No. 25-

IN THE

Supreme Court of the United States

KRISTEN SILLOWAY, CHRISTA DURAN, AND BRIGITTA VAN EWIJK,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case raises recurring, important questions regarding the proper application of the Fair Labor Standards Act's ("FLSA") salary basis test for exemption from overtime pay.

The Ninth Circuit's decision is in direct and apparent conflict with *Helix Energy Solutions Group, Inc.* v. *Hewitt*, 598 U.S. 39, 55-56 (2023), where this Court ruled that 29 C.F.R. 541.602(a) and 29 C.F.R. 541.604(b) constitute two "non-overlapping paths to satisfy the salary-basis requirement," with 29 C.F.R. 541.604(b) being the test applicable to hourly-rate employees. The Ninth Circuit is the first court to hold that the express requirements of 29 C.F.R. 541.604(b) do not apply in the public sector and that, contrary to *Helix*, 29 C.F.R. 541.602(a) can be used to satisfy the salary-basis test even where employees are paid with regard to hours worked. In addition, while the employees in this case received additional compensation for additional hours worked, the Ninth Circuit failed to apply the express requirements of 29 C.F.R. 541.604(a) of the salary basis test, which are separate and in addition to the requirements of 29 C.F.R. 541.604(b) and 29 C.F.R. 541.602(a).

The questions presented are:

Whether employees paid an hourly rate applied to the number of hours worked each pay period can satisfy the salary-basis requirement in 29 C.F.R. 541.602(a), which requires payment of a predetermined amount each pay period without regard to the number of hours worked.

Whether employees whose earnings are computed on an hourly basis and who receive additional compensation for hours worked need to satisfy the salary-

basis requirements in both 29 C.F.R. 541.604(a) and (b) to be exempt from the FLSA's overtime pay requirements.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners (Plaintiffs-Appellants below) are Kristen Silloway, Christa Duran, and Brigitta Van Ewijk. None of the petitioners is a corporation.

Respondent (Defendant-Appellee below) is the City and County of San Francisco.

STATEMENT OF RELATED PROCEEDINGS

The proceedings directly related to this matter are the district court case *Silloway* v. *City & County of San Francisco*, No. 20-cv-7400-RS (N.D. Cal.), App. 55a-70a and the Ninth Circuit case *Silloway* v. *City & County of San Francisco*, No. 22-16079 (9th Cir.), App. 5a-54a. The district court case was consolidated with *Litvinova* v. *City & County of San Francisco*, No. 18-cv-01494-RS (N.D. Cal.). The Ninth Circuit case was consolidated with *Litvinova* v. *City & County of San Francisco*, No. 22-16568 (9th Cir.).

The district court granted summary judgment for the City and County of San Francisco and entered judgment on July 15, 2022. See *Silloway* v. *City & Cnty. of San Francisco*, No. 20-cv-7400-RS (N.D. Cal. July 15, 2022), App. 55a-70a.

The Ninth Circuit reversed the district court's decision and remanded the case back to the district court to resolve material factual issues on September 11, 2024. Judge Bea wrote a partial concurrence and dissent, expressing that the majority's application of the FLSA's salary basis test contravened established Supreme Court authority and binding Department of Labor rules. He also stated that he would reverse and remand with instructions to grant summary judgment in favor of Petitioners. See *Silloway* v. *City & Cnty. of San Francisco*, No. 22-16079 (9th Cir. Sept. 11, 2024), App. 5a-54a.

The Ninth Circuit denied Petitioners' petition for rehearing and rehearing *en banc* on October 23, 2024. *Silloway* v. *City & Cnty. of San Francisco*, No. 22-16079 (9th Cir. Oct. 23, 2024), App. 71a-72a.

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The Ninth Circuit's opinion is reported at 117 F.4th 1070 and reproduced at App. 5a-54a. The district court's opinion is reported at 615 F.Supp.3d 1061 and reproduced at App. 55a-70a.

JURISDICTION

The Ninth Circuit issued its opinion on September 11, 2024. Petitioners timely filed a petition for rehearing and rehearing *en banc* on September 25, 2024, which the court of appeals denied on October 23, 2024. App. 71a-72a. This Court has jurisdiction under 28 U.S.C. 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The following relevant statutory and regulatory provisions are set forth in Appendix D: 29 U.S.C. 207(a)(1), 29 U.S.C. 213(a)(1), 29 C.F.R. 541.602, 29 C.F.R. 541.604, and 29 C.F.R. 541.710.[1]

STATEMENT OF THE CASE

A. Legal Background

Congress passed the FLSA in 1938 to protect "all covered workers from substandard wages and oppressive working hours." *Barrentine* v. *Ark.-Best Freight Sys., Inc.,* 450 U.S. 728, 739 (1981); see also 29 U.S.C. 202(a) (stating that the FLSA protects "the minimum

[1] After giving full citations for each regulation, this petition refers to these regulations simply as "section 602," "section 604," and "section 710."

standard of living necessary for the health, efficiency, and general well-being of workers"). The law requires employers to pay overtime compensation to employees who work more than forty hours in a work week. 29 U.S.C. 207(a)(1). These overtime requirements are designed "to reduce overwork and its detrimental effect on the health and well-being of workers" and to increase overall employment "by incentivizing employers to hire more employees rather than requiring existing employees to work longer hours." 81 Fed. Reg. 32,391, 32,449 (May 23, 2016).

The FLSA does, however, exempt certain categories of workers, including those "employed in a bona fide executive, administrative, or professional capacity," from these overtime protections. 29 U.S.C. 213(a)(1). "'Exemptions to FLSA are * * * narrowly construed in order to further Congress' goal of providing broad federal employment protection.'" *Abshire* v. *Cnty. of Kern*, 908 F.2d 483, 485 (9th Cir. 1990) (citing *Mitchell* v. *Lublin, McGaughy & Assoc.,* 358 U.S. 207, 211 (1959)). To qualify for the professional exemption, an employer must show that an employee is "[c]ompensated on a salary * * * basis." 29 C.F.R. 541.300.

29 U.S.C. 213(a)(1) expressly grants the Secretary of the Department of Labor ("Secretary") the authority to "define[ ]" and "delimit[ ]" the scope of the FLSA's exemption of bona fide executive, administrative, or professional employees from the FLSA's overtime requirements.[2] Accordingly, the Secretary has promulgated regulations that set out the salary basis test under the FLSA. 29 C.F.R. 541.602(a) states that an

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[2] This is an "uncontroverted, explicit delegation of authority" to the Secretary and does not raise any issues under *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024). *Mayfield* v. *United States Dep't of Lab.*, 117 F.4th 611, 617 (5th Cir. 2024).

employee is paid on a salary basis "if the employee regularly receives each pay period * * * a predetermined amount constituting all or part of the employee's compensation." Under section 602(a), the employee must "receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." *Ibid.* 29 C.F.R. 541.604(b) states that an employer may "compute[]" an employee's earnings "on an hourly, a daily or a shift basis without losing the exemption" only if (1) "the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked," and (2) "a reasonable relationship exists between the guaranteed amount and the amount actually earned." 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." *Ibid.*

In *Helix* v. *Hewitt*, this Court made clear that sections 602(a) and 604(b) constitute two "non-overlapping paths to satisfy the salary-basis requirement." 598 U.S. at 55-56. "*Helix* held that § 602(a) (aided by § 604(a)) applies to employees paid on a weekly basis while § 604(b) applies to employees paid on a more frequent basis, such as by the hour or day." *Gentry* v. *Hamilton-Ryker IT Sols., L.L.C.*, 102 F.4th 712, 720 (5th Cir. 2024); see also *id.* at 720-21 (citing *Helix*, 598 U.S. at 51) (holding that section 604(b) applied to employees paid "'guaranteed weekly salar[ies]' * * * valued at their individual hourly rate times eight hours" because plaintiffs' "actual earnings could only be ascertained by determining the number of hours worked that week[,]" and "not, as § 602(a) requires, by ignoring that number and paying a predetermined amount.").

29 C.F.R. 541.604(a) sets out additional requirements for meeting the salary basis test if employers provide workers with additional compensation on top of their set salaries. Under section 604(a), "[a]n employer may provide an exempt employee with additional compensation without losing the exemption" only "if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis." In *Gentry*, the Fifth Circuit clarified that even in circumstances where section 604(b) does not apply, both sections 602(a) and 604(a) must be satisfied for the salary basis test to be met when employers provide workers with additional compensation beyond their set salaries. *Gentry* v. *Hamilton-Ryker IT Sols., L.L.C.*, 102 F.4th at 721.

In the public sector, 29 C.F.R. 541.710 allows public agencies to make certain permissible salary deductions for partial-day absences occasioned by the employee; however, it does not do away with the FLSA's salary basis test. By its plain terms, section 710 applies only when an employee of a public agency "otherwise meets the salary basis requirements of § 541.602." The Department of Labor ("DOL") has explained that public employers must still meet all applicable aspects of the salary basis test, including those in sections 602(a), 604(a), and 604(b), before the section 710's public accountability exception applies. 57 Fed. Reg. 37,666, 37,671 (Aug. 19, 1992) ("A public sector employer must still be able to demonstrate that a claimed exempt employee satisfies all other aspects of the 'salary basis' requirements for exemption.") Thus, an employer may not avail itself of the deductions permitted by the exception unless it has proven that its employees are properly paid on a salary basis in the first place. *Rowe* v. *Reynolds,* 624 F. Supp. 3d 1036, 1048-49 (S.D. Iowa 2022) ("[A]n employer . . . must 'guaran-

tee' the full salary in the first instance before it can use the public accountability exception as a basis for making deductions.").

B. Petitioners' Suit and District Court Proceedings

This case concerns nurses who were employed by the City and County of San Francisco ("the City") either full-time or part-time as "staff nurses" and who also had the opportunity to pick up additional shifts as "per diem nurses." App. 56a-57a. The per diem shifts "exist because the City is perennially short staffed, so the staff nurses cannot cover the load with their normal shifts." App. 57a. Some nurses essentially work two full-time jobs, performing more than eighty hours of work in a single week. Nonetheless, the City did not pay these nurses overtime pay for hours worked over forty hours in a week. App. 57a-58a.

Petitioners filed a collective action complaint against the City on behalf of themselves and similarly situated nurses on October 22, 2020. App. 19a. In the complaint, Petitioners alleged that the City violated the FLSA by failing to pay the nurses overtime pay. *Ibid.* The case was consolidated with *Litvinova* v. *City & County of San Francisco,* No. 3:18-cv-1494-RS (N.D. Cal.), another collective action against the City based on similar facts. *Ibid.*

The City claims that it is not legally required to pay these nurses overtime pay, arguing that the nurses are salaried and therefore entirely exempt from the overtime requirements of the FLSA. App. 58a. However, there is clear evidence that the City calculated the compensation of these nurses on an hourly basis and that they were only paid for the hours that they actually worked. While the City has a salary ordi-

nance that lists annual compensation figures for the nurses, in actual practice, the City divided these annual figures into hourly rates and compensated the nurses for only the hours that they worked at these hourly rates. App. 9a.

The memorandum of understanding ("MOU") between the City and the nurses, which governs the terms and conditions of the nurses' employment, does not guarantee the nurses a minimum amount of compensation each pay period. App. 38a. To the contrary, it expressly permits the City to cancel nurses' shifts and reduce their pay. *Ibid.* In addition, there is also nothing in the City's payroll system that ensures the nurses were paid a minimum guaranteed amount each pay period. App. 11a-13a. In fact, the City's expert report shows over seventy instances where the nurses were paid less than their alleged full-time salary. App. 30a.

On July 15, 2022, the district court considered the parties' cross-motions for summary judgment and granted summary judgment in favor of the City. App. 70a. The court found the City's salary ordinance showing salary figures for the nurses to be "dispositive evidence" that they were paid on a salary basis and held the nurses' hourly pay rates used in payroll constituted merely an "accounting fiction" for administrative purposes. App. 19a. Thus, the district court ruled that the nurses were exempt from the FLSA's overtime requirements. *Ibid.*

C. The Ninth Circuit's Decision

On September 11, 2024, a Ninth Circuit majority panel reversed the district court's summary judgment ruling and remanded the case back to the district court to resolve "[m]aterial factual questions remain[ing] in dispute as to whether the plaintiff staff nurses received

predetermined amounts of compensation on a weekly or less frequent basis during the relevant time" as required under section 602(a). App. 43a. While the majority reversed the district court's decision in Plaintiffs' favor, its application of the salary basis test was flawed and contradicts settled Supreme Court authority regarding the salary basis test, as established in *Helix* v. *Hewitt*, 598 U.S. at 55-56. According to the Ninth Circuit majority, "[t]he proper focus for the salary basis test is ***whether an employee receives a predetermined amount of compensation on a weekly or less frequent basis***, irrespective of any promises made in an employment contract." App. 10a (emphasis added). In other words, the majority determined that the proper focus was whether the salary basis requirement in section 602(a)[3] was satisfied, despite the fact that the nurses' compensation was "computed on an hourly * * * basis," which requires application of section 604(b) of the salary basis test under *Helix*. 29 C.F.R. 541.604(b); *Helix* v. *Hewitt*, 598 U.S. at 55-56. The majority also failed to analyze whether the employment arrangement between the City and the nurses included "a guarantee of at least the minimum weekly-required amount paid on a salary basis," as required under section 604(a), since the nurses were paid extra for their per diem shifts.

In addition, the majority established a new standard for application of the salary basis test, concluding that "the salary basis test [in section 602(a)] ap-

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[3] Section 602(a) is the only section of the salary basis test that requires a "predetermined amount constituting all or part of the employee's compensation." 29 C.F.R. 541.602. Sections 604(a) and (b) of the salary basis test require "a guarantee of at least the minimum weekly-required amount paid on a salary basis." 29 C.F.R. 541.604.

plies differently to private and public employers." App. 24a. According to the majority,

> Whereas a private employer must pay its employees predetermined amounts on a weekly or less frequent basis, a public employer must give its employees the *opportunity* to earn predetermined amounts on a weekly or less frequent basis, a prospect that will be fulfilled so long as employees do not miss work for unexcused reasons.

Ibid.

Judge Bea wrote a partial concurrence and dissent, expressing his view that "the majority revises key parts of the Secretary's rules and practically writes out others altogether." App. 48a. "§ 604(b)—arguably the only relevant rule here because it is the only one to speak about the salaried status of hourly-rate employees—makes only a brief appearance in the majority's analysis before it is 'cart[ed] . . . off the stage.'" *Ibid.* (citing *Hewitt,* 598 U.S. at 56). "[I]n holding (at least implicitly) that § 602(a)—not § 604(b)—applies to such workers, the majority 'subvert[s] § 604(b)'s strict conditions on when th[ose] [employees'] pay counts as a "salary."'" App. 54a (citing *Hewitt,* 598 U.S. at 56).

Judge Bea also correctly pointed out that "the majority's 'public vs. private' employer distinction * * * does not hold up under closer scrutiny," as both public and private employers may deduct pay, just under different regulations. App. 50a; see 29 C.F.R. 541.710 (allowing certain partial day deductions in the public sector); 29 C.F.R. 541.602(b) (allowing certain full day deductions in the private sector). "If we follow [the majority's] reading of 'the interplay' between § 602(a)'s requirements and an employer's ability to make permissible pay deductions, Maj. Op. at 19, then private employees

are no more entitled to § 602(a)'s promise of a 'fixed compensation' than are public employees, *Hewitt,* 598 U.S. at 51." App. 52a. If this were to be the case, "[n]ot much" would be "left of § 602(a)'s [predetermined amount requirement] in future cases such as this one, where an employer, calculating pay 'top-down,' reduces its workers' compensation to an hourly- or daily-rate under § 710 or § 602(b)." *Ibid.*

Judge Bea concluded that since the City computed the nurses' compensation on an hourly basis without "guarantee[ing] them a fixed amount of pay that does not depend on the days or hours they worked," he would find that they "are not salaried under the FLSA, and the City must pay them overtime under that statute." App. 54a. He "would reverse and remand with instructions to grant summary judgment in favor of the Nurses on their claim for overtime compensation under the FLSA." *Ibid.*

Petitioners filed a petition for panel rehearing and rehearing *en banc* on September 25, 2024. The Ninth Circuit denied the petition on October 23, 2024. App. 71a-72a. Judge Bea voted to grant the petition for panel rehearing and rehearing *en banc*. App. 72a.

REASONS FOR GRANTING THE PETITION

This petition should be granted for two major reasons.

First, the Ninth Circuit's decision is in direct conflict with this Court's decision in *Helix* v. *Hewitt*, 598 U.S. at 55-56, which established that section 602(a) of the FLSA's salary basis test applies to employees whose earnings are computed on a weekly basis while section 604(b) applies to employees whose earnings are computed on an hourly basis. The Ninth Circuit's

decision conflicts with *Helix* by applying section 602(a) to nurses paid on an hourly basis. Notably, the Ninth Circuit also ignores section 604(a), which is applicable in this case since the nurses received additional compensation for additional hours worked beyond their normal work hours.

Second, the Ninth Circuit's decision raises an important question of how the FLSA's salary basis test applies to public sector employees. Citing the public accountability exemption in section 710, the Ninth Circuit states that public sector employers only need to provide "employees the *opportunity* to earn predetermined amounts on a weekly or less frequent basis" (as opposed to actually paying predetermined amounts) for section 602(a) to be met. App. 24a. However, section 710 makes no such distinction for public employees, as it states in plain terms that it is only applicable when an employee of a public agency "otherwise meets the salary basis requirements of § 541.602." 29 C.F.R. 541.710. The court's decision broadens the requirements of section 602(a) of the salary basis test for public sector employers to the point that, as Judge Bea remarks, "[n]ot much" is left. App. 52a. The result is that the Ninth Circuit's decision upends the salary basis test for public sector employees. In addition, the decision also creates a "'public vs. private' employer distinction" that, as Judge Bea points out, "does not hold up under closer scrutiny," thus rendering the salary basis test ineffectual with both public and private employers. App. 50a.

Each of these reasons justify this Court granting this petition. Altogether, this case presents an ideal vehicle for this Court to establish the proper application of sections 602(a), 604(a), and 604(b) of the FLSA's salary basis test within the public sector.

I. The Ninth Circuit's decision presents a direct conflict with this Court's decision in *Helix* v. *Hewitt* because it applies the wrong salary basis test for statutory exemption from the FLSA's overtime requirements

The Ninth Circuit majority's decision to ignore the requirements of section 604(b) and instead apply section 602(a) to nurses whose compensation is computed on an hourly basis is in direct and unavoidable conflict with this Court's decision in *Helix* v. *Hewitt*, 598 U.S. at 55-56. In *Helix*, this Court held that sections 602(a) and 604(b) "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* held that § 602(a) (aided by § 604(a)) applies to employees paid on a weekly basis while § 604(b) applies to employees paid on a more frequent basis, such as by the hour or day." *Gentry* v. *Hamilton-Ryker IT Sols., L.L.C.*, 102 F.4th at 720. Highlighting this distinction between sections 602(a) and 604(b), this Court made clear that section 602(a) cannot be applied to "cover * * * hourly-rate employees[, since it] would subvert § 604(b)'s strict conditions on when their pay counts as a 'salary.'" *Helix*, 598 U.S. at 56; see also *id.* at 58 ("§ 604(b)'s focus on * * * hourly workers confirms that § 602(a)—as its own text shows—pertains only to employees paid by the week (or longer)."). In other words, sections 602(a) and 604(b) are "***alternative, independent methods*** for satisfying the salary basis test." *Gentry,* 102 F.4th at 720 (emphasis added). Only one section is applicable, depending on how the employees' compensation is computed.

Which salary basis test applies—section 602(a) or 604(b)—is determined by whether the employees'

compensation is computed on "a weekly, or less frequent basis" (section 602(a)) or "an hourly, a daily or a shift basis" (section 604(b)). In *Helix*, this Court explained that "[a] 'basis' of payment typically refers to the unit or method for calculating pay, not the frequency of its distribution." *Id.* at 53. Thus, employees would be paid on an hourly basis if they are paid based on their hours worked, even if they receive their paychecks once a week. *Ibid.* In that situation, section 604(b) would apply for purposes of determining whether the salary basis test is satisfied.

As Judge Bea emphasizes in his partial concurrence and dissent, section 604(b) is "the only relevant rule here because it is the only one to speak about the salaried status of hourly-rate employees." App. 48a. In this case, it is clear that the wages of staff nurses were computed on an hourly basis, since "[t]he Memorandum of Understanding between the City and the Nurses * * * provides that the Nurse's [compensation] 'shall be calculated . . . proportionate to the hours *actually worked*,'" and "[t]he City's own expert and Director of Compensation admitted at deposition that the Nurses' 'compensation . . . [is] based on [the] hours they worked.'" App. 47a. Thus, as in *Gentry*, where the plaintiffs' "paychecks were [also] a function of the hours worked," the applicable test of whether the salary basis requirement is met here is 604(b), not 602(a). *Gentry*, 102 F.4th at 721.

While the majority acknowledges the two alternative paths for satisfying the salary basis test App. 14a-16a, it ignores the plain language of the regulation requiring the application of section 604(b) whenever pay is computed on an hourly basis and instead applies section 602(a) even though the City computes the nurses' compensation based on their hours worked.

App. 23a-28a. Just as "[a] daily-rate employee like Hewitt is not paid on a salary basis under § 602(a) of the Secretary's regulations * * * [and] may qualify as paid on salary only under § 604(b)," hourly-rate employees like the nurses here are not paid on a salary basis under section 602(a) and may qualify as paid on salary only under section 604(b). *Helix*, 598 U.S. at 61. The majority's application of the salary basis test under section 602(a) over section 604(b) is in direct conflict with this Court's decision in *Helix* and "cart[s] § 604(b) off the stage" in the way that *Helix* admonishes. *Helix*, 598 U.S. at 56.

The majority's decision to focus on section 602(a) is also at war with other circuit authority and guidance from the Department of Labor tasked with enforcing the FLSA regulations, which make clear there needs to be a minimum guarantee under section 604(b) when compensation is calculated on an hourly or daily basis. See *Hughes* v. *Gulf Interstate Field Servs., Inc.*, 878 F.3d 183, 190 (6th Cir. 2017) ("[T]he threshold question of whether there was a guarantee * * * matters for determining whether employees whose pay was at least arguably calculated on a daily basis qualified as exempt."); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, Fair Labor Standards Act (July 9, 2003), 2003 WL 23374601, at *2 ("If a pay system compensates employees who are claimed to be exempt on the basis of hourly wage rates computed from their actual hours worked each week, it is necessary to determine whether a salary guarantee is in effect and operational. Payment on an hourly basis without an operative salary guarantee does not qualify as a 'salary basis' of payment within the meaning of the regulations."). The majority's decision is an outlier and creates a conflict in authority on how the salary basis test should be applied.

II. The Ninth Circuit's decision raises important questions over the proper application of the salary basis test

A. The Ninth Circuit's decision ignores the salary basis requirements of sections 604(a) and 604(b) in a way that is contrary to authority from this Court, other circuit courts, and the DOL

Despite the fact that the nurses here had their compensation computed on an hourly basis and received considerable additional compensation on top of their regular wages for per diem shifts, the Ninth Circuit failed to apply the requisite salary basis test set out in sections 604(b) and 604(a) and instead focused its analysis solely on sections 602(a) (the test for employees paid on a weekly or less frequent basis under) and 710 (the public accountability principle allowing certain permissible deductions of pay by public agencies). App. 14a-17a. The questions raised in this petition are of exceptional importance to the effective administration of the state as public agencies determine whether they are required to pay employees overtime compensation under the FLSA.

The Ninth Circuit's decision to ignore the analysis required by either section 604(b) or section 604(a) contravenes the plain text of the regulations as well as the leading Supreme Court decision in *Helix*, relevant circuit court authority, and guidance from the Department of Labor, which administrates the regulation. Notably, if employees receive additional compensation for hours outside the normal work week, 604(a)'s requirement of a "minimum guarantee[]" of compensation included in the "employment arrangement" must still be met, even if the salary basis requirements of sections 602(a) or 604(b) are satisfied. 29

C.F.R. 541.604(a). Section 604(a) is separate from and works in tandem with sections 602(a) and 604(b). *Gentry*, 102 F.4th at 722 ("Section 604(a) builds upon § 602(a) and makes clear that salaried employees may receive 'additional' or 'extra' compensation only if 'the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis.'"); *id.* at 723 ("While § 604(a) permits hourly compensation for work '*beyond* the normal workweek,' § 604(b) applies to hourly compensation for work within the normal workweek.").

Here, while the majority recites the requirements of section 604(a), it completely skips over analyzing whether these requirements are met, and simply concludes that "if an employer satisfies § 602(a), it can provide additional compensation under § 604(a) on any basis." App. 16a-17a. This contravenes the plain language of section 604(a), which specifically requires a minimum guarantee. 29 C.F.R. 541.604(a) ("An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis.").

By ignoring the requirements of 604(a), the Ninth Circuit conflates 602(a)'s "predetermined amount" requirement with 604(a)'s requirement of a "guarantee" included in the "employment arrangement." This is contrary to the plain text of the regulations and established case law. Cf. 29 C.F.R. 541.604(a) (requiring guarantee in the "employment arrangement") with 29 C.F.R. 541.602(a) (no requirement of predetermined amount in the "employment agreement"); see also *Hughes*, 878 F.3d at 188-89 (citing *Orton* v. *Johnny's Lunch Franchise, LLC*, 668 F.3d

843, 848 (6th Cir. 2012)) ("employment agreement" language was removed from text of section 602(a)); *id.* at 192-93 (dismissing argument "that a 'guarantee' is the same thing as a 'predetermined amount'" since "[t]he operative idea" behind a guarantee is "that the employer is contractually obligated not to change its mind and reduce whatever amount it previously determined to provide"); *Rowe* v. *Reynolds*, 624 F. Supp. 3d at 1048 (There is a crucial difference between a guarantee in an employment arrangement and scheduling practices that are "merely a function of * * * staffing needs.").

Indeed, no courts have ruled that section 604 does not apply in the public sector. While *McGuire* established that municipalities may use an hourly accounting system, it never held that the FLSA's salary basis requirements do not need to be met in the public sector. *McGuire* v. *City of Portland*, 159 F.3d 460, 464 (9th Cir. 1998). On the other hand, several courts have applied section 604 in the public sector. See, *e.g.*, *Rodgers* v. *Basin Sch. Dist. No. 72*, No. CIV04-287-S-EJL, 2006 WL 3497254, at *3 (D. Idaho Dec. 4, 2006); *Flahive* v. *Lee Cnty. Sch. Bd.*, No. 2:11-cv-453-FtM-36DNF, 2012 WL 13140734, at *6 (M.D. Fla. Aug. 31, 2012); *Serv. Emps. Int'l Union, Loc. 721* v. *Cnty. of Riverside*, No. 08-1746-JTM, 2011 WL 13224832, at *4 (C.D. Cal. July 29, 2011); *Reich* v. *Cnty. of Cook*, No. 10 C 3155, 2012 WL 3581169, at *3 (N.D. Ill. Aug. 14, 2012). The Ninth Circuit's decision to focus on just section 602(a) and ignore sections 604(a) and 604(b) creates a conflict in authority on how the salary basis test functions in the public sector.

Sections 602(a), 604(b), and 604(a) each lay out requirements of the salary basis test that must be satis-

fied in different scenarios, and all these provisions "must [be] read * * * in harmony." *Gentry*, 102 F.4th at 723. Courts need guidance in addressing the important recurring question of how to properly apply these requirements, as made clear in the Ninth Circuit's decision. The Ninth Circuit's rejection of section 604(b) and conflation of the requirements in sections 602(a) and 604(a) renders the salary basis requirements of 604 superfluous and meaningless.

B. The Ninth Circuit's decision creates an erroneous distinction between how the salary basis requirements of section 602 are applied in the public and private sectors, which upends the entire salary basis test

Citing section 710(a), the panel holds that it is "required to draw a sharp distinction between practices that are available to public employers but prohibited to private employers" (App. 28a) and extends this even further by proclaiming that "the salary basis test [under section 602(a)] applies differently to private and public employers." App. 24a. Without citation to any authority, the panel announces a new rule for how the salary basis test should be applied in the public sector:

> Whereas a private employer must pay its employees predetermined amounts on a weekly or less frequent basis, a public employer must give its employees the *opportunity* to earn predetermined amounts on a weekly or less frequent basis, a prospect that will be fulfilled so long as employees do not miss work for unexcused reasons.

Ibid.

The panel's ruling is directly contradicted by DOL rules and regulations, which make clear that public sector employers must satisfy "all * * * aspects of the 'salary basis' requirements" before they can claim the exemption under section 710. 57 Fed. Reg. at 37,671. Section 710 "do[es] not provide a basis for making a special public sector rule." *Id.* at 37,673.

Section 710's public accountability rule cannot be extended so far as to swallow the entire salary-basis requirement. Instead, Section 710 is narrowly tailored and only varies the kinds of permissible deductions public sector employers can make. It does not upend the entire salary basis test in the public sector.

As Judge Bea points out, the majority "read[s] § 710's protections for public employers so broadly as to allow public employers to evade almost completely the otherwise clear requirements of § 602(a) to pay 'salaried' workers a predetermined amount." App. 49a n.2. However, as Judge Bea also notes, the distinction between public and private sector employers is not as extreme as the majority suggests, given that private sector employers are also allowed certain deductions under section 602(b) (though limited to full-day deductions rather than partial days). App. 50a. "Thus, following the majority's logic, a private employer could just as easily claim exemption from § 602(a)'s 'predetermined amount' requirement by relying on its own ability to dock a worker's pay for time not worked." *Ibid.* The majority's exemption of public sector employers from section 602(a)'s salary basis requirement in this case poses the grave risk that *no employers* will now be required to satisfy those requirements. Without the requirements of section 604(b), 604(a), and 602(a), the FLSA's salary basis test is rendered meaningless.

C. The question of how the FLSA's salary basis test is to be applied is a recurring issue of national importance that extends beyond the facts in this case

The questions presented here extend far beyond the plight of the nurses in this case. Over the years, numerous courts nationwide have struggled with how to apply the various salary basis regulations under the FLSA.

In *Anani* v. *CVS RX Services, Inc.,* 730 F.3d 146, 147 (2d Cir. 2013), the Second Circuit held that section 604(b) was not applicable to a pharmacist paid a guaranteed base weekly amount and who received additional compensation for hours worked in excess of forty-four hours each week because they were already considered a highly compensated employee under 29 C.F.R. 541.601. Similarly, in *Litz* v. *Saint Consulting Group, Inc.,* 772 F.3d 1, 5 (1st Cir. 2014), the First Circuit held that the highly compensated employee regulation under 29 C.F.R. 541.601 stands alone and that the highly compensated consultants could be deemed exempt without needing to satisfy the requirements of section 604(b).

However, in *Hewitt* v. *Helix Energy Sols. Grp., Inc.*, 15 F.4th 289 (5th Cir. 2021), aff'd, 598 U.S. 39, an *en banc* Fifth Circuit majority distinguished *Litz* and *Anani* and held that section 604(b) was still applicable to the highly skilled operations supervisors in that case. *Hughes* v. *Gulf Interstate Field Servs. Inc.,* 878 F.3d 183, and *Coates v. Dassault Falcon Jet Corp.,* 961 F.3d 1039 (8th Cir. 2020), also both suggested that those courts would apply section 604(b) to highly compensated welding inspectors and team leaders or production liaisons, respectively.

This Court granted a writ of certiorari in *Helix* to resolve the question of how to properly apply the various salary basis regulations to highly compensated employees. *Helix* v. *Hewitt*, 598 U.S. at 49-61. This Court's decision in *Helix* was dispositive. It clarified the applicability of the FLSA regulations by explaining highly compensated employees still have to satisfy the salary basis requirements under sections 602(a) and 604(b), with section 602(a) of the salary basis test applicable to employees whose compensation is computed on a weekly basis while section 604(b) applies to employees whose compensation is computed more frequently, such as on an hourly basis. *Helix*, 598 U.S. at 55-56.

In *Gentry*, the Fifth Circuit agreed that *Helix* was dispositive and additionally held that section 604(a) must be satisfied, if applicable, even when 604(b) or 602(a) are met. *Gentry* v. *Hamilton-Ryker IT Sols., L.L.C.*, 102 F.4th at 721. *Helix* should have been dispositive in this case just like it was in *Gentry*. See *Gentry*, 102 F.4th at 720. Instead, the Ninth Circuit failed to follow *Helix* and created a direct conflict by ruling that public sector nurses whose compensation is computed on an hourly basis are not required to satisfy the requirements of sections 604(b), and, instead, must only meet the requirements of section 602(a).

The Ninth Circuit's decision here also raises a new, important question of how the FLSA's salary basis test operates within the public sector, since it creates an erroneous distinction between public and private employers. App. 24a. The majority's decision exempts public sector employers from the salary basis requirements of section 604(b) and creates a too broad standard for them under section 602(a), which is contrary to *Helix* as well as authority from the Department of Labor. See 57 Fed. Reg. at 37,673 ("Principles of public account-

ability do not provide a basis for making a special public sector rule for additional compensation paid.").

As Judge Bea points out, "'[t]he broader regulatory structure' at play * * * suffers a blow from the majority's holding [in this case]." App. 53a. "[N]ot much" is "left of § 602(a)'s text in future cases such as this one, where an employer, calculating pay 'top-down,' reduces its workers' compensation to an hourly- or daily-rate under § 710 or § 602(b)." App. 52a. Based on the Ninth Circuit decision's direct conflict with *Helix* and the important questions that it raises, a writ of certiorari is warranted to direct lower courts on the proper application of the various salary basis regulations within the public sector.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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