No. _____

IN THE

Supreme Court of the United States

BRENT HEBERT and AARON MOHAMMED,
Petitioners,

—vs.—

FMC TECHNOLOGIES INCORPORATED,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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December 22, 2023

QUESTIONS PRESENTED

Petitioner Brent Hebert serviced mechanical equipment on offshore oil and gas wells. FMC paid him a salary plus a daily bonus (called a "field service premium") when he worked offshore. Often times, Hebert's total take-home pay was two times—or more—his base salary. He sued FMC under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 ("FLSA"), claiming that he was entitled to retroactive overtime pay. Petitioner Aaron Mohammed joined the lawsuit by consenting in writing to be part of it under 29 U.S.C. § 216(b).

FMC responded that Hebert was not entitled to overtime pay under the Act's exemptions for executive, administrative and professional employees, 29 U.S.C. § 213(a)(1) ("EAP exemptions"), because he performed professional duties and was compensated on a salary basis. *See*, 29 C.F.R. § 541.300. The Fifth Circuit agreed even though, with respect to the latter, Hebert's base salary did not bear a "reasonable relationship" to the amount he actually earned in a typical week. *See*, 29 C.F.R. § 541.604(b). It also held that Mohammed was not ever a party to the case because the district court did not "certify a class." In reaching these conclusions, the Fifth Circuit ignored relevant decisions of this Court and regulations and other authority promulgated by the Department of Labor. Its decision also conflicts with decisions from the First, Third, Ninth, Sixth and Eleventh Circuits.

The questions presented are:

1. whether an employee is paid on a salary basis for purposes of the EAP exemptions to the FLSA 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 exceed 50% of the employee's guaranteed weekly pay; and

2. whether collective-action "certification" is condition precedent to the joinder of additional party plaintiffs under 29 U.S.C. § 216(b).

PARTIES TO THE PROCEEDING

Petitioners Brent Hebert and Aaron Mohammed were the appellants in the court below.

Respondent FMC Technologies Incorporated was the appellee in the court below.

RELATED PROCEEDINGS

Hebert v. FMC Techs., Inc., No. 4:20-cv-02059, U.S. District Court for the Southern District of Texas. Judgment entered September 28, 2022.

Hebert v. FMC Techs., Inc., No. 22-20562, U.S. Court of Appeals for the Fifth Circuit. Judgment entered June 21, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners are offshore oilfield workers who work long hours in demanding conditions. FMC, though, does not pay them overtime as required by 29 U.S.C. § 207(a)(1). It claims they are "employed in a bona fide … professional capacity," 29 U.S.C. § 213(a)(1), and exempt FLSA's overtime-pay requirements under its EAP exemptions. According to regulations promulgated by the Secretary of Labor, the EAP exemptions include "professional" employees who perform certain enumerated duties, 29 C.F.R. § 541.301, and who are "[c]ompensated on a salary or fee basis pursuant to § 541.600" at the minimum level specified in the regulations, 29 C.F.R. § 541.300(a)(1).

Respondent did not pay Petitioners "on a salary or fee basis" because it did not pay them *without* regard to the number of hours or days they worked or *solely* by the week (or longer). *See*, 29 C.F.R. § 541.602(a). It is true that they each received a *base* salary in excess of the minimum level. But they also received additional remuneration for each day that they worked offshore. In all or nearly all of those weeks, Petitioners' daily remuneration materially exceeded their base salaries. In seven-day workweeks—of which there were many—it was over 2.5 times their base salaries.

Because he did not fall within the FLSA's EAP exemptions, Hebert filed this action to recover time-and-a-half compensation under the FLSA whenever he worked more than 40 hours in a week. Specifically, he claimed that he was not paid on a "salary basis"—an essential element

FMC's exemption defense—because the company's total compensation system ran afoul of 29 C.F.R. § 541.604(b), which prohibits an employer from paying a token "salary" while tying the bulk of the employee's pay to the days he actually works. Mohammed joined the lawsuit by consenting in writing to be part of it under 29 U.S.C. § 216(b). App. 3a-4a.

This fact pattern should sound familiar. It is essentially the same one that led to this Court's decision in *Helix Energy Sols. Gp., Inc. v. Hewitt*, 143 S.Ct. 677, 598 U.S. 39 (2023). The only real difference between *Helix* and this case is that this case involves the application of § 541.604(b) to the FLSA's professional exemption, 29 C.F.R. § 541.301, and *Helix* involved its application to the Act's highly compensated employee exemption, 29 C.F.R. § 541.601. Importantly, in *Helix* both the majority opinion and the dissents (and the parties) agreed that § 541.604(b)'s "special" salary-basis rule applies to all of the EAP exemptions except for the highly compensated employee exemption, 143 S.Ct. at 688-89, 692-95, which is not at issue in this case, making the Fifth Circuit's decision more obviously wrong. In fact, this Court specifically said in *Helix* that § 541.602(a)—on which the Fifth Circuit relied to determine that Hebert was paid on a salary basis, App. 4a-6a—"applies *solely* to employees paid by the week (or longer)[,]" 143 S.Ct. at 685 (emphasis added). But since Hebert was not paid "solely"[1] by the week, § 541.602(a) does not apply.

[1] See *infra* page 6.

Nonetheless, both the district court and the Fifth Circuit rejected Hebert's claim. App. 4a-6a, 16a-18a. They said that Respondent is permitted to pay Hebert neither a true salary nor overtime and still claim the EAP exemptions. *Id*. Under the Fifth Circuit's reasoning employers could routinely pay their employees $2,500 per week or more but guarantee only $700. This would effectively allow employers to dock employees for partial day absences in contravention of 29 C.F.R. § 541.602(a)(1). On these facts, other courts of appeals have reached the opposite conclusion regarding § 541.604(b)'s application to the EAP exemptions and, specifically, to pay practices like the one at issue in this case, which are common in a wide variety of industries.[2] Certiorari is warranted to resolve this clear circuit split. The Fifth Circuit's decision, if permitted to stand, would render § 541.604(b)'s reasonable-relationship requirement completely superfluous which would, as this Court put it, "depriv[e] … workers at the heartland of the FLSA's protection—those paid less than $100,000 annually—of overtime pay." *Helix*, 143 S.Ct. at 691-92. In *Helix*, this Court has recently rejected a similar attack on the FLSA's scheme. The same result should follow here, and this Court should grant certiorari to correct the Fifth Circuit's flawed interpretation and restore consistency to this significant area of the law.

[2] See *infra* pages 10-14.

OPINIONS BELOW

The Fifth Circuit's opinion is available at 2023 U.S. App. LEXIS 15578 and 2023 WL 4105427 and reproduced at App. 1a-9a. The district court's opinion is available at 2022 U.S. Dist. LEXIS 221858 and 2022 WL 17422642 and reproduced at App. 11a-20a.

JURISDICTION

The Fifth Circuit entered its judgment on June 21, 2023. The last ruling on all timely filed petitions for rehearing was on August 24, 2023. On November 17, 2023, Justice Alito granted an application to extend the certiorari deadline to December 22, 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 … professional capacity … ." 29 U.S.C. § 213(a)(1). To qualify for the professional 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 his total take-home pay. 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.[3] U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2018-25 (Nov. 8, 2018).

[3] The ratio Hebert's actual earnings to his guaranteed weekly salary exceeded this ratio in all but two-day workweeks (during which there would be no overtime liability) as a matter of arithmetical fact. See *infra* page 7.

B. Facts and Procedural History

FMC is an offshore oil and gas equipment and service company. App. 2a. It employs installation engineers, like Hebert and Mohammed, who "provide[] support for testing, installation, intervention, and recovery of subsea equipment." *Id.* Installation engineers typically work 12 hours per day and six or seven days per week. (ROA.975-76.[4]) FMC pays installation engineers a biweekly salary plus a daily bonus (called a "field service premium") when they worked in the field. *Id.* (*See also*, ROA.969 ("The field service premium[] … is a daily bonus that is *purely based off the time that is spent working in the field*[.]" (emphasis added)).) The field service premium is the lesser of $425 or 13% of the installation engineer's annual salary divided by 28. (ROA.962-63.) And even though it knows that the installation engineers work well in excess of 40 hours per week, FMC does not pay them overtime. (ROA.913.)

At the time of his termination, Hebert's annual salary was $90,000, and his daily bonus was $417.86. (ROA.559, 621-22, 647.) So in most weeks, his total take-home pay materially exceeded his base salary:

[4] "ROA" refers to the electronic record on appeal in the Fifth Circuit.

Workdays	Salary	Earnings	Ratio
1	$1,730.77	$2,148.63	1.24:1
2	$1,730.77	$2,566.48	1.48:1
3	$1,730.77	$2,984.34	1.72:1
4	$1,730.77	$3,402.20	1.97:1
5	$1,730.77	$3,820.05	2.21:1
6	$1,730.77	$4,237.91	2.45:1
7	$1,730.77	$4,655.77	2.69:1

After his employment with FMC ended, Hebert filed a lawsuit alleging that the FLSA entitled him to overtime. Approximately six weeks after the district court entered the scheduling order—and over four months before the deadline to add new parties—Mohammed joined the lawsuit by consenting in writing to be part of it under 29 U.S.C. § 216(b). (ROA.191.) After discovery, both parties moved for summary judgment. FMC argued that it was not liable to Hebert for overtime pay because he was an exempt professional under 29 U.S.C. § 213(a)(1) and 29 C.F.R. § 541.300. App. 13a. Hebert argued that the exemption was inapplicable because FMC did not pay him 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—an essential element of that defense. *Id.*

The district court agreed with FMC, ruling that Hebert was exempt under the test for professional employees. App. 11a-34a. It explained that Hebert was paid on a "salary basis" for purposes of the EAP exemptions because his "*base* salary was paid biweekly and did not change[,]" App. 18a (emphasis added), and that it did not matter if Hebert also received nonguaranteed extras on a daily basis that "total as much as, or even more than, [his

base] salary[]" *id.* (citations omitted). In fact, the district court expressly found that the reasonable relationship test, 29 C.F.R. § 541.604(b), did not apply even though a substantial portion of Hebert's pay was computed on a daily basis. App. 16a-17a, 18a. The district court did not address Mohammed's claims at all. App. 11a-20a.

Hebert and Mohammed appealed to the Fifth Circuit. In an opinion by Judge Jolly, the panel found that Hebert was an exempt professional because, among other things, he was paid on a "salary basis." App. 1a-9a. The panel explained that "Hebert does not lose his status as an employee paid on a salary basis just because he was also paid a [daily] bonus on top of the salary … ." App. 6a. Relatedly, the panel opined that "the reasonable relationship requirement of [29 C.F.R. § 541.]604(b)"—as well as *Hewitt v. Helix Energy Sols. Gp., Inc.*, 15 F. 4th 289 (5th Cir. 2021) (*en banc*) and this Court's decision in *Helix*—only apply to employees who are paid "*solely* at a daily rate." App. 6a (emphasis added). The panel also said that Mohammed was "not a party to the appeal[,]" App. 4a, because "the district court declined to certify a class," App. 3a.

Hebert and Mohammed petitioned for rehearing *en banc* on (1) the question of whether an employee is paid on a salary basis for purposes of the EAP exemptions to the FLSA 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 exceed 50% of the employee's guaranteed weekly pay and (2) the question of whether collective-action "certification" is

condition precedent to the joinder of additional party plaintiffs under 29 U.S.C. § 216(b). The petition was denied. App. 10a.

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 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 exceed 50% of the employee's salary. 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 Circuit has answered it in the affirmative, and the Fifth Circuit has answered it both ways. The courts of appeals are plainly divided on how to apply this regulatory provision, warranting this Court's intervention.

The Fifth Circuit's decision is wrong. Among other things, this Court specifically said in *Helix* that § 541.602(a)—on which the Fifth Circuit relied to determine that Hebert was paid on a salary basis, App. 4a-6a—"applies *solely* to employees paid by the week (or longer)[,]" 143 S.Ct. at 685 (emphasis added). But since Hebert was not paid "*solely*" by the week, § 541.602(a) does not apply. The Fifth 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 Fifth 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 Fifth Circuit's Decision on These Exceptionally Important Employment-Law Issues Squarely Conflicts with This Court's Decisions in *Helix* and *Symczyk* and with Decisions from the First, Third, Ninth, Sixth and Eleventh Circuits and Authority Promulgated by the Department of Labor

The Fifth 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) (emphasis added). Therefore, Fifth Circuit's decision to ignore the part of Hebert'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

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 (3rd 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 Fifth Circuit's decision vis-à-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 (Jul. 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.").

The Fifth Circuit also held that although Mohammed had "submitted a consent to opt-in" to the case in the district court, App. 3a, he was not ever party because the district court "declined to certify a class," *id.* That

determination starkly departs from this Court's decision in *Genesis Healthcare Corp. v Symczyk*, 569 U.S. 66 (2013), and at least four other courts of appeals to squarely address the issue and, more fundamentally, the plain language of the statute. *See*, 29 U.S.C. § 216(b); *Symczyk*, 569 U.S. at 75 (explaining that "'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action[]"); *Waters v. Day & Zimmerman NPS, Inc.*, 23 F.4th 84, 89 (1st Cir. 2022) ("Conditional certification cannot be the cornerstone of party status because it is not a statutory requirement; rather, certification 'is a product of interstitial judicial lawmaking or ad hoc district court discretion[—]nothing in section 216(b) expressly compels it.'" (quoting *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1100 (9th Cir. 2018)); *Canaday v. Anthem Cos.*, 9 F.4th 392, 394 (6th Cir. 2021) ("Once they file a written consent, opt-in plaintiffs enjoy party status as if they had initiated the action."); *Mickles v. Country Club Inc.*, 887 F.3d 1270, 1278 (11th Cir. 2018) ("The plain language of § 216(b) supports that those who opt in become party plaintiffs upon the filing of a consent and that nothing further, including conditional certification, is required.").

II. The Fifth Circuit's Decision Is Wrong on the Merits

Certiorari is all the more appropriate because the Fifth Circuit's decision is clearly wrong. It is undisputed that 29 C.F.R. § 541.604(b) applies to the EAP exemptions. It also undisputed that § 541.602(a) applies *solely* to employees paid by the week. Because Petitioner did not satisfy all the requirements of the professional exemption, Petitioner is

not exempt under 29 C.F.R. § 541.301. Finally, it is also undisputed that collective action "certification" is not a condition precedent to the joinder of additional parties under 29 U.S.C. § 216(b).

a. The "Minimum Guarantee Plus Extras" Provision, 29 C.F.R. § 541.604(b), Applies to Employees Who Earn a Salary Plus a Daily Bonus

The general rule, 29 C.F.R. § 541.602(a), is that an employee can only be exempt from the overtime requirements of the FLSA under the EAP exemptions if, among other things, he is paid on a salary basis—or *without* regard to the number of hours or days he worked. *See*, 29 C.F.R. §§ 541.300(a)(1), 541.602. Hebert was not paid the prototypical salary described in 29 C.F.R. § 541.602(a) because he received, in addition to his guaranteed weekly salary, nonguaranteed extras—called "field service premiums"—that were computed on a daily basis. (*See*, ROA.615 ("The field service premium[] … is a daily bonus that is *purely based off the time that is spent working in the field*[.]" (emphasis added)).) So to establish the EAP exemptions, FMC needed to show that it complied with 29 C.F.R. § 541.604(b).

The Fifth Circuit, though, decided differently. App. 4a-6a. In doing so, it simply ignored the nonguaranteed daily extras that Hebert undisputedly received—which comprised a significant portion of his total take-home pay—explaining that, to satisfy the salary-basis element of the EAP exemptions, it *only* mattered that Hebert "received a bi-weekly salary without regard to the number

of hours or days he worked." App. 5a; *see also*, App. 6a ("Thus, Section 604(b) is inapplicable here because the record shows Hebert was paid a guaranteed bi-weekly salary."); *id.* (explaining that 29 C.F.R. § 541.604(b) applies in situations where "the employee [is] paid solely at a daily rate"). That, though, is not what the regulation says, and it is not what this Court held in *Helix*.

Citing 29 C.F.R. § 541.604(b), this Court has explained that when any part of an employee's pay is computed on a daily basis, the employer must "also guarantee the employee [the minimum salary level in the regulations] regardless of the number of hours, days or shifts worked[]" and that the "promised amount must bear a reasonable relationship to the amount actually earned in a typical week[.]" *Helix*, 143 S.Ct. at 684 (internal citations and quotations omitted). In this case, Hebert received both a salary and nonguaranteed extras on a daily basis. (*See*, ROA.615.) So consistent with this Court's decision in *Helix* and § 541.604(b), FMC needed to establish that its total "compensation system function[ed] 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). Because FMC did not, Hebert was not exempt from the FLSA's overtime-pay requirements under 29 U.S.C. § 213(a)(1).

b. Collective-Action "Certification" Is Not a Condition Precedent to the Joinder of Additional Party Plaintiffs Under 29 U.S.C. § 216(b)

The Fifth Circuit decided that Mohammed was not ever a party to the case below or this appeal because the trial court declined to "certify a class" and that certification-related issues were waived because they were not briefed. App. 3a-4a. Stated differently, the panel held that Mohammed could have only joined the action *if* the trial court conditionally certified a class. *Id*. But in *Symczyk*, this Court correctly held that

> 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action. The *sole* consequence of conditional certification is the sending of court-approved written notice to employees … who in turn become parties to a collective action only by filing written consent with the court.

569 U.S. at 75 (emphasis added).

That is precisely what happened in this case. Mohammed joined this case on December 17, 2020, by consenting in writing to be part of it under 29 U.S.C. § 216(b). (ROA.191.) As of that date, he was a full party for all purposes, and the case proceeded with two plaintiffs asserting FLSA claims against FMC until it was dismissed nearly two years later on September 27, 2022, App. 20a. *See*, *Waters*, 23 F.4th at 89 ("Conditional certification cannot be the cornerstone of party status because it is not a statutory requirement; rather, certification 'is a product

of interstitial judicial lawmaking or ad hoc district court discretion[—]nothing in section 216(b) expressly compels it.'" (quoting *Campbell*, 903 F.3d at 1100); *Mickles*, 887 F.3d at 1278 ("The plain language of § 216(b) supports that those who opt in become party plaintiffs upon the filing of a consent *and that nothing further, including conditional certification, is required*." (emphasis added).) And even though he was a "full party for all purposes," the district court and the Fifth Circuit both refused to even consider Mohammed's claims at all.

III. The Questions Presented Are Important and Frequently Recurring

Whether an employee is paid on a salary basis for purposes of the FLSA's 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 exceed 50% of the employee's salary is an important and frequently recurring issue. All white-collar workers, regardless of industry, who receive a salary plus nonguaranteed extras on an hourly, daily or per-shift basis are affected. And if the Fifth Circuit's decision in this case is allowed to stand, § 541.604(b)'s reasonable-relationship requirement would be rendered completely superfluous. Employers could satisfy the salary-basis element of the EAP exemptions simply by showing that they paid the minimum salary level in the regulations regardless of the number of hours, days or shifts worked. For example, an employer could achieve the result that *Helix* countenanced against by artificially labeling an employee's day rate (or some other small part

of his total take-home pay) his "salary" as long as it met the regulatory minimum and purported to include a guarantee. *See*, 29 C.F.R. § 541.600(a) ("To qualify as an exempt executive, administrative or professional employee under section 13(a)(1) of the Act, an employee must be compensated on a salary basis at a rate of not less than $684 per week[.]"). That cannot be right.

Furthermore, after this Court's decision in *Helix*, the question presented has received outsized and extensive attention in the courts of appeals. In fact, two Fifth Circuit panels have addressed the issue, and each reached a different conclusion as to it.[5] *Compare*, App. 4a-6a, *with, Gentry v. Hamilton-Ryker IT Sols., LLC*, No. 22-40219, 2023 U.S. App. LEXIS, at *2-*3 (5th Cir. Jul. 24, 2023), *pet. reh'g en banc filed* (5th Cir. Aug. 7, 2023). It is presently considering the issue in two other cases. *See*, *Gilcrhist v. Schlumberger Tech. Corp.*, No. 22-50257 (5th Cir.); *Boudreaux v. Schlumberger Tech. Corp.*, No. 22-30819 (5th Cir.). The Tenth Circuit has squarely addressed the issue. *See*, *Wilson v. Schlumberger Tech. Corp.*, 80 F.4th 1170 (10th Cir. 2023). That case will likely be appealed to this Court. Numerous district courts also continue to wrestle

[5] The panel's unpublished decision also squarely conflicts with other published Fifth Circuit authority. *See*, *Hewitt*, 15 F.4th at 294 ("And as the Labor Department has explained, without the reasonable-relationship test, employees could routinely receive weekly pay of $1,500 or more and yet be guaranteed only the minimum required $455[.] … But such a pay system would be inconsistent with the salary basis concept and *the salary guarantee would be nothing more than an illusion.*" (internal citations and quotations omitted) (emphasis in original) (cleaned up)).

with the issues. *See*, *Guilbeau v. Schlumberger Tech. Corp.*, No. SA-21-CV-00142-JKP, 2023 U.S. Dist. LEXIS 117614, at *17-*26, *21 n.3 (W.D. Tex. Jul. 7, 2023); *Vaughn v. Wingo Serv. Co.*, No. 4:20-cv-3915, 2022 WL 4280665, at *3 (S.D. Tex. Aug. 4, 2022); *Gentry v. Hamilton-Ryker IT Sols., LLC*, No. 3:19-cv-00320, 2022 WL 658768, at *5 (S.D. Tex. Mar. 4, 2022). There is no reason to wait any longer. The Court should resolve these important and frequently recurring employment-law questions or confusion will persist.

CONCLUSION

The Court should grant the petition.

Respectfully Submitted,

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December 22, 2023