is not paid on a salary basis for purpose of 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.

(Petition at 6 (emphasis added).)

Helix actually says:

> [A]n employer may base an employee's pay on an hourly, daily or shift rate without "violating the salary basis requirement" or "losing the . . . exemption" so long as two conditions are met. First, the employer must "also" guarantee the employee at least $455 per week (the minimum salary level) regardless of the number of hours, days or shifts worked." And second, *the promised amount must also bear a "reasonable relationship, to the amount actually earned in a typical week—more specifically, it must be roughly equivalent. . . .*

598 U.S. at 47 (emphasis added and internal citations omitted).

Petitioner knows that, in this context, the terms "salary" and "promised amount" are not interchangeable and that using the term salary to introduce the quote is an attempt to change the meaning to support his argument.

Petitioner also attempts to conflate the use of the terms "salary" and "guarantee" which clearly have different meanings under §§ 602(a) and 604(b). (Petition at 10.) The Petitioner notes the Court's *dicta* that Helix could have added a weekly guarantee satisfying the reasonable relationship to correct the situation. The

Petitioner then switches terms and says that he worked under the same guaranteed salary arrangement. *Id*.

The term predetermined amount as used in § 602(a) and guarantee as used in § 604(b) are different. Predetermined amount under § 602(a) means "a preset weekly [] salary." *Helix*, 598 U.S. at 46. That is not the same as a guarantee under § 604(b). The § 604(b) guarantee is a "minimum payment" for hourly, daily, or shift wage employees. To suggest otherwise is a misstatement at best. Moreover, it is clear here that the salary paid to Petitioner was a true salary paid on a biweekly basis regardless of whether he worked or not.

B. The Petition Mischaracterizes the Facts.

Petitioner represents that "the bonuses [are] paid to the crew who report to the rig and work the assigned tour." (Petition at 3). In other words, Petitioner paints the picture that STC's rig bonus is essentially show up pay. As long as an employee reports to work, he is "entitled" to the pay.

Those are not the facts. The rig bonus, its elements, and the requirements to earn that compensation are all part of a separate job bonus policy, which was an exhibit at trial. The entirety of the bonus pay and its amount was contingent pay. The pay would only be awarded for days billable to a customer, and the amount itself would depend upon the types and nature of the service provided. For example, Petitioner was eligible for higher rig bonuses for performing specialized services, which resulted in higher billing to the customer, or for reduced crew days, which increased STC's margin.

In other words, the rig bonuses were tied to the revenue generated by the employees subject to the policy at the rig. If those employees were not generating revenue, there would be no bonus. Thus, they did not receive any bonus on shop days, office days or days in which there was no work.[4] Further, STC's policy provided that Petitioner and the other crew members would forfeit their bonuses in the event of major safety violations or customer satisfaction issues. Thus, there is a clear difference between the bonuses and a day-rate.

Part of Petitioner's false construct also includes separating work into that performed during the normal work week and that performed outside the normal work week. (Petition at 3.) But then he assumes that his normal work week is seven days. (Petition at 22.) Thus, according to Petitioner, everything falls within the normal work week.

Petitioner also mischaracterizes the jury's finding as to Instruction No. 10. He states the jury found STC did not pay him on a salary basis – or without regard to the number of hours or days he worked. (Petition at 4.) The Tenth Circuit quoted the entirety of Jury Instruction No. 10 in its opinion. The only question put forth in Instruction No. 10 was whether there was a reasonable relationship between the weekly salary guarantee

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[4] Trial testimony showed the cyclical nature of the work and that Petitioner and other team members could be working for seven or eight weeks straight, and then be off for six or more weeks as there was no work. Even when they were off for multiple full weeks, STC still paid Petitioner and the crews their base salary. When there was work, and revenue, STC shared the revenue generation in the form of the bonuses.

and the employee's usual earnings. Petitioner clearly embellishes the jury's finding.

C. Petitioner Mischaracterizes § 604.

Petitioner's misstatements regarding § 604 amount to an attempt to rewrite or at least reimagine the regulation. Section 604(a) provides that an employer satisfying § 602(a) can provide an employee with additional compensation without losing the exemption. 29 C.F.R. § 541.604(a). Furthermore, § 604(a) puts no restrictions as to the amount or form of that additional compensation. *Id*. It does, however, provide a few examples of such additional compensation including commissions, revenue-based bonuses or hours worked beyond the normal work week. Further, it says such additional compensation may be paid on any basis.

Petitioner essentially argues the examples in § 604 (a) are an exclusive list. This cannot be reconciled with § 604(a)'s explicit language "Thus, for example. . . . " And there is no language in § 604(a) to suggest that the DOL intended to limit additional compensation to just the three examples that are provided.

Petitioner asserts that the last example, additional compensation for hours beyond the normal workweek, is *exclusively* applicable to any time-based additional compensation and that any additional time-based compensation for work "during the normal workweek" falls under § 604(b). Other than Petitioner's assertion that this is how the regulation should be interpreted, there is no language in the regulation supporting this conclusion, nor is it a reasonable or logical interpretation.

Petitioner attempts to further support his argument that § 604(a) is limited to time-based additional compensation outside the normal workweek by postulating that if the DOL had meant to allow "time-based additional compensation" during the normal workweek to fall under § 604(a), the DOL could have easily added that language. (Petition at 15-16.) Petitioner then concludes as it did not, case closed.

That logic applies equally to Petitioner only with more force. It would be far easier for the DOL just to add the word "exclusively" to outside the normal workweek compensation if the DOL had intended to adopt Petitioner's position. Furthermore, this is nothing but pure speculation on Petitioner's part. The regulation says what it says. Petitioner is not free to add terms or speculate on the effect of hypothetical additional terms.

Further, it weighs against Petitioner that one can make the same arguments as to every example listed under § 604(a). Section 604(a) specifically lists commissions as permissible additional compensation. When do store managers earn commissions other than on a day-by-day basis during the course of their normal workdays? Section 604(a) includes revenue bonuses. When does a company earn revenue other than on a day-by-day basis during the course of its normal workdays?

D. Petitioner Cites Documents That Are Not Authority.

Petitioner also relies on documents having no authoritative value in supporting his argument, including DOL amicus briefs from other cases and opinion letters based on different facts. And Petitioner does

not state whether he sought permission from the DOL to submit the briefs in this case.[5]

The DOL has not submitted an amicus brief in this case and there is no reason to believe that it would submit an amicus brief based on the facts in this case. Petitioner is not free to just pick DOL briefs from other cases and say this is what the DOL would say if they had elected to support me. Clearly, in a situation such as this, the old DOL amicus briefs are not entitled to deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944) ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."). There is no indication the DOL ever looked at this case, let alone looked at this case with thoroughness.

Petitioner's citations to the DOL opinion letters fare no better. Each involves hourly or day rate employees. Opinion letter 2020-13 involves professional employees paid $1,500 per day or $50 per hour, depending on the type of work. Opinion letter 2018-25 involved engineers guaranteed 30 hours and paid their hourly rate for additional time. That letter also specifically asked if that compensation plan met the reasonable relationship test and assumed that the reasonable relationship test applied in the first place. The 2003 letter is based

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[5] Petitioner identifies the briefs as coming from the *Helix* and *Gentry* cases. The facts in both differ from the facts here. *Helix* involved a pure day rate. *Gentry* involves a salary equal to eight hours of pay and straight pay at the same hourly rate for all time over eight hours.

on DOL regulations that employed a different test and were superseded by the 2004 regulations. None of these opinion letters apply to this case.

IV. BASIC POLICY PRINCIPALS SUPPORT THE TENTH CIRCUIT AND THIS COURT'S INTERPRETATIONS OF THE REGULATIONS.

As further justification for the position that the Tenth Circuit took in *Wilson* and that this Court took in *Helix*, this Court should consider the original reason why the DOL adopted the reasonable relationship test. *See* Federal Register Vol. 69, No. 79 (April 23, 2004). As the DOL explained, the requirement stems from a concern for employees paid on an hourly or shift basis. The DOL offered the example of day rate workers who regularly worked five days a week and would cover their guarantee as long as they worked at least two days. If work is available, they might be working a full week including overtime at straight time pay. If work is not available, they might be sent home after the two days with only their guaranteed pay, effectively docking them three days' pay. *Id.* at 22184.

This logic simply doesn't apply to salaried employees. A salary is a predetermined amount for a fixed period of time of at least one week, but which can be monthly, bi-monthly or annual. As it has no relation to the time actually worked, it is the same whether an employee works three days, five days, or seven days. The docking concern simply does not exist for salaried employees.[6] Thus, it makes no sense to attempt to

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[6] The "docking" logic certainly does not apply to Petitioner. The oil industry is cyclical and that when business was slow, STC carried Petitioner by paying him his full salary for six to eight

apply the reasonable relationship test to a salaried employee, even if the salaried employee receives additional compensation.

Instead, the DOL instituted a uniform base salary level for those employees paid a true salary. That minimum level serves as a proxy to identify those employees actually performing exempt duties. As the DOL stated, the minimum salary level "simplified enforcement by providing a ready method of screening out obviously nonexempt employees." 69 Fed. Reg. at 22165.

Petitioner's arguments as to how § 604(b) should be interpreted puts it in conflict with the governing statute. Petitioner states that the only employees who fall squarely under § 602(a) are those who receive *only* a salary. The logical outcome of Petitioner's argument is that any salaried exempt employee who is receiving compensation above his/her base salary must meet the reasonable relationship test. This would require all those employees to have a salary equal to at least two-thirds of their total compensation.[7]

Petitioner's attempt to require that a true salary be at least two-thirds of an exempt employee's income, regardless how high the income, imposes a minimum wage indexed on total income. Moreover, this minimum salary is divorced from the original DOL purpose,

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weeks at a time when there was no work. When there was work and Petitioner was generating revenue for STC, STC shared that revenue in the form of the rig bonus.

[7] Petitioner says that the reasonable relationship test permits additional compensation of up to 50% above the guaranteed amount.

to distinguish those actually performing exempt duties from those who are not.

29 U.S.C. § 213 exempts white collar employees from both FLSA overtime and the minimum wage requirements. Raising the minimum salary above the appropriate screening level violates the controlling statute. *See Nevada v. U.S. Dept. of Labor*, 275 F.Supp. 3d 795 (E.D. Tex. 2017) (granting summary judgment and enjoining enforcement of 29 C.F.R. part 541 as the salary threshold was no longer a plausible proxy). Thus, the limitations imposed by the statute defeat Petitioner's argument.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied. Petitioner has not stated any compelling reason that this Court should review the Tenth Circuit's decision. The Tenth Circuit correctly cited and properly applied the law. Its decision is in accordance with this Court's *Helix* opinion and the opinion of every Court of Appeals that has considered this issue. Petitioner tries to get around this by mischaracterizing facts, case law, and the regulations. Moreover, in *Hebert*, this Court recently denied a petition for writ of *certiorari* involving similar facts and raising the very same arguments. There is no reason the Court should reach a different conclusion in this case, and the Petition should be denied.

Respectfully submitted,

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