No. 21-984

In the
# Supreme Court of the United States

HELIX ENERGY SOLUTIONS GROUP, INC.;
HELIX WELL OPS, INC.,
*Petitioners*,

v.

MICHAEL J. HEWITT,
*Respondent.*

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

## BRIEF IN OPPOSITION

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## INTRODUCTION

The Petition is best summarized as follows: Since Respondent Hewitt's ("Respondent" or "Hewitt") daily pay rate always exceeded $455 per day, Respondent always received more than $455 per week of work for Petitioners Helix ("Petitioners" or "Helix"). And since Petitioners paid Respondent more than $100,000 per year, Petitioners claim entitlement to an exemption from paying Respondent overtime under the federal Fair Labor Standards Act ("FLSA")—specifically the FLSA's Highly Compensated Employee regulation codified at 29 C.F.R. § 541.601 ("HCE Regulation"). Because they claim entitlement to the HCE Regulation, Petitioners argue that the Fifth Circuit split with the First and Second Circuits by applying a separate regulation for daily rate employees codified at 29 C.F.R. § 541.604(b).

Petitioners' arguments are unavailing. To reach first base on its Circuit split argument, Petitioners must demonstrate they established the HCE Regulation's requirements. Section B of the HCE regulation requires Petitioners to prove that they paid Respondent on a "salary or fee basis as set forth in … § 541.602 …" 29 C.F.R. § 541.601(b)(1). The Fifth Circuit correctly determined that Petitioners failed to establish they paid Respondent on a "salary basis" under 29 C.F.R. § 541.602 because Helix failed to pay Hewitt, a daily-rate employee, (1) on a "weekly, or less frequent basis," and (2) with, and not, "without regard to the number of days or hours worked." (Pet. Appx. at 4-5, 11). Petitioners devote only eight sentences to support their supposition that they paid Hewitt on a

"salary basis," (Petition at 24-25), and the reason for such scant treatment is evident: It is contrary to the plain text of the law, almost every published FLSA decision, and the opinion of the Department of Labor. UNITED STATES DEP'T OF LABOR OPINION FLSA2020-13 (Aug. 31, 2020) (attached at Resp. Appx. at 52a-65a).

Since Petitioners cannot establish that they paid Respondent on a "salary basis" under the FLSA's "general rule" regulation, the Fifth Circuit analyzed whether Petitioners could meet the "Minimum Guarantee Plus Extras" regulation at 29 C.F.R. § 541.604(b) and determined that they could not. (Pet. Appx. at 11). Petitioners know they cannot pass this regulation's requirements, so they argue that the Fifth Circuit erred by even considering 29 C.F.R. § 541.604(b) and that two Circuits have determined that 29 C.F.R. § 541.604(b) does not apply to the HCE Regulation. (Petition at 13-16).

None of the arguments pass muster, and all require Helix to prove it paid Hewitt on a "salary basis" under 29 C.F.R. § 541.602. The Fifth Circuit addressed the issue of a split in its opinion. It correctly determined that it split precisely zero Circuits when it analyzed and applied 29 C.F.R. § 541.604(b), as the cases Petitioners cite have significantly different factual underpinnings from this one. (Pet. Appx. at 17). Had the Fifth Circuit refused to analyze and apply 29 C.F.R. § 541.604(b), it would have created a split with the Sixth and Eighth Circuits. (Pet. Appx. at 12, 17-18). Moreover, beyond the fact that no split exists, the U.S. Department of Labor reached the same conclusion as

the Fifth Circuit. (Resp. Appx. at 52a-65a). Finally, since Petitioners failed to pay Respondent on a "salary basis," it does not matter that the Fifth Circuit analyzed 29 C.F.R. § 541.604(b), or whether the HCE Regulation is subject to 29 C.F.R. § 541.604(b).

This Court will read the Fifth Circuit's opinion. The twelve-judge majority grounded its decision in textualist and judicially neutral principles that federal courts considering the FLSA's "salary-basis" test have consistently applied for the past 80 years, regardless of employee or industry interests. Should the dissenters' view carry the day, this Court will stray from the law's plain text to rewrite the FLSA, which will have radical consequences for employees and employers alike.

## STATEMENT OF THE CASE

### A. Factual And Procedural Background

On December 29, 2014, Hewitt began working for Helix as a "Tool Pusher" on an offshore oil rig. (ROA.197, 204-05, 816).[1] In addition to supervising several other employees, Hewitt was responsible for ensuring that all operations on the rig complied with "client and company procedure." (ROA.204-05). A Tool Pusher is not a pure white-collar office job. (ROA.204:18-205:22). For only one reason—his supervisory duties—Helix classified the position as "exempt" from the FLSA and did not pay Hewitt for

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

any overtime hours. (ROA.328:18-23).[2] On August 3, 2017, Helix terminated Hewitt without telling him why. (ROA.51:6-8, 286).

Before the Fifth Circuit and this Court, Helix concedes it paid Hewitt a daily rate for his work. (Pet. Appx. at 7 ("Helix concedes that it paid Hewitt based solely on a day rate"); Petition at 1). Under the FLSA, employers must generally pay daily rate employees an overtime premium. 29 C.F.R. § 778.112. Hewitt worked a significant amount of overtime, and Helix did not pay him for the overtime he worked and earned. (ROA.208 at 58:19-23; ROA.215).

On August 18, 2017, Respondent filed suit for unpaid overtime under the FLSA. (ROA.7-17). On July 31, 2018, the parties filed cross-motions for summary judgment. (ROA.177-771). Respondent argued Petitioners could not prove they satisfied any applicable exemption under the FLSA because they did not pay him on a "salary basis." (ROA.182-191). Petitioners argued that since Respondent's daily rate exceeded the FLSA's "salary level" test, it actually paid him on a "salary basis" and owed Hewitt no overtime. (ROA.372-378).

The district court granted Petitioners' motion for summary judgment, concluding that Petitioners paid Respondent on a "salary basis" because Hewitt always received an amount over the FLSA's then "salary level"

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[2] Helix's HR Director Kenric McNeal provided devastating testimony that Helix's analysis of the FLSA was limited to his duties, and not whether Helix paid him on a "salary basis."

of $455 for any week in which he performed work and disposed of the claim with prejudice. (ROA.824).

Hewitt filed a timely appeal. (ROA.825-827). On April 20, 2020, the Panel assigned to this case reversed the District Court and ruled unanimously in Respondent's favor on the lead issue presented. *Hewitt v. Helix Energy Solutions Group*, *Inc.*, 956 F.3d 341 (5th Cir. 2020) ("*Hewitt I*") (attached at Resp. Appx. at 1a-8a). The Panel determined that Petitioners paid Respondent: (1) "an amount contingent on the number of days he worked each week. So he was not paid on a 'salary basis' under the Labor Department regulations;" and (2) "'*with*' (not 'without') 'regard to the number of days worked,' in direct conflict with the plain language of 29 C.F.R. § 541.602(a)(1)." (*Id.* at 6a, 7a) (emphasis in original).

After the Panel issued its decision, Petitioners filed a Petition for Rehearing *En Banc* and procured a couple of briefs from industry groups bemoaning the decision. The original Panel reconsidered its decision, held oral argument, and rigorously examined the parties' attorneys. On December 21, 2020, the same Panel withdrew *Hewitt I* and then held two judges to one, in Respondent's favor. *Hewitt v. Helix Energy Solutions Group, Inc.*, 983 F.3d 789 (5th Cir. 2020) ("*Hewitt II*") (attached at Resp. Appx. at 9a-51a). While the Court still determined Petitioners failed to pay Respondent on a "salary basis" under 29 C.F.R. § 541.602, it also addressed a two-pronged "special" rule for the FLSA's salary-basis test—29 C.F.R. § 541.604(b)—and found that Petitioners did not satisfy either prong. (Resp. Appx. at 11a, 17a). The Panel's

majority determined that its "reading of the regulations finds support not only from the Sixth and Eighth Circuits, but also in repeated statements by the Labor Department." (*Id.* at 19a). It outlined the constraints placed upon it as follows:

> If we were limited to the statutes enacted by Congress, we might very well have ruled for Helix in this matter. But we are also bound by regulations issued by the Secretary of Labor. And those regulations exempt daily rate employees from overtime—but only "if" that employee's compensation meets certain conditions. Helix asks us to ignore those conditions. But we are not at liberty to do so. And certainly not on the ground that the oil and gas industry warrants special treatment not supported by the text, or because Hewitt already makes enough money and thus doesn't deserve FLSA protection. Our duty is to follow the law, not to vindicate anyone's policy preferences. Our ruling today construes the salary basis for everyone—not just the oil and gas industry. Likewise, the salary basis test applies not only to highly compensated employees like Hewitt, but also to all other executive, administrative, and professional employees—including those who earn less than a fifth of what Hewitt makes.

(*Id.* at 25a).

Helix filed a second Petition for Rehearing *En Banc*. The Fifth Circuit withdrew *Hewitt II*, held oral argument, and then reversed the district court for the third time, twelve judges to six. *Hewitt v. Helix Energy*

*Solutions Group, Inc.*, 15 F.th 289 (5th Cir. 2020) ("*Hewitt III*"). (Pet. Appx. at 1-76). Judge Ho, writing for the majority, demonstrated how "[t]he plain text of the regulations is decisive … [and] this textualist approach is also shared by the Sixth and Eighth Circuits and the Secretary of Labor—not to mention the overwhelming majority of district courts that have confronted these issues …". (Pet. Appx. at 11). In addressing the policy arguments of Petitioners and the *amici*, the Court determined:

> Our job is to follow the text—not to bend the text to avoid perceived negative consequences of the business community. That is not because industry concerns are unimportant. It is because those concerns belong in the political branches, not the courts. "We will not alter the text in order to satisfy the policy preferences" of any person or industry. "These are battles that should be fought among the political branches and the industry."

(Pet. Appx. at 20) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002)).

### B. Statutory And Regulatory Background

#### 1. The FLSA and its Relevant Implementing Regulations

The FLSA prohibits, for qualifying employees, employment "for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified 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).

The law exempts some employees from this requirement, such as those "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).

The FLSA grants the Secretary of Labor "broad authority to define and delimit the scope of the exemption for executive, administrative, and professional employees." *Auer v. Robbins*, 519 U.S. 452, 456 (1997) (citing 29 U.S.C. § 213(a)(1)). "Under the Secretary's chosen approach, exempt status requires that the employee be paid on a salary basis, which in turn requires that his compensation not be subject to reduction because of variations in the 'quality or quantity of the work performed." *Id.* Courts "must sustain the Secretary's approach so long as it is 'based on a permissible construction of the statute.'" *Id.* (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–843 (1984)).

The FLSA's implementing regulations are codified at 29 C.F.R. Part 541. Petitioners argue that they satisfied the FLSA's so-called HCE Regulation at 29 C.F.R. § 541.601, (Petition at 1), which "is a less burdensome way to prove an executive, administrative, or professional exemption, [and is] not a separate exemption."[3] *Coates v. Dassault Falcon Jet Corp.*, 961 F.3d 1039, 1048 (8th Cir. 2020). To claim entitlement to the HCE Regulation, an employer must prove (1) the employee performs specific job duties of an exempt executive, professional, or administrative employee (the "duties" test); (2) the employer paid the employee

[3] Congress did not authorize a separate "highly compensated employee" exemption in 29 U.S.C. § 213(a)(1).

on a salary basis (the "salary-basis" test); and (3) the employer paid the employee a salary of above a defined floor (the "salary-level" test). 29 C.F.R. § 541.601.

Hewitt concedes that Helix could satisfy the FLSA's so-called "duties" test under the HCE Regulation. And, if Petitioners paid Respondent on a "salary basis," which they did not, they could satisfy the "salary level" test. Petitioners, however, failed a fundamental requirement: They paid Respondent on a daily rate, which is not a salary under the FLSA, meaning they failed the FLSA's "salary-basis" test.

### 2. The FLSA Distinguishes Between Daily Rate and Salaried Employees

Under the FLSA, a "day rate" is "a flat sum for a day's work … without regard to the number of hours worked in the day." 29 C.F.R. § 778.112. Helix concedes it paid Hewitt a daily rate. (Pet. Appx. at 7; Petition at 1). With few exceptions not applicable here, employers must pay overtime to daily-rate employees. 29 C.F.R. § 778.112 ("[h]e is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek").

Salaried employees are not daily rate employees. The FLSA has a different definition of the term "salary basis" at 29 C.F.R. § 541.602(a) contained in its "General Rule." It reads in relevant part:

> An employee will be considered to be paid on a "salary basis" within the meaning of these regulations 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 variations in the quality or quantity of the work performed.*
>
> (1) … an exempt employee *must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked* …

29 C.F.R. § 541.602(a) (emphasis added).

An employee paid "an amount contingent on the number of days he worked each week … [is] not paid on a 'salary basis' under Labor Department regulations." *Hughes v. Gulf Interstate Field Servs., Inc.*, 878 F.3d 183, 189 (6th Cir. 2017); *see also* Resp. Appx. at 61a (pay "based … on the number of days worked" is not a "salary basis"); FLSA2009-18 (Jan. 16, 2009) at 4 (day rates are "inconsistent with the guaranteed salary basis of payment required"); FLSA2009-14 at 2 (Jan. 15, 2009) (same).

### 3. The FLSA's Special Rule for the Salary-Basis Test's "General Rule"

The FLSA's white-collar exemptions do not always mandate overtime for daily-rate employees. For example, an employer can pay doctors and lawyers a daily rate and still legally classify them exempt from overtime. 29 C.F.R. § 541.600(e). The FLSA also expressly excepts certain "daily rate" workers in the "motion picture producing industry." 29 C.F.R. § 541.709.

The FLSA also permits an employer to exempt a daily-rate employee from overtime *if* it can show: (1) A "guarantee" of "minimum weekly" pay "on a salary basis" to the employee and (2) a "reasonable relationship" between the guarantee and the amount earned by the employee. 29 C.F.R. § 541.604(b). After scrutinizing the arguments, the Fifth Circuit found that "Helix does not even purport to meet these conditions. Instead, Helix asks us to ignore them altogether. … But respect for the text forbids us from ignoring text. As a matter of plain text, we hold that … Helix must comply with § 541.604(b)." (Pet. Appx. at 5).

## REASONS FOR DENYING CERTIORARI

All the reasons for denying certiorari are within *Hewitt III*'s majority opinion, authored by a committed textualist and grounded in judicially neutral principles. The Court comprehensively addressed and defeated each argument raised by Petitioners, including their view that the court created an alleged Circuit split. Respondent also offers the following arguments.[4]

[4] Petitioners lead with their argument that the Fifth Circuit split the Circuits and then argue that the Fifth Circuit's decision was wrong on the merits. Since all of Petitioners' arguments first hinge on the requirement that they pay him on a salary, Respondent has flipped the order of its response to provide better context.

### A. Petitioners Fail to Establish Entitlement to the HCE Regulation Because They Did Not Prove They Paid Respondent on A "Salary Basis"

Petitioners assert the Fifth Circuit's decision was wrong on the merits, (Petition at 22-33), while simultaneously and erroneously claiming that the Fifth Circuit agreed with its analysis that Petitioners paid Respondent on a "salary basis," (Petition at 25) ("[t]he *en banc* majority did not dispute any of the above analysis"). Contrary to this declaration, the Fifth Circuit did not find that Helix paid Hewitt a salary. If it had, then the case would have been over. Instead, the Fifth Circuit explained that since Petitioners admitted they paid Hewitt by the day, Helix could not meet the FLSA's "general rule" for the salary-basis test. (Pet. Appx. at 16). Because it could not meet the "general rule," it looked to see if they could meet a special rule. *Id.* ("Hewitt cannot be a 'highly compensated employee' under § 541.601 unless his total annual compensation satisfies the salary-basis test. And the only way for an employee to have his pay 'computed on a daily basis' 'without violating the salary basis requirement' is to comply with § 541.604").

The HCE Regulation requires Helix to establish it paid Hewitt on a "salary … basis as set forth in … § 541.602 …" 29 C.F.R. § 541.601(b)(1).[5] Thus, the HCE Regulation requires Helix to prove it complied with the FLSA's "salary-basis" regulation located at 29 C.F.R. § 541.602. Yet, the Petition simply glosses over

[5] Helix has never argued it paid Hewitt on a "fee" basis. The only issue is whether Helix paid Hewitt on a "salary basis."

this requirement. (Petition at 15) ("[b]ecause Respondent satisfies the requirements of the HCE regulation, and because 29 C.F.R. § 541.604(b) does not apply or alter or supersede those requirements, Respondent is exempt").

Petitioners' reason for glossing over is apparent: Applying the law to these facts demonstrates that Petitioners cannot meet 29 C.F.R. § 541.602's requirements, which they must do to satisfy the FLSA's HCE Regulation at 29 C.F.R. § 541.601(b). Petitioners failed to provide any facts demonstrating that they paid Respondent a "predetermined" or "guaranteed" pay rate on a "weekly, or less frequent basis" as required by § 541.602(a). Petitioners paid Respondent "with" and not "without" regard to the number of days he worked, which § 541.602(a)(1) disallows. Petitioners also maintained the right to reduce Respondent's pay based on the quality of his work in violation of § 541.602(a). (ROA.209:61:6-9) (Hewitt's testimony that Helix required him to sign paperwork acknowledging his pay was subject to deduction for negligence).

Petitioners also offered no evidence that it guaranteed Respondent *any* amount of pay. They only provided evidence that Hewitt's daily rate exceeded $455 a week—over the then-existing "salary level" test amount—but failed to prove that Hewitt received more than $455 a week *because* Petitioners guaranteed him a salary of at least $455 a week. This logical fallacy serves as the foundation of Petitioners' argument that they paid Respondent a salary.

If there was no guaranteed daily pay rate, there was no guaranteed weekly pay rate. Respondent is not abstractly speculating. Helix offered him no guarantee of pay. Helix lowered and raised Hewitt's day rate throughout his employment for various reasons, including economic ones. (ROA.217-285) (check stubs showing varying day rates throughout Hewitt's employment).

Petitioners ignore all that and dismissively assert in eight sentences that they paid Respondent a salary because he received an amount of pay over the FLSA's then-existing "salary level" of $455 per week. (Petition at 24-25). Petitioners focus exclusively on the level of pay Respondent received and ignore the method (or "basis") on which Helix calculated his pay. Rewriting a regulation to fit a preferred outcome is not textualism.

The text is clear that an employer may not base the predetermined amount on the employee's quantity of work. 29 C.F.R. § 541.602(a) ("which amount is not subject to reduction because of variations in the quality or quantity of the work performed"). Further, it is irrelevant whether Helix actually made deductions based on the quality of his work because the law prohibits pay that is "*subject to* deduction" based on the employee's "quality of the work." *Id.* (emphasis added). Finally, Helix paid Hewitt *with*—and not *without*—regard to the number of days he worked in violation of 29 C.F.R. § 541.602(a)(1)'s plain-text requirement that "an exempt employee must receive the full salary for any week in which the employee

performs any work *without* regard to the number of days or hours worked." (emphasis added).

Petitioners' argument restructures the FLSA in an unprecedented manner. Consider an employee paid by the hour. Hourly employees, like day rate employees, are generally entitled to overtime. If an hourly employee otherwise entitled to overtime received more than the law's "salary level" through a weekly or less frequent paycheck, Helix's proposed revision means the employer paid the employee on a salary basis. Helix *admitted* this at oral argument before the Panel.[6] Helix's argument would also apply to commissioned and piece-rate employees, who, like day-rate employees, no one considers salaried under 29 C.F.R. § 541.602. Indeed, every worker getting a weekly (or less frequent) paycheck for more than the FLSA's "salary level" would have satisfied the law's "salary-basis" test, regardless of the method used to calculate their pay. But the "salary-basis" test asks how an employer determines that pay. It is not applied in hindsight, with the "level" of payment to the employee the sole determinant. What matters is how Helix determined what it owed Helix, and Helix could only make that determination by calculating the day rate by the days worked after Hewitt worked them. In other words, Helix post-determined Hewitt's pay, as opposed to the law's requirement that a salary is "a predetermined amount." 29 C.F.R. § 541.602.

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[6] https://www.ca5.uscourts.gov/OralArgRecordings/19/19-20023_9-9-2020.mp3 at 27:06-27:17 ("Q. [The Court]: So would your position be, that even someone paid hourly, is salaried if that hourly amount exceeds the minimum and it's guaranteed. A. Yes, it would").

Nothing supports such an end-run around the law, other than a tortured (mis)reading of the regulation. Helix's rewritten rule is the opposite of the Department of Labor's consistent interpretation of the regulation across multiple administrations. "[The DOL's Wage and Hour Division] knows how to include in the exemption certain employees whose pay is calculated on a daily basis; it has chosen not to do so broadly." (Resp. Appx. at 61a at n.27).

Helix failed to pay Hewitt on a "salary basis." Because of that, Helix cannot establish entitlement to the HCE Regulation. 29 C.F.R. § 541.601(b) ("Total annual compensation" must include at least $684 per week paid on a salary … basis as set forth in … § 541.602 …").

### B. The Fifth Circuit's Decision Creates No Split and Finds Support from the Sixth and Eighth Circuits

Petitioners complain the Fifth Circuit erred by applying 29 C.F.R. § 541.604(b). As demonstrated *supra*, since Helix failed to pay Hewitt on a salary basis, it cannot claim entitlement to the HCE Regulation. Unless another regulation applied, it was game, set, match on this case against Helix.

The Fifth Circuit analyzed and applied a regulation for workers paid an "hourly, a daily, or shift basis…" 29 C.F.R. § 541.604(b). If the employer can establish that it paid the employee a minimum guaranteed amount of $455 "on a salary basis," and if there is a "reasonable relationship" between that minimum guarantee and the amount earned by the employee,

then the employer may satisfy the salary-basis test. 29 C.F.R. § 541.604. (Pet. Appx. at 4) ("[T]he Secretary has promulgated a special rule that must be satisfied before an hourly or daily rate will be regarded as a 'salary'"). After its analysis, the Fifth Circuit determined that because Helix offered Hewitt no "guarantee" of "minimum weekly" pay "on a salary basis," and (2) a "reasonable relationship" between the alleged guarantee and the amount earned, the Court determined that Helix did "not comply with either prong of § 541.604(b)." (*Id*. at 11).

In its main reason for seeking certiorari, Petitioners argue that the Fifth Circuit created a Circuit split by applying 29 C.F.R. § 541.604(b) to the HCE Regulation. (Petition at 2) ("The HCE regulation is a self-contained provision that *deems* highly compensated employees exempt if they perform any of several listed duties and earn more than $455 in salary each week they work") (emphasis in original). The problem here is that even if Petitioners were correct—and they are not—Petitioners still must establish entitlement to the HCE regulation by proving they paid Respondent a salary—which they did not.

**1. No Conflict Exists with the First or Second Circuits**

Based on a faulty assumption that they paid Hewitt on a "salary basis" under the HCE Regulation, Petitioners argue the Fifth Circuit—by analyzing and applying § 541.604(b), created "a clear" and "plain and simple" Circuit split with the First and Second Circuits in *Litz v. Saint Consulting Group, Inc.*, 772 F.3d 1 (1st

Cir. 2014), and *Anani v. CVS RX Services, Inc.*, 730 F.3d 146 (2d Cir. 2013). (Petition at 13; 16-20).

Any fair reading of those opinions demonstrates beyond doubt that they are distinguishable because those cases involved guarantees of weekly pay, and Helix made no guarantee of weekly pay to Hewitt. Unlike Hewitt, who Helix paid purely by the day, the workers in *Litz* and *Anani* were paid a weekly guarantee of pay by the employer. As stated in the majority opinion: "*Litz* and *Anani* involve pay calculated 'on a weekly, or less frequent basis' (29 C.F.R. § 541.602(a))—and not pay 'computed on … a daily … basis' (§ 541.604(b))." (Pet. Appx. at 17).

In *Litz*, the employer's compensation plan provided that "'[a]ll project managers will ... be guaranteed a minimum weekly salary of $1,000 whether they bill any hours or not.' Therefore, if a project manager billed 10 hours at a $50 hourly rate, or $500, she would still receive $1,000 in pay for that week." 772 F.3d at 2. The Court's decision "depend[ed] on whether Saint Consulting paid the $1,000 stipend on a salary basis within the meaning of 29 C.F.R. § 541.602(a)." *Id.* at 3. The First Circuit held that the guaranteed $1,000 per week payment, which it labeled an "undisputed guarantee," "plainly qualifies as a payment on a 'salary basis.'" *Id.* at 3, 5. Helix paid no weekly guarantee to Hewitt, and so the Fifth Circuit's decision is not in conflict with *Litz*.[7]

[7] Notably, in *Litz*, neither party relied on 29 C.F.R. § 541.604. *Id.* at 5 ("Saint Consulting does not rely on that exemption" and "plaintiffs do not take a position on this issue").

The same is true for *Anani*. In *Anani*, the Second Circuit determined that a pharmacist qualified for the HCE regulation when he received a guaranteed $1,250 weekly salary and significant additional compensation based on the number of hours worked after 44 hours in a week. *Id.* at 148. ("appellant's base weekly salary was guaranteed, *i.e.,* to be paid regardless of the number of hours appellant actually worked in a given forty-four-hour shift. The requirements of C.F.R. §§ 541.600 and 541.602 are thus satisfied with regard to the minimum guaranteed weekly amount being paid 'on a salary basis.'") *Anani* is not in conflict with the Fifth Circuit's holding for the same reason *Litz* is not in conflict—the facts and reasoning are dissimilar.

**2. The Fifth Circuit Prevented a Split**

In distinguishing *Litz* and *Anani*, the Fifth Circuit pointed out that the Sixth Circuit previously distinguished those cases on the same grounds when it decided *Hughes*. (Pet. Appx. at 17) ("Indeed, the Sixth Circuit has already distinguished *Litz* and *Anani* on precisely this textual ground"). Similarly, the Eighth Circuit determined that the FLSA's salary-basis test is "subject to numerous interpretive rules," including 29 C.F.R. § 541.604(b). *Coates*, 961 F.3d at 1042 (8th Cir. 2020). Pointedly, both *Hughes* and *Coates* were decided after *Litz* and *Anani*.

Petitioners argue the Sixth Circuit did not squarely address the issue at bar, (Petition at 20-21), but such a reading of *Hughes* is plainly wrong. In *Hughes*, the employer paid the plaintiffs a day rate of $337 and paid each plaintiff annualized pay over $100,000. 878 F.3d at 186, 189. The defendant made the same argument

Appellees make here and similarly cited to *Litz* and *Anani*. The Court distinguished those two cases on the same grounds listed above. *Id.* at 189 ("the situations in which those authorities ignore [541.604] … are situations in which the textual requirements of 29 C.F.R. §§ 541.601, 541.602(a) are already clearly met"). In *Hughes*, however—like this case—there was no such guarantee, and so the Court correctly declined to apply *Litz* or *Anani* to the facts it faced. Instead, the Court determined that the employer failed to demonstrate that it met "textual prerequisites" of 29 C.F.R. § 541.602(a) because the plaintiffs introduced evidence that the defendant paid them a "day rate" and "thus reason to conclude that their pay was calculated *more* frequently than weekly," *id.* at 189 (emphasis in original).

### 3. The Fifth Circuit Correctly Interpreted 29 C.F.R. § 541.604(b), and Even if it was Wrong, Petitioners Still Lose

Petitioners argue the Fifth Circuit erred by analyzing and applying 29 C.F.R. § 541.604(b) to the FLSA's HCE Regulation. (Petition at 25-33). As explained *infra*, the Fifth Circuit correctly applied the regulation. Even if it was wrong, however, it is of no consequence since Helix cannot establish entitlement to the HCE Regulation.

Petitioners also note the HCE Regulation's text does not reference 29 C.F.R. § 541.604. (Petition at 27). True, but none of the 29 U.S.C. § 213(a)(1) exemptions defined and delimited by the Department of Labor references 29 C.F.R. § 541.604. *See* 29 C.F.R. § 541.100(b) (executive exemption references "salary

basis" under 29 C.F.R. § 541.602 but not under 29 C.F.R. § 541.604); 29 C.F.R. § 541.200(b) (same for administrative exemption); 29 C.F.R. § 541.300(b) (same for professional exemption); 29 C.F.R. § 541.400(c) (same for computer employees' exemption). The Fifth Circuit's majority made the same point:

> the same "salary basis" language that appears in the highly compensated employee regulation also appears in the regulations governing more modestly paid executive, administrative, and professional employees. Like their "highly compensated" counterparts, these employees are exempt only if they are "[c]ompensated on a salary basis." … There is no principled basis for applying or ignoring § 541.604(b) based on how much the employee is paid.

Judge Ho's concurring opinion makes the point finer: Since none of the exemptions mention 29 C.F.R. § 541.604, it would render the regulation "surplusage" under this theory advanced by Petitioners and the dissenters in the Fifth Circuit. (Pet. Appx. at 25).

29 C.F.R. § 541.604(b) explicitly mentions the "salary basis" requirement, as it begins with the following clause: "An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement … ." The "salary-basis" requirement is at 29 C.F.R. § 541.602, which is referenced explicitly in the HCE Regulation at 29 C.F.R. § 541.601(b)(1). As noted aptly by the Fifth Circuit:

> [E]ven accepting Helix's premise about § 541.602, it should go without saying that an employer must comply with *all* relevant regulations. Helix admits that Hewitt's pay is "computed on a daily basis," so it must comply with § 541.604(b). Indeed, § 541.604(b) makes this explicit: It says that an otherwise "exempt" employee who is paid a daily rate "los[es] the exemption" and "violat[es] the salary basis requirement" unless the employer complies with § 541.604(b).

(Pet. Appx. at 6).

Petitioners also argue that the HCE Regulation uses the term "deemed exempt," making it a stand-alone provision, as the other exemptions do not use such language. (Pet. Appx. at 26). No. It means they "are exempt" if they can establish pay on a "salary … basis as set forth in 29 C.F.R. § 541.602" as 29 C.F.R. § 541.604(b)(1) explicitly states. Since Helix failed to pay Hewitt on a "salary basis" under 29 C.F.R. § 541.602, they lose unless they could establish the requirements of 29 C.F.R. § 541.604(b). (Pet. Appx. at 15) ("the only way for an employee to have his pay 'computed on a daily basis' 'without violating the salary basis requirement' is to comply with § 541.604(b)").

As the Fifth Circuit explained, the Department of Labor supports its interpretation: "That opinion concluded that, absent some special rule, daily rate workers 'would not qualify as highly compensated employees' because 'their day rate does not constitute payment on a salary basis.'" (Pet. Appx. at 12-13) (citing Resp. Appx. at 52a-53a). The Department of

Labor made clear that it "knows how to include in the exemption certain employees whose pay is calculated on a daily basis; it has chosen not to do so broadly." (Resp. Appx. at 61a n.27).

Ultimately, Petitioners' arguments—even if this Court thinks that the Fifth, Sixth, and Eighth Circuits reached the wrong conclusion on an issue the First and Second Circuits did not directly address—cannot prevail unless they prove they paid Hewitt on a "salary basis," and they failed to do so.

### C. Appeals To "Common Sense" and Grave Rolling are Unavailing

Courts have correctly and consistently applied the "salary-basis" test countless times. Helix objects to paying someone overtime to whom they believe they have already paid generously. This objection explains why Petitioners, in every brief and argument, decry that the sky is falling when all the Fifth Circuit did is apply 80 years of overwhelming, binding, and persuasive precedent to the facts of this case.

"[I]t should go without saying that we are governed by the text of the FLSA and its implementing regulations, not some unenumerated purpose." (Pet. Appx. at 18) (citing *Encino Motorcars*, *LLC v. Navarro*, ___ U.S. ___, 138 S. Ct. 1134, 1152 (2018)). "Indeed, if the Secretary had wanted to exempt employees based solely on the fact that they are well compensated, the regulations could have been written accordingly." *Id.* at 19. "Congress has never amended the text of the FLSA to categorically exempt highly paid employees from overtime—to the contrary, as previously noted, it

has repeatedly rejected efforts to do so." *Id.* at 18. "[E]mployees are not to be deprived of the benefits of the [FLSA] simply because they are well paid." *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 161, 162 (1945) (noting that underground mine workers "are not deprived of the benefits of the [Act] simply because they are well paid"). This issue is "hardly novel—and can hardly come as a surprise to the oil and gas industry." (Pet. Appx. at 15). If the Department of Labor wanted to exempt all employees making a total annual compensation of $100,000 or more per year, it could have done so.

Put simply, Helix has spent four years trying to persuade courts, and now the highest court, to declare by judicial fiat that the FLSA's "salary-basis" test means something contrary to its ordinary meaning and 80 years of precedent. There is, however, a principled way to protest the "salary-basis" test, and that is through the political process. (Pet. Appx. at 20) ("Our job is to follow the text—not to bend the text to avoid perceived negative consequences for the business community. That is not because industry concerns are unimportant. It is because those concerns belong in the political branches, not the courts") (citing *Barnhart*, 534 U.S. at 462).

### D. *Amici* Efforts to Change the Law *via* Judicial Fiat

#### 1. Six States Argue Something Petitioners Did Not Raise Below

Six states argue that the Department of Labor has "issued regulations that are in serious tension with the

statute: they make the executive exemption turn on the employee's compensation and how his compensation is computed." (States' Brief at 3). They also argue that the Fifth Circuit "stretched those regulations even farther from the statute—to bestow overtime pay on a highly paid executive solely because his total compensation may turn in part on how many days he works in a week." (*Id.*). Petitioners—for good reason—have never advanced these arguments.

In his concurring opinion, Judge Ho effectively responded to these objections with the following question: "So how exactly do they propose that we construe the regulations to *avoid* a salary-basis test, when the regulations *explicitly apply* a salary-basis test?" (Pet. Appx. at 22). The answer the States attempt to provide is on page 12 of their brief, but their solution is to ignore the "salary-basis" test so long as the employer meets the "salary level" test. This radical argument contradicts the FLSA's regulations, which require pay on a "salary basis" and not just a "salary level." As Judge Ho observed, a Court's "duty is to interpret the text—not to ignore it." (Pet. Appx. at 22).

**2. Industry Briefs are no More Persuasive**

In addition to the baseless argument the FLSA's "salary level" test supplants its "salary-basis" test, energy industry briefs essentially argue that day rates are common in the oil patch and that the regulations' imposition of a salary-basis test is unfair.

As Judge Ho correctly addressed in his concurring opinion:

> When all is said and done, amici's point amounts to this: An employee's compensation can satisfy the income level requirements of § 541.601—yet violate the salary-basis test requirements of § 541.604(b). Okay, but so what? I thought everyone agreed that the regulations impose a three-prong test: (1) the performance of certain duties, (2) income over a certain level, and (3) the salary-basis test. These are obviously separate and distinct requirements—the text makes this clear, and the parties do not dispute it. So an employer cannot prevail unless it meets all three requirements. And it is of course possible to satisfy one prong but not another. If that is all that amici is setting out to prove, then mission accomplished—but how this leads to judgment for Helix is a mystery.

(Pet. Appx. at 24-25).

Further, despite its protestations now, companies within the energy industry *advocated* for the Department of Labor's inclusion of the salary-basis test. Harold Stein, "Executive, Administrative, Professional … Outside Salesman Redefined," *Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition,* (1940) at 42 ("[t]he salary paid the employee is the best single test of the employer's good faith in characterizing the employment as of a professional nature"). In the so-called Stein Report, companies within the energy industry received an acknowledgment for their role in lobbying the Department of Labor for the "salary-basis" test. *Id.* at 6 n.16 ("A salary qualification was included

in proposed redefinitions submitted by the following: Shell Oil Co., Mid-Continent Oil & Gas Association. … Oklahoma Stripper Well Association …"). And, as further noted in this supported analysis, "[s]urely if Congress had meant to exempt all white collar workers, it would have adopted far more general terms than those actually found in section 13(a)(1) of the act." *Id.* at 6-7.

In any event, compliance with the FLSA was not complex. (Pet. Appx. at 29) ("Just provide Hewitt a minimum weekly guarantee of, say, $4,000. That's the economic equivalent of Hewitt's daily rate of $963. Such an arrangement would benefit both parties. Helix would avoid paying Hewitt overtime. And Hewitt would enjoy a stable, predictable weekly income").

The truth is that Helix never even bothered to look at the salary-basis regulation when it decided not to pay Hewitt overtime. HR Director Kenric McNeal provided direct and devastating testimony against Helix on this point:

> Q. All right. To your knowledge, why are toolpushers not eligible for overtime at Helix?
> A. Because they are in a supervisory role.
> Q. Okay. Anything else?
> A. No sir.

(ROA.328 at 19-23). Thus, Hewitt's job duties—as opposed to some well-thought-out pay design of the hydrocarbon industry—were the sole reason Helix failed to pay Hewitt overtime.

In short:

> [A]mici's arguments are at war with the text. So we cannot credit them, no matter how important (or upset) the industry may be. If the court's ruling today is bad for the industry (notwithstanding how easy it would be for Helix to comply with the salary-basis test), that is a policy consideration for the political branches—not the courts.

(Pet. Appx. at 32).

## CONCLUSION & PRAYER

This Court should not grant certiorari. A bedrock principle of legal interpretation is to apply the ordinary meaning of laws, regardless of the policy preferences of litigants. Helix should place its dissatisfaction with the law on the lawmaker—not Hewitt—and it should not ask this Court to enact legislation via "interpretation" for its preferred policy outcome.

Because an employee *received* something of value does not mean the employer *guaranteed* the employee something of value. If a person wins a lottery and *receives* a prize, one cannot deduce that he was *guaranteed* to win. Yet, the very foundation of Helix's case is that because its paychecks to Hewitt were over the FLSA's "salary level" test, it paid him on a "salary basis." This illogical approach leads to an illegal result.

All Hewitt asks is for this Court to refuse to shoehorn the plain text of the law to Helix's desire because someone at the company failed to check the

FLSA's requirements before classifying Hewitt's position as exempt from overtime.

Respectfully submitted,

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# APPENDIX

# APPENDIX

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## APPENDIX 1

**United States Court of Appeals, Fifth Circuit.**

**No. 19-20023**

**[Filed: April 20, 2020]**

| | |
|---|---|
| MICHAEL J. HEWITT, | ) |
| Plaintiff - Appellant | ) |
| | ) |
| v. | ) |
| | ) |
| HELIX ENERGY SOLUTIONS GROUP, INCORPORATED; HELIX WELL OPS, INCORPORATED, | ) |
| Defendants - Appellees | ) |

Before WIENER, HIGGINSON, and HO, Circuit Judges.

**Opinion**

JAMES C. HO, Circuit Judge:

A panel of this court recently divided over the proper interpretation of a Labor Department regulation issued under the Fair Labor Standards Act (FLSA). *See Faludi v. U.S. Shale Sols.*, 936 F.3d 215 (5th Cir. 2019), *opinion withdrawn*, 950 F.3d 269 (5th Cir. 2020). Today we revisit the issue initially raised, but ultimately left undecided, in *Faludi*.

The regulation in question defines what it means for an employee to be compensated on a "salary basis"—a requirement that must be met for an employer to qualify for certain exemptions under the FLSA. As the regulation makes clear, an employee is paid on a "salary basis" if he "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount"—and if that salary is paid "without regard to the number of days or hours worked." 29 C.F.R. § 541.602(a), (a)(1).

Based on those provisions, the dissent in *Faludi* concluded that an employee is *not* paid on a salary basis—and therefore *is* entitled to the protections of the FLSA—if the employee is paid a daily, rather than weekly, rate. *See* 936 F.3d at 222 (Ho, J., dissenting). The majority initially disagreed. *Id.* at 220. But after the employee in *Faludi* filed a petition for rehearing en banc, the panel majority withdrew its earlier opinion and decided the case on other grounds. *See Faludi v. U.S. Shale Sols.*, 950 F.3d 269, 271 (5th Cir. 2020).

The case we decide today presents the same interpretive question that divided our court in *Faludi*. We hold, consistent with the dissent in *Faludi*, that an employee who is paid a daily rate is not paid on a "salary basis" under 29 C.F.R. § 541.602(a). Accordingly, we reverse the district court and remand for further proceedings.

**I.**

Michael Hewitt was an employee of Helix for over two years, working as a Tool Pusher. In that position, Hewitt managed other employees while on a

"hitch"—that is, while working offshore on an oil rig. Each hitch lasted about a month. Helix paid Hewitt a set amount for each day that he worked. Hewitt received his paycheck biweekly.

Hewitt worked more than forty hours a week. So under the FLSA, he would ordinarily be entitled to overtime unless he was an exempt employee. 29 U.S.C. §§ 207(a)(1), 213(a)(1).

And that is what Helix contends, arguing that Hewitt is either an exempt executive or highly compensated employee. *See* 29 C.F.R. § 541.100 (executive employees); § 541.601 (highly compensated employees).

Both of those exemptions require the employer to meet both a duties test and a salary test. The salary test, in turn, has two components—first, the employer must pay the employee a minimum per-week rate, and second, the employer must pay the employee on a "salary basis." *Id.*

Hewitt contends that Helix did not pay him on a "salary basis" because it calculated his pay based on a daily, rather than weekly, rate. Helix responds that Hewitt's daily rate was greater than the weekly salary requirement under Labor Department regulations. Accordingly, Helix argues, so long as Hewitt worked at least a single day during any particular week, he would receive more than the weekly salary requirement, and was therefore paid on a "salary basis" under Labor Department regulations.

The district court agreed with Helix and granted summary judgment to the company on the ground that Hewitt is exempt as either an executive or highly

compensated employee. *Hewitt v. Helix Energy Sols. Grp., Inc.*, 2018 WL 6725267, at *4 (S.D. Tex. Dec. 21, 2018). Hewitt appealed.

The primary question presented on appeal is purely a matter of legal interpretation. As such, review is de novo. *See 21st Mortg. Corp. v. Glenn (In re Glenn)*, 900 F.3d 187, 189 (5th Cir. 2018). For the reasons we explain below, we reverse.

**II.**

At the heart of this appeal is the proper interpretation of the following Labor Department regulation:

> An employee will be considered to be paid on a 'salary basis' within the meaning of this part 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 variations in the quality or quantity of the work performed.

29 C.F.R. § 541.602(a) (emphasis added).

Broadly speaking, then, § 541.602(a) requires that an employee receive for each pay period a "predetermined amount" calculated on a "weekly, or less frequent" pay period. To put it plainly: The salary basis test requires that an employee know the amount of his compensation

for each weekly (or less frequent) pay period during which he works, *before* he works.[1]

An example helps: Consider an employee with an employment contract providing an annual salary to be paid biweekly. That employee can easily determine what he will receive every two weeks before he works—just divide his annual salary by twenty-six. He is thus "paid on a 'salary basis.' " *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (July 9, 2003) (reviewing a pay system guaranteeing that employees "will be paid at least 1/26th of their annual salary every other week").[2]

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[1] Subsection (b) does allow employers to deduct, and thus, vary, employees' pay while still paying them on a salary basis. That subsection is not at issue in this case.

[2] To be sure, that is an approximation—there are 52 weeks *plus one day* in a 365-day year. So technically, the annually-salaried employee will receive slightly less than 1/26th of the annual salary per biweekly paycheck. But the point is the same—that employee can count on receiving at least that predetermined amount for each biweekly paycheck. *See also*, *e.g.*, *Escribano v. Travis County*, 947 F.3d 265, 267 (5th Cir. 2020) (" 'Salary basis' ... generally means what its label suggests: an employee is paid on a salary basis if he or she receives the same wage each pay period."); *Hughes v. Gulf Interstate Field Servs., Inc.*, 878 F.3d 183, 189 (6th Cir. 2017) (noting that an annual salary meets the salary basis test); *id.* at 193 n.7 (comparing payment on a salary basis to an employment contract with a set compensation); *In re Wal-Mart Stores, Inc.*, 395 F.3d 1177, 1184 (10th Cir. 2005) ("[T]he natural reading of ['predetermined amount'] is that it refers to the amount previously agreed on for the period for which the salary is to be paid.").

Now consider Hewitt. He was paid biweekly. But he did not receive a constant fraction of his annual compensation—akin to the 1/26th amount mentioned above—for each biweekly pay period. Rather, he had to take the number of days he worked (past tense) and multiply by the operative daily rate to determine how much he earned. So Hewitt knew his pay only *after* he worked through the pay period.

As a result, he did *not* receive a "predetermined amount" "on a weekly, or less frequent basis"—rather, he received an amount contingent on the number of days he worked each week. So he was not paid on a "salary basis" under Labor Department regulations. *See*, *e.g.*, *Hughes v. Gulf Interstate Field Servs., Inc.*, 878 F.3d 183, 189 (6th Cir. 2017) (calculating compensation based on a per-day amount meant that "it was very much disputed whether what [the employees] received weekly was in fact guaranteed"); *cf. Anani v. CVS RX Servs., Inc.*, 730 F.3d 146, 148 (2d Cir. 2013) (noting that an employee's salary was "guaranteed" when it was "paid regardless of the number of hours appellant actually worked in a given forty-four-hour shift").[3]

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[3] If Hewitt and Helix agreed beforehand on the length of each hitch, there could be an argument that Hewitt's salary was "predetermined." *See, e.g.*, *Thomas v. County of Fairfax*, 803 F. Supp. 1142, 1149 n.15 (E.D. Va. 1992). Helix did not make that argument to the district court, and only mentions that point here in passing, burying it in a paragraph discussing § 541.604(b). So we will not consider the argument. *See*, *e.g.*, *AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 700 (5th Cir. 2009) ("[A]rguments not raised before the district court are waived."); *Brinkmann v. Dall. Cty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987) ("We

Any doubt that this is a proper reading of § 541.602(a) is put fully to rest by looking at § 541.602(a)(1). That section provides as follows: "[A]n exempt employee must receive the *full* salary for any week in which the employee performs any work *without regard to the number of days or hours worked*." 29 C.F.R. § 541.602(a)(1) (emphases added).

Hewitt's pay cannot be squared with this provision. He was paid on a daily rate—so he was paid "*with*" (not "without") "regard to the number of days or hours worked," in direct conflict with the plain language of § 541.602(a)(1). So § 541.602(a)(1) confirms that Hewitt was not paid on a salary basis.[4]

* * *

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will not raise and discuss legal issues that [a party] failed to assert.").

[4] The parties also discuss whether Helix meets the alternative requirements of 29 C.F.R. § 541.604(b), which governs employment compensation based on minimum weekly guarantee in addition to hourly or daily rates. As § 541.604(b) provides, an employer may "compute[ an employee's earnings] on an hourly, a daily or a shift basis," while still satisfying "the salary basis requirement," so long as "the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis"—that is, paid according to § 541.602. 29 C.F.R. § 541.604(b). Two problems here: As explained above, Helix did not pay Hewitt on a salary basis, as § 541.604(b) expressly requires. Moreover, § 541.604(b) requires that there be "a reasonable relationship ... between the guaranteed amount and the amount actually earned." Helix does not even attempt to claim that it meets that requirement, instead saying that the test does not apply.

We reverse the grant of summary judgment to Helix and remand for proceedings consistent with this opinion.[5]

[5] Hewitt also asks for liquidated damages. *See* 29 U.S.C. § 216(b). But the district court decided this case on summary judgment. Issues relating to liability, including whether liquidated damages are appropriate, *see*, *for example*, *Lowe v. Southmark Corp.*, 998 F.2d 335, 337 (5th Cir. 1993), are best left to the district court in the first instance.

## APPENDIX 2

**United States Court of Appeals, Fifth Circuit.**

**No. 19-20023**

**[Filed: December 21, 2020]**

MICHAEL J. HEWITT,
Plaintiff—Appellant,

v.

HELIX ENERGY SOLUTIONS GROUP, INCORPORATED; HELIX WELL OPS, INCORPORATED,
Defendants—Appellees.

Before Wiener, Higginson, and Ho, Circuit Judges.

**Opinion**

James C. Ho, Circuit Judge:

Our prior opinion in this case is withdrawn, and the following is substituted in its place. The petition for rehearing en banc remains pending.

* * *

The Fair Labor Standards Act establishes a standard 40-hour work week by requiring employers to pay a 50 percent overtime penalty for any time worked over 40 hours per week. *See* 29 U.S.C. § 207(a). Many people do

not think of overtime pay as a penalty on the employer, but as a benefit to the employee. But that is not the only way—and perhaps not even the proper way—to understand the Act. Historically, the FLSA has been understood to "reduce unemployment," as well as to protect workers from excessive hours, by encouraging employers to hire two workers to work 40 hours rather than one worker to work 80 hours. Hence the use of the term "penalty." *See*, *e.g.*, *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987) (Posner, J.) (explaining that Congress enacted the FLSA in part "to spread work and thereby reduce unemployment, by requiring an employer to pay a penalty for using fewer workers to do the same amount of work as would be necessary if each worker worked a shorter week"). *See also Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942) ("[O]ne of the fundamental purposes of the Act was to induce worksharing and relieve unemployment by reducing hours of work.") (quotations omitted).

These principles apply, of course, only to those workers who are in fact covered by the Act. Congress exempted "bona fide executive, administrative, [and] professional" employees from the overtime laws. 29 U.S.C. § 213(a)(1). And it expressly authorized the Secretary of Labor to promulgate regulations to further "define[ ] and delimit[ ]" those terms. *Id.*

This case involves a worker who is purportedly an "executive" employee under the regulations—and a "highly compensated" one at that, earning over $200,000 per year. *See* 29 C.F.R. § 541.100 (executive

employees); *id.* § 541.601 (highly compensated employees). But the precedent we establish here will equally govern lower paid "administrative" and other employees as well, who receive "not less than $684 per week," or $35,568 per year. *See id.* § 541.200 (administrative employees).

That is because this appeal turns on a legal question common to all executive, administrative, and professional employees—and to the modestly and highly compensated alike: whether a worker is paid "on a salary basis" under § 541.602. *See id.* § 541.100(a)(1); *id.* § 541.200(a)(1); *id.* § 541.300(a)(1); *id.* § 541.601(b)(1). (The regulations also exempt employees paid on a "fee basis," but that is not an issue in this appeal.)

Helix Energy Solutions Group paid Michael Hewitt a daily rate. Under the regulations, an employee whose pay is computed on a daily basis—rather than on a weekly, monthly, or annual basis—could in theory be regarded as paid on a "salary basis" under § 541.602. But the regulations are explicit that special rules apply when it comes to daily rate workers:

> An exempt employee's earnings *may be computed on* an hourly, *a daily* or a shift *basis, 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 regardless of the number of

> hours, days or shifts worked, *and* a reasonable relationship exists between the guaranteed amount and the amount actually earned.

*Id.* § 541.604(b) (emphasis added).

So a daily rate worker can be exempt from overtime—but only "if" two conditions are met: the minimum weekly guarantee condition and the reasonable relationship condition. The employer here does not even purport to meet both of these conditions. Instead, the employer candidly asks us to ignore those conditions.

But "if" means "if"—not "irrespective of." And respect for text forbids us from ignoring text. Respect for text thus requires us to hold that Helix is subject to the requirements of § 541.604(b). We accordingly reverse and remand for further proceedings.

**I.**

Hewitt worked as a tool pusher for Helix for over two years. In that position, Hewitt managed other employees while on a "hitch"—that is, while working offshore on an oil rig. Each hitch lasted about a month. According to the summary judgment record, Helix paid Hewitt based solely on a daily rate.

Helix concedes that it required Hewitt to work over forty hours per week. Helix nevertheless attempts to avoid the FLSA overtime penalty by characterizing Hewitt as either an executive or highly compensated employee—both of which are exempt from the FLSA overtime requirements. *See id.* § 541.100 (executive

employees); *id.* § 541.601 (highly compensated employees).[1]

To prevail under either formulation, Helix must show that it paid Hewitt on a "salary basis" as defined by the regulations. *Id.* §§ 541.100(a)(1), .600(a), .601(b)(1). (Alternatively, Helix could attempt to invoke the highly compensated employee exemption by showing that it paid Hewitt on a "fee basis"—but it has made no such argument in this appeal. *See id.* §§ 541.601(b)(1), .605.)

Hewitt contends that Helix did not pay him on a "salary basis" because the company calculated his pay using a daily rate but did not satisfy the requirements of § 541.604(b). Helix responds that it was not required to comply with § 541.604(b).

The district court agreed with Helix and granted the company summary judgment. *Hewitt v. Helix Energy Sols. Grp.*, 2018 WL 6725267, at *3–*4 (S.D. Tex. Dec. 21, 2018). This appeal followed. We review the district court's interpretation of the applicable Labor Department regulations de novo. *See Davis v. Signal Int'l Texas GP, L.L.C.*, 728 F.3d 482, 488 (5th Cir. 2013).

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[1] We note that "highly compensated employees" are simply a subset of exempt executive, administrative, or professional employees. *See*, *e.g.*, *Coates v. Dassault Falcon Jet Corp.*, 961 F.3d 1039, 1042 n.2 (8th Cir. 2020) ("Although the parties and the district court refer to a 'highly compensated employee exemption,' this is a less burdensome way to prove an executive, administrative, or professional exemption, not a separate exemption."); *see generally* 29 C.F.R. § 541.601(c).

**II.**

There are multiple components to the salary basis test, as articulated in various Labor Department regulations. There is the "[g]eneral rule"—and then there are various exceptions and provisos to that general rule. To properly understand and apply the salary basis test, we must examine not only the general rule, but also any exceptions or provisos that bear upon a particular fact pattern—such as the daily rate issue presented in this appeal.

**A.**

The "[g]eneral rule" begins as follows: "An employee will be considered to be paid on a 'salary basis' within the meaning of this part 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." 29 C.F.R. § 541.602(a) (emphasis added). The general rule further provides that "an exempt employee must receive the full salary for any week in which the employee performs any work *without regard to the number of days or hours worked*." *Id.* § 541.602(a)(1) (emphasis added).

The emphasis on being paid "on a weekly, or less frequent basis"—and "without regard to the number of days or hours worked"—begs the question: What if an employee's compensation is computed on a *daily* basis—rather than on a weekly, monthly, or annual basis? In other words, what if the employee is *not* paid "on a weekly, or less frequent basis," but instead *with* "regard to the number of days or hours worked"?

In sum: Can a daily rate employee ever be regarded as being paid on a "salary basis" and therefore exempt from overtime pay under the FLSA?

To answer that question, we must look beyond the "[g]eneral rule," and turn instead to one of the provisos promulgated by the Secretary. And as it turns out, the answer is yes—a daily rate employee *can* qualify under the salary basis test—but only "if" certain other conditions are met.

The Sixth and Eighth Circuits have so held. And we agree: "The text of § 541.602(a) does not tell us what to do when an employee's salary is *not* clearly calculated 'on a weekly, or less frequent basis.' " *Hughes v. Gulf Interstate Field Servs. Inc.*, 878 F.3d 183, 189 (6th Cir. 2017). Instead, we must turn to a "helpful" "neighboring provision"—namely, § 541.604(b). *Id.* Similarly, the Eighth Circuit concluded that the "general definition" of salary basis as set forth in § 541.602(a) is "subject to numerous interpretive rules." *Coates v. Dassault Falcon Jet Corp.*, 961 F.3d 1039, 1042 (8th Cir. 2020). And the first example that circuit gave was § 541.604(b). *See id.* (quoting § 541.604(b)); *see also id.* at 1048 (relying on *Hughes* and § 541.604(b)).

So we turn to § 541.604(b). That regulation makes clear that an employer *can* pay an exempt employee an amount "computed on ... a daily ... basis, without losing the exemption or violating the salary basis requirement." 29 C.F.R. § 541.604(b). But that is so only "if" two conditions are met. *Id.* Those conditions are as follows: First, "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." *Id.* Second, "a reasonable relationship exists between the guaranteed amount and the amount actually earned." *Id.*

This two-prong test protects employees in two ways. First, the "minimum weekly" guarantee ensures that a daily rate employee still receives a guaranteed amount each week "regardless of the number of hours, days or shifts worked." *Id.* In other words, it sets a *floor* for how much the employee can expect to earn, "regardless" of how many hours, days, or shifts the employee works. *Id.* Second, the reasonable relationship test ensures that the minimum weekly guarantee is not a charade—it sets a *ceiling* on how much the employee can expect to work in exchange for his normal paycheck, by preventing the employer from purporting to pay a stable weekly amount without regard to hours worked, while in reality routinely overworking the employee far in excess of the time the weekly guarantee contemplates. 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 (thus effectively allowing the employer to dock the employee for partial day absences)." Dep't of Labor, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22,121, 22,184 (2004). But "[s]uch a pay system would be inconsistent with the salary basis concept and *the salary guarantee would be nothing more than an illusion*." *Id.* (emphasis added).

*See also Brock v. Claridge Hotel & Casino*, 846 F.2d 180, 185 (3rd Cir. 1988) (explaining that an employee is not paid on a "salary basis" if "the employee's usual weekly income" calculated on an hourly basis "far exceeds the 'salary' guarantee" the employer provided).

So an employer can pay a daily rate under § 541.604(b) and still satisfy the salary basis test of § 541.602—but only if the employer complies with both the minimum weekly guarantee requirement and the reasonable relationship test.

Helix does not comply with either prong. First, it pays Hewitt a daily rate without offering a minimum weekly required amount that is paid "regardless of the number of hours, days or shifts worked." 29 C.F.R. § 541.604(b). Rather, Helix theorizes that the daily rate that it pays Hewitt *is* a minimum weekly guaranteed amount—even though it is the very opposite of an amount that is paid "regardless of the number of ... days ... worked." *Id.* Second, Helix does not comply with the reasonable relationship test. To the contrary, it pays Hewitt orders of magnitude greater than the minimum weekly guaranteed amount theorized by Helix—namely, Hewitt's daily rate. Not surprisingly, Helix does not even bother to contend that it satisfies the reasonable relationship test.

Instead, Helix contends that it is not required to comply with § 541.604(b), because Hewitt is a "highly compensated employee" under § 541.601. In other words, in Helix's view, if an employee satisfies § 541.601, there is no need to additionally satisfy § 541.604(b).

But the text of § 541.601 says precisely the opposite. It makes clear that it's not enough that the employee receives a "total annual compensation of at least $107,432." *Id.* § 541.601(a) (1). It *also* requires that that " '[t]otal annual compensation' *must include* at least $684 per week *paid on a salary ... basis*." *Id.* § 541.601(b)(1) (emphases added). So Hewitt cannot be a "highly compensated employee" under § 541.601 unless his total annual compensation satisfies the salary basis test. And as we've already explained, the only way for an employee paid on a daily rate to satisfy the salary basis test is to comply with the two conditions of § 541.604(b).

Moreover, the same "salary basis" language that appears in the highly compensated employee regulation also appears in the regulations governing *all* executive, administrative, and professional employees—including employees who make far less than $107,432 per year. *Id.* § 541.601(a)(1). Like their "highly compensated" counterparts, all other executive, administrative, and professional employees are exempt if they are "[c]ompensated on a salary basis." *Id.* § 541.100(a) (1). *See also id.* § 541.200(a)(1) (same); *id.* § 541.300(a) (1) (same). And that is so even though they receive much less compensation—"not less than $684 per week," or $35,568 per year. *Id.* § 541.100(a)(1); § 541.200(a)(1) (same); *id.* § 541.300(a)(1) (same). We can find no textual or other principled basis for exempting highly compensated employees, but not all other executive, administrative, and professional employees, from § 541.604(b).

**B.**

Our reading of the regulations finds support not only from the Sixth and Eighth Circuits, but also in repeated statements by the Labor Department. Those statements confirm that a daily rate employee falls outside the general rule, and thus must qualify under some other exception or proviso such as § 541.604(b).

For example, when the Department promulgated § 541.604(b) in 2004, it explained that the "[p]roposed section 541.604(b) provided that an exempt employee's salary may be computed on an hourly, daily or shift basis, if the employee is given 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 'a reasonable relationship exists between the guaranteed amount and the amount actually earned.' " Defining and Delimiting the Exemptions, 69 Fed. Reg. at 22,183. "[T]he reasonable relationship requirement applies ... when an employee's actual pay is computed on an hourly, daily or shift basis." *Id.*

And just this year, the Labor Department reaffirmed this point within the specific context of "highly compensated employees" who are "paid a day rate." U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2020-13, 2020 WL 5367070, at *1 (Aug. 31, 2020). In an opinion letter, the Administrator of the Wage and Hour Division agreed with our previous ruling in this case, noting that "[t]he Fifth Circuit recently addressed a similar question, holding that an employee paid a daily rate, *with no minimum weekly guarantee*, is not paid on a salary basis" under "the plain language of the salary basis test." *Id.* at *4 (emphasis added) (citing

*Hewitt v. Helix Energy Sols. Grp.*, 956 F.3d 341, 342–43 (5th Cir. 2020)). "The *Hewitt* plaintiff, like the employees here, was paid per day of work." *Id.* "[S]o he was paid '*with*' (not 'without') 'regard to the number of days or hours worked,' in direct conflict with the plain language of the salary basis test." *Id.* (some quotations omitted).

Moreover, the Administrator further explained that this "conclusion is further supported by [the Department] having specified certain instances when exempt executive, administrative, or professional employees may be paid a daily rate while not more generally permitting a day rate to satisfy the salary basis test." *Id.* at *4 n.27 (noting as an example 29 C.F.R. § 541.709, which exempts certain motion-picture employees from complying with the salary basis test at all). So the Department "knows how to include in the exemption certain employees whose pay is calculated on a daily basis; it has chosen not to do so broadly." *Id.* "The familiar 'easy-to-say-so-if-that-is-what-was-meant' rule of interpretation has full force here." *Id.* (cleaned up) (quoting *C.I.R. v. Beck's Estate*, 129 F.2d 243, 244 (2nd Cir. 1942)). And that same logic of course applies to other daily rate provisions like § 541.604(b). We see no reason not to agree with the respected Administrator.

**C.**

Helix contends that our understanding of the salary basis test conflicts with *Litz v. Saint Consulting Group, Inc.*, 772 F.3d 1 (1st Cir. 2014), and *Anani v. CVS RX Services, Inc.*, 730 F.3d 146 (2nd Cir. 2013). To be sure, there is some language in *Anani* that appears to be in

tension with the approach taken here. *See Anani*, 730 F.3d at 149 ("We perceive no cogent reason why the requirements of C.F.R. § 541.604 must be met by an employee meeting the requirements of C.F.R. § 541.601."); *see also Litz*, 772 F.3d at 5 (quoting *Anani* but noting that "[p]laintiffs 'do not take a position on this issue' ").

But on closer analysis, we see no actual conflict here. Unlike Hewitt, the employees in *Litz* and *Anani* were paid a weekly guaranteed salary "regardless of the number of hours, days or shifts worked." 29 C.F.R. § 541.604(b). *See Litz*, 772 F.3d at 2 (employees were "guaranteed a minimum weekly salary of $1,000 *whether they bill[ed] any hours or not*") (emphasis added); *Anani*, 730 F.3d at 148 (employee's "base weekly salary was guaranteed, i.e. to be paid *regardless of the number of hours ... actually worked*") (emphasis added). In other words, *Litz* and *Anani* were in fact weekly rate cases. So those cases have nothing to say about Hewitt, who was paid solely based on a daily rate.

Indeed, the Sixth Circuit has made precisely this observation already. As that court explained, "the situations in which [*Litz* and *Anani*] ignore § 541.604(b) are situations in which the textual requirements of 29 C.F.R. §§ 541.601, 541.602(a) are already clearly met." *Hughes*, 878 F.3d at 189. In other words, "*Anani* and *Litz* involved plaintiffs who ... were undisputedly guaranteed weekly base salaries above

the qualifying level." *Id.* at 189–90. We agree with the Sixth Circuit: There is no split.[2]

**D.**

Amici offer two additional points in hopes of bolstering Helix's position.

First, amici suggest that, because Hewitt was already well compensated, extending overtime protection to him conflicts with the purpose of the FLSA.

But that is wrong as a matter of both text and purpose. To begin with, it should go without saying that we are governed by the text of the regulation, not some unenumerated purpose. *See Encino Motorcars, LLC v. Navarro*, —— U.S. ——, 138 S. Ct. 1134, 1142, 200 L.Ed.2d 433 (2018). If the Secretary had wanted to exempt employees based solely on the fact that they are well compensated, the regulations could have been written accordingly. In fact, as the Labor Department has publicly noted, "a number of commenters" have "urge[d] the Department to abandon the salary basis test entirely, arguing that [the] requirement serves as

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[2] Moreover, if there is a split, it's one that has existed since 2017, when the Sixth Circuit decided *Hughes*. What's more, it seems telling that, since *Hughes*, no circuit has seen fit to join the First and Second Circuits in this alleged split. Quite the opposite, in fact: Just this year, both the Eighth Circuit and the Labor Department sided with the Sixth Circuit (and with our circuit) over *Litz* and *Anani*. *See Coates*, 961 F.3d at 1048 (relying on *Hughes* and § 541.604(b)); Opinion Letter FLSA2020-13, 2020 WL 5367070 (relying on *Hewitt*). Even the dissent acknowledges as much. *Post*, at 806 – —— (noting *Hughes* and *Coates*); id. at 806–07 – —— (noting Opinion Letter FLSA2020-13).

a barrier to the appropriate classification of exempt employees." Defining and Delimiting the Exemptions, 69 Fed. Reg. at 22,176. But the Secretary has so far rejected those requests, and instead required *both* that the employee be paid at least a certain amount of compensation *and* that the compensation be paid "on a salary basis." *See id.* ("[T]he Department has decided that [the salary basis test] should be retained."). *See also* 3 Employ. Coordinator Comp. § 3:26 ("Note that a highly compensated employee must still meet the requirements of the salary basis test, being paid at least $684 on a salary basis, to be exempt from the overtime requirements. Thus, an employee earning over $100,000 will not necessarily be a highly compensated employee if the employee's compensation is paid on an hourly basis.").

Moreover, amici's purposivist argument is not just anti-textual—it also fails on its own terms. Amici suggest that Hewitt is well paid, so he has no right to complain about his hours. But it should surprise no one that many people value more free time over more money. And honoring that preference has always been at the heart of the FLSA. As we noted at the outset, courts have historically understood overtime pay not so much as a benefit to employees (although it obviously is), but as a "penalty" to employers—a penalty specifically designed to make it more expensive for an employer to hire one worker to work 80 hours than two workers to work 40 hours. *See*, *e.g.*, *Overnight Motor Transp.*, 316 U.S. at 577, 62 S.Ct. 1216; *Mechmet*, 825 F.2d at 1176. The overtime penalty helps "reduce unemployment" by encouraging employers to add more workers rather than more hours. *Id.* So amici's

approach is not just contrary to text—it also undermines a core purpose of the FLSA.

Second, amici complain that faithful application of the regulatory text will wreak havoc on the oil and gas industry.

But of course, the salary basis test applies across countless industries, not just oil and gas—and if the oil and gas industry doesn't like it, it can seek an industry exemption, just as other industries have done. *See*, *e.g.*, 29 C.F.R. § 541.709 (exempting certain motion-picture employees from complying with the salary basis test).

Perhaps one reason why no oil and gas exemption exists to date is because it is unclear why that particular industry would be uniquely harmed by the ordinary application of the Secretary's salary basis test. After all, there would appear to be any number of ways that companies like Helix could avoid paying overtime under the FLSA. They could pay Hewitt a comparable weekly or monthly salary, rather than a daily rate. Or they could pay him a fee for each hitch—or comply with the "fee basis" test in some other way. *See id.* §§ 541.601(b) (1), .605. (Alternatively, they could hire more tool pushers, so that none of them has to work more than forty hours. Admittedly, that would increase costs to the company. But that would also serve a core objective of the FLSA, namely, to increase employment. If the industry does not like that result, its complaint lies not with Hewitt—or this court—but with Congress.)

Barring all of that, the industry can lobby Congress or the Secretary of Labor to amend the salary basis test—

either on behalf of all employers, or for just those in the oil and gas business. But what the industry cannot do to ask judges to "alter the text [of the regulations] in order to satisfy ... policy preferences." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002). "These are battles that should be fought among the political branches and the industry. Those parties should not seek to amend the [regulations] by appeal to the Judicial Branch." *Id.*

* * *

If we were limited to the statutes enacted by Congress, we might very well have ruled for Helix in this matter. But we are also bound by regulations issued by the Secretary of Labor. And those regulations exempt daily rate employees from overtime—but only "if" that employee's compensation meets certain conditions. Helix asks us to ignore those conditions. But we are not at liberty to do so. And certainly not on the ground that the oil and gas industry warrants special treatment not supported by the text, or because Hewitt already makes enough money and thus doesn't deserve FLSA protection. Our duty is to follow the law, not to vindicate anyone's policy preferences. Our ruling today construes the salary basis for everyone—not just the oil and gas industry. Likewise, the salary basis test applies not only to highly compensated employees like Hewitt, but also to all other executive, administrative, and professional employees—including those who earn less than a fifth of what Hewitt makes.

We reverse the grant of summary judgment to Helix and remand for further proceedings consistent with this opinion.[3]

James C. Ho, Circuit Judge, concurring:

The dissent begins by expressing "due respect" to the majority—and then ends with a well-known literary quote about idiots. *Post*, at 802–03, 809 & n.39. It concludes that my opinion in this case is worth "nothing." *Id.* at 809.

To some, statements like these may be reminiscent of the wisdom of Ricky Bobby. *See* Talladega Nights: The Ballad of Ricky Bobby (2006) ("What? I said 'with all due respect!' "). To others, it may call to mind a recent observation by one of our respected colleagues: "More often than not, any writing's persuasive value is inversely proportional to its use of hyperbole and invective." *Keohane v. Fla. Dep't of Corrs. Sec'y*, 981 F.3d 994, 996 (11th Cir. 2020) (Newsom, J., concurring in the denial of rehearing en banc).

As the adage goes, the loudest voice in the room is usually the weakest.

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[3] On remand, Helix may be able to demonstrate that it paid Hewitt on a "fee basis" under 29 C.F.R. § 541.605, or that it complied with another regulatory exemption from the overtime requirements. The parties can resolve those issues, along with any other factual disputes, on remand. Hewitt also asks for liquidated damages. *See* 29 U.S.C. § 216(b). But the district court decided this case on summary judgment. Issues relating to liability, including whether liquidated damages are appropriate, *see*, *e.g.*, *Lowe v. Southmark Corp.*, 998 F.2d 335, 337 (5th Cir. 1993), are best left to the district court in the first instance.

* * *

"Reasonable jurists can apply traditional tools of construction and arrive at different interpretations of legal texts." *Gamble v. United States*, —— U.S. ——, 139 S. Ct. 1960, 1986, 204 L.Ed.2d 322 (2019) (Thomas, J., concurring). For example, in *JCB, Inc. v. Horsburgh & Scott Co.*, 912 F.3d 238 (5th Cir. 2018), I observed that "Judge Duncan and I emphatically agree that the proper function of the judiciary is to construe statutory texts faithfully .... We nevertheless reach different conclusions as to the particular text before us, as textualists sometimes do." *Id.* at 242 (Ho, J., concurring). Some laws are "capable of competing plausible interpretations among reasonable jurists of good faith." *Id.*

But with "due respect," if there is a reasonable textual basis for refusing to apply 29 C.F.R. § 541.604(b) in cases governed by § 541.601 involving highly compensated employees, I cannot find one in the dissent.

1. The dissent's entire textual basis for refusing to apply § 541.604(b) in cases involving § 541.601 amounts to this: § 541.601 does not mention § 541.604. To quote the dissent: "§ 541.601 is devoid of any reference to § 541.604(b). It instead mentions only § 541.602." *Post*, at 807. *See also id.* at 807 (same).

But if the dissent is right that we shouldn't apply § 541.604(b) to any provision that does not explicitly mention it, then we should also refuse to apply § 541.604(b) to *any* executive, administrative, or professional employee—regardless of how much or

little he is compensated. After all, the regulations governing executive, administrative, and professional employees are all indistinguishable from § 541.601: All of them cite § 541.602—and none of them cite § 541.604(b). *See* 29 C.F.R. §§ 541.100, .200, .300. Indeed, under the dissent's reading, we would *never* apply § 541.604(b)—because §§ 541.602 and 541.604(b) do not expressly cross-reference each other. The dissent's theory would thus render § 541.604(b) a dead letter—contrary to the canon against surplusage.

I suggest that the following is a better reading of the text: None of these provisions needs to cite § 541.604(b), because § 541.604(b) itself makes clear that it is modifying the "salary basis" test of § 541.602. *See id.* § 541.604(b) (laying out the circumstances in which an "exempt employee's earnings may be computed on an hourly, daily, or a shift basis[ ] *without ... violating the salary basis requirement*") (emphasis added).

Besides which, there is nothing remarkable about reading one legal provision in light of another—even in the absence of an express cross-reference. *See*, *e.g.*, *Lockhart v. United States*, 546 U.S. 142, 148, 126 S.Ct. 699, 163 L.Ed.2d 557 (2005) (Scalia, J., concurring) (collecting cases holding that "Congress ... may [enact] exempt[ions] ... by 'fair implication'—that is, *without an express statement*") (emphasis added) (citing, *e.g.*, *Warden v. Marrero*, 417 U.S. 653, 659-660 n.10, 94 S.Ct. 2532, 41 L.Ed.2d 383 (1974); *Marcello v. Bonds*, 349 U.S. 302, 310, 75 S.Ct. 757, 99 L.Ed. 1107 (1955); *Hertz v. Woodman*, 218 U.S. 205, 218, 30 S.Ct. 621, 54 L.Ed. 1001 (1910); *Great N. Ry. Co. v. United States*,

208 U.S. 452, 465, 28 S.Ct. 313, 52 L.Ed. 567 (1908)). Indeed, it is a bedrock principle of statutory interpretation that "text[s] must be construed as a whole." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 167 (2012). *See also id.* ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

Under the dissent's brand of textualism, by contrast, courts may read a provision out of the law altogether, on the ground that no other provision of law expressly cites it. That is a peculiar approach to textualism. It is no wonder that the dissent does not cite a single court that has ever embraced its cross-referencing theory of interpretation.

2. The dissent offers a second justification for its interpretation. It suggests that applying § 541.604(b) here would somehow render § 541.601 "superfluous." *Post*, at 804–05 (quoting *Anani v. CVS RX Services, Inc.*, 730 F.3d 146, 149 (2nd Cir. 2013)).

But that can't be right. The dissent forgets that § 541.604(b) only applies to those whose pay is "computed on an hourly, a daily or a shift basis." 29 C.F.R. § 541.604(b). It doesn't apply to weekly, monthly, and annually salaried workers at all. So how can applying § 541.604(b) to daily rate workers render § 541.601 surplusage—when § 541.604(b) would have no effect on highly compensated weekly, monthly, and annually salaried workers governed by § 541.601? The answer is that it can't.

So what gives? I can't help but wonder if the dissent's surplusage argument is premised on a basic misunderstanding of § 541.601. Perhaps the dissent believes that the Secretary of Labor promulgated § 541.601 so that the highly compensated don't have to comply with salary basis requirements like § 541.604(b). Because if that's the premise, then applying § 541.604(b) to cases involving § 541.601 might very well render the latter provision surplusage.

But if that's the dissent's premise, it's demonstrably wrong. As the majority notes, *ante*, at 794–95, § 541.601 still requires the highly compensated to be "paid on a salary ... basis." 29 C.F.R. § 541.601(b)(1). So the Secretary did not promulgate § 541.601 to alter the salary basis requirement for the highly compensated—rather, the Secretary promulgated § 541.601 to alter the "executive, administrative, or professional" duties requirement for the highly compensated. Indeed, § 541.601 expressly tells us so in subsection (c): "A high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis *of the employee's job duties*." *Id.* § 541.601(c) (emphasis added).

So it's not surprising that the Eighth Circuit sides with our majority here, and not the dissent. *See*, *e.g.*, *Coates v. Dassault Falcon Jet Corp.*, 961 F.3d 1039, 1042 n.2 (8th Cir. 2020) ("[the] 'highly compensated employee exemption[ ]' ... is a less burdensome way to prove an executive, administrative, or professional exemption") (citing 29 C.F.R. § 541.601(c)).

It's likewise unsurprising that the Sixth Circuit sides with our majority over the dissent. The dissent's sole

authority for its surplusage theory is *Anani*. But *Anani* involved a weekly, not daily, rate employee—as both the Sixth Circuit and the majority here have pointed out, and the dissent itself concedes. *See Hughes v. Gulf Interstate Field Servs. Inc.*, 878 F.3d 183, 189–90 (6th Cir. 2017) ("*Anani* ... involved [a] plaintiff[ ] who ... [was] undisputedly guaranteed [a] weekly base salar[y] above the qualifying level."); *ante*, at 795–96 (same); *post*, at 804 (*Anani* involves an "employee with a guaranteed weekly amount"). This case, by contrast, involves a daily rate employee—as the dissent admits. *See post*, at 805–06 (noting "Hewitt's [ ] daily rate").

3. The dissent acknowledges that its approach has been rejected by the Sixth and Eighth Circuits. It simply accuses the Sixth Circuit of following "false premise[s]," and dismisses the Eighth Circuit as "misguided." *Id.* at 806–08.

The dissent likewise admits that its approach has been rejected by the Labor Department. It concedes that a recent opinion letter issued by the Department "directly address[es] the question presented in this case." *Id.* at 807 – ——. The dissent nevertheless minimizes its importance, claiming that the letter was simply following our circuit's prior opinion in this case. To quote the dissent, "[t]he DOL opinion letter did not 'call the play'—it is merely cheerleading after the fact." *Id.* at 807.

It is unclear to me how the dissent thinks this metaphor serves its cause. I would have thought that the whole point of being a "cheerleader" is to take sides in a competition between opposing sides. And that is precisely what the Labor Department did here: If there

is a circuit split as the dissent claims, then the Department took sides in that split by siding with us, as well as with the Sixth and Eighth Circuits—and not with the dissent.

4. The dissent accuses the majority of engaging in purposivism. *Id.* at 807–08 – ———. But this is projection. For it is the dissent that seems to embrace purposivism. The majority disavows it—discussing legislative intent and purpose only to explain how amici's purposivist arguments (echoed by the dissent) fail on their own terms. *Ante*, at 795–97 – ———.

a. For example, the dissent begins its analysis by appealing to "common sense." *Post*, at 803–04. But as the majority responds, it is common sense that many people prefer more free time over more money. *Ante*, at 796–97. It is common sense that workers like Hewitt might not want to work a 16-hour day (or an 80-hour week), for the exact same pay that they would have earned working far fewer hours over the same number of days. It is common sense that free time is valuable to workers at every level of compensation—and not just to lesser paid employees. And so it is unsurprising that these principles would be reflected in FLSA regulations.

b. The dissent insists that "[i]t would be redundant and a waste of resources" to force the oil and gas industry to hire more tool pushers. *Post*, at 808. Yet the dissent admits that "the FLSA was enacted to encourage employers to hire more employees." *Id.*

Besides which, what's so hard about a daily rate worker complying with § 541.604(b) anyway? All you

have to do is meet the minimum weekly guarantee and reasonable relationship requirements. Heck, the regulation even provides a helpful example of how to do this: "[A]n exempt employee guaranteed compensation of at least $725 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $210 per shift without violating the $684-per-week salary basis requirement." 29 C.F.R. § 541.604(b).

So all it takes here is just one simple adjustment. Helix paid Hewitt $963 per day. So imagine that Helix also assured Hewitt that he would never earn less than, say, $4,000 per week—even during those weeks in which he worked four days or less. That simple adjustment would be enough to satisfy the salary basis test by satisfying both prongs of § 541.604(b): Hewitt would be paid a minimum weekly guarantee of $4,000, regardless of the number of hours, days, or shifts worked. And that guaranteed weekly pay would be reasonably related to the amount actually earned—consistent with the example provided in § 541.604(b) itself.

In sum, it is not at all clear why our holding would necessarily require the industry to hire more tool pushers or otherwise endure significantly higher expenses. *See also ante*, at 797–98 (noting other potential measures that the industry could adopt).

c. Perhaps strangest of all, the dissent quotes a snippet of legislative history from 1997 to support its contention that overtime pay just shouldn't apply to high earners. *Post*, at 807–08 & nn.35–36. The dissent neglects to mention that the sentiment it imputes to

"Congress" is nothing more than a floor statement by a lone House member, in support of a proposed FLSA amendment that never got so much as a vote.

This is not even good purposivism, let alone good textualism.

* * *

The dissent used to side with the majority on these issues. *See Hewitt v. Helix Energy Sols. Grp.*, 956 F.3d 341 (5th Cir. 2020). It once agreed that "an employer may compute an employee's earnings on an hourly, a daily or a shift basis, ... so long as the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis." *Id.* at 344 n.4 (cleaned up) (citing 29 C.F.R. § 541.604(b)).

But now the dissent calls for rehearing en banc. So what's changed?

Certainly none of the relevant legal texts have changed. To the contrary, our view has since been *reinforced* by the Labor Department, as well as by a(nother) unanimous circuit decision (the Eighth Circuit in *Coates*).

The only change I'm aware of is that an armada of oil industry amici now urges us to take this case en banc. According to one amicus, applying § 541.604(b) here would "threaten[ ] the country's hydrocarbon industry." According to other amici, applying § 541.604(b) will "negatively impact[ ] a vital industry." The dissent openly echoes amici's themes—speaking on behalf of "[t]hose of us who were born, bred, and educated in the

'oil patch.' " *Post*, at 802. *See also*, *e.g.*, *id.* at ——— (applying § 541.604(b) "will have lasting, negative repercussions ... on the petroleum industry"); *id.* at 803 (applying § 541.604(b) "will likely have devastating effects ... in the oil and gas arena"); *id.* (quoting amici).

But with "due respect" to "[t]hose of us who were born, bred, and educated in the 'oil patch,' " *id.* at 808: Those of us who were born, bred, and educated in textualism are unfamiliar with the "bad for business" theory of statutory interpretation offered by the dissent under the purported flag of textualism.

No one of course doubts the importance of the energy industry to the health and prosperity of our nation. But these are policy arguments that should be presented to Congress and the Secretary, not the judiciary. "These are battles that should be fought among the political branches and the industry"—"not ... by appeal to the Judicial Branch." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002). *See also ante*, at 802 (same).

I remain, as always, willing—indeed, duty bound—to go wherever the text leads. For it is the text enacted by the political branches that leads—and the judiciary that follows. If our panel has erred, I will be the first to admit it. But nothing in the dissent persuades me that anything in the text directs us to ignore § 541.604(b), or to reject the opinions of the Sixth and Eighth Circuits and the Labor Department. To the contrary, this case seems by every indication to fall well within the plain terms of § 541.604(b). Indeed, why did the Secretary bother to promulgate this provision, if not to govern daily rate cases just like this? The dissent offers no

good reason. And I cannot conceive of one myself. Accordingly, I concur.

Jacques L. Wiener, Jr., Circuit Judge, dissenting:

With due respect for my esteemed colleagues in the majority, who in good faith attempt to apply the regulatory text as written, I am compelled to dissent.

Those of us who were born, bred, and educated in the "oil patch," and who practiced mineral law for decades, are quite familiar with the levels of personnel who work the various on-shore and off-shore oil rigs and platforms. First come the geologists and petroleum engineers who make trips to oil and gas rigs, but who spend most of their time in offices analyzing and advising owners and promoters. They are analogous to colonels or even generals in the military. Next, among those who spend all of their worktime on oil rigs and platforms, the superintendent ranks highest—the equivalent of captains or even majors. Then come the so-called tool pushers (who never "push" a "tool"), the equivalent of first or second lieutenants. Tool pushers oversee and maintain direct contact with the common laborers on the oil and gas rigs—universally called "roughnecks," the equivalent of privates or PFCs.

* * *

Plaintiff-Appellant Michael Hewitt worked for Defendant-Appellee Helix Energy Solutions Group, Inc. ("Helix") as a tool pusher, supervising approximately twelve to fourteen roughnecks at any given time. The parties agree that Hewitt made $963 per day for every day that he worked, regardless of the number of hours

per day he worked.[4] His salary totaled more than $200,000 per year. Common sense dictates that he was a "highly compensated employee,"[5] and a very high one indeed. In fact, Hewitt made more than twice as much as the threshold amount of $100,000 required to be a highly compensated employee at the time of the then-applicable regulation.[6] So why, you ask, would such a highly compensated employee be entitled to overtime? The answer is clear to the panel majority: because (1) he was not entitled to a guaranteed weekly rate, and (2) there was no "reasonable relationship" between his take-home pay and his daily rate. To me, this conclusion ignores common sense.

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[4] Hewitt's pay fluctuated from as low as $871.65 per day to as high as $1,912.32 per day. His daily rate, however, was predetermined by an employment agreement. So his daily rate was always "predetermined." *See* 29 C.F.R. § 541.602(a). At oral argument the parties referred to his salary as $963 per day, regardless of the number of hours per day he worked. In any event, his salary was indisputably more than $455 per day—the minimum amount that must be earned by highly compensated employees under the relevant regulation at the time the incident arose. *See id.* § 541.601(b)(1) (2014).

[5] *See id.* § 541.601(a)(1) (2020).

[6] *See id.* § 541.601(b)(1) (2014). The 2014 version of the regulation was the version in place at the time of Hewitt's employment. On June 8, 2020, however, the total annual compensation was changed to at least $107,432, including at least $684 per week. *See id.* § 541.601 (2020). Hewitt's daily rate of $963 and annual compensation of $200,000 satisfy either version of the regulation. Throughout the rest of this dissent, I refer to and use the numbers from the 2020 version of the regulation.

To determine whether Hewitt was a highly compensated employee and thus not entitled to overtime under the Fair Labor Standards Act ("FLSA"), however, we cannot rely on mere common sense; we must look to the text of the regulation governing this type of employee. The highly compensated employee exemption states that "an employee with total annual compensation of at least $107,432 is deemed exempt ... if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee."[7]

The parties agree that Hewitt met all of these conditions. So why does the panel majority require more? It is clear to me as a textualist that if one looks at § 541.601, there is no requirement that an employee meet § 541.604(b)'s reasonable relationship test. In fact, § 541.601 is devoid of *any reference* to § 541.604(b); it states only that the " '[t]otal annual compensation' must include at least $684 per week paid on a salary ... basis *as set forth in* [ ]*§ 541.602*."[8] (Note that there is no requirement that the employee's pay satisfy § 541.604(b).) The panel majority chooses to look beyond the text of the regulation at issue and look to an inapplicable regulation, *viz.*, § 541.604(b).

This was not the law prior to the panel majority's opinion. And I fear that the result of the panel majority's opinion will have lasting, negative

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[7] *Id.* § 541.601(a)(1).

[8] *Id.* § 541.601(b)(1) (emphasis added).

repercussions, not just on the petroleum industry, but on all industries in this region and in any region that finds the panel majority's opinion persuasive. Moreover, it creates an unnecessary circuit split,[9] while purporting not to do so, by bringing in cases that are inapplicable to the case at hand.[10]

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[9] *See Anani v. CVS RX Servs., Inc.*, 730 F.3d 146, 149 (2d Cir. 2013) ("We perceive no cogent reason why the requirements of C.F.R. § 541.604 must be met by an employee meeting the requirements of C.F.R. § 541.601."); *Litz v. Saint Consulting Grp., Inc.*, 772 F.3d 1, 2 (1st Cir. 2014) (holding that the reasonable relationship test does not apply to highly compensated employees and citing *Anani*).

[10] The panel majority says *Coates v. Dassault Falcon Jet Corp.* and *Hughes v. Gulf Interstate Field Services, Inc.* are applicable to this case and that "[t]here is no split" between these cases, Hewitt's case, and *Anani* and *Litz*. This is wrong, as explained below. Moreover, in *Hughes*, the employees' daily rate was below the regulatory minimum, so § 541.604(b) was clearly applicable. *See* 878 F.3d 183, 185–86 (2017) (noting that the employees received a letter stating that they were entitled to a daily rate of $337 per day in addition to their weekly per diem and computer stipend). The *Hughes* court also applied the reasonable relationship test because the employees' salary was not computed on a "weekly, or less frequent basis." *Id.* at 189. Hewitt's salary, however, *was* computed on a "weekly, or less frequent basis," see 29 C.F.R. § 541.602(a), because, although his salary was based on a daily rate, it was computed and paid based on the total number of days he worked each week. In *Coates*, the employees were paid $285.56 per day bi-weekly ($74,244.96 divided by 52 weeks per year divided by 5 days per week). *See* 961 F.3d 1039, 1044 n.5 (8th Cir. 2020). So for the same reason as the *Hughes* court, the *Coates* court was required to apply the reasonable relationship test. In short, there is no circuit split between *Hughes*, *Coates*, *Anani*, and *Litz*, but the

I begin, as does the panel majority, by applying the unambiguous language of the regulation at issue: the highly compensated employee exemption. Section 541.601 states that "an employee with total annual compensation of at least $107,432 is deemed exempt[.]"[11] There is one, and only one, condition: The "[t]otal annual compensation must include at least $684 per week paid on a salary ... basis as set forth in [ ]§ 541.602."[12] Importantly, the Secretary points us to § 541.602 (the salary basis test), not to § 541.604(b) (the reasonable relationship test).

By requiring employees meeting the requirements of § 541.601 to also meet the requirements of § 541.604(b), the panel majority creates tension where there need not be any. And why is there no tension between § 541.604(b) and § 541.602? Because these provisions apply to different groups of employees. To quote *Anani*:

> We perceive no cogent reason why the requirements of C.F.R. § 541.604 must be met by an employee meeting the requirements of C.F.R. § 541.601. Indeed, C.F.R. § 541.601 is rendered essentially meaningless if a "highly compensated employee" must also qualify for the exemption under C.F.R. § 541.604 or, to state the converse, would lose the "highly compensated employee"

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panel majority creates a split by applying the reasonable relationship test to Hewitt's salary, which was more than the regulatory minimum.

[11] 29 C.F.R. § 541.601(a)(1).

[12] *Id.* § 541.601(b)(1).

> exemption by failing to qualify under C.F.R. § 541.604. To be sure, C.F.R. § 541.604 deals with employees who earn the "[m]inimum [g]uarantee plus extras," but every employee with a guaranteed weekly amount exceeding $455 who earns over $100,000, and is therefore purportedly exempted by C.F.R. § 541.601, also fits the description of having a "minimum guarantee plus extras." Appellant's interpretation thus renders C.F.R. § 541.601 superfluous. The reading that gives full meaning to both C.F.R. § 541.601 and C.F.R. § 541.604 is that each deals with different groups of employees who receive a "minimum guarantee plus extras." The first exemption deals with those employees who earn over $100,000 annually while the second exemption deals with employees whose guarantee with extras totals less than $100,000 annually.[13]

Continuing to follow the text, then, we look to § 541.602 only—the "condition" of a highly compensated employee. That "salary basis test" requires that:

> the employee [1] regularly receives each pay period [2] on a weekly, or less frequent basis, [3] a predetermined amount [4] constituting all or part of the employee's compensation, [5] which amount is not subject to reduction

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[13] 730 F.3d at 149 (alterations in original).

> because of variations in the quality or quantity of the work performed.[14]

Hewitt's bi-weekly pay clearly and indisputably satisfied the salary basis test. He received his paycheck every two weeks. He thus "regularly receive[d] each pay period on a weekly, *or less frequent basis*."[15] Hewitt's pay—$963 per day—was *predetermined*: Prior to performing any work, he knew the amount he would be paid for each day, regardless of how few or how many hours he worked. His daily rate did not constitute all of his compensation, but the salary basis test only requires that the predetermined amount—here, $963 per day for each day on which he worked—constitute "all *or part*" of Hewitt's compensation. It is thus possible, as in Hewitt's case, that a daily rate employee, who has only a partially predetermined total compensation, could satisfy the salary basis test.

Furthermore, Hewitt's salary, or his base pay, was not subject to reduction "because of variations in the

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[14] 29 C.F.R. § 541.602(a).

[15] *Id.* (emphasis added). *But see Hughes*, 878 F.3d at 189 (holding that a daily rate is not received "on a weekly, or less frequent basis" because a daily rate is "calculated *more* frequently than weekly"). *Hughes* seems to be an outlier in holding that a daily rate is calculated more frequently than weekly. *See*, *e.g.*, *Coates*, 961 F.3d at 1046 (explaining that a human resources employee "gave an accurate general description of [the defendant's] hourly-based payroll records, a system which, as we have explained, is not inconsistent with the Secretary's salary-basis regulations," which require that the employee be paid on a weekly, or less frequent basis).

quality or quantity of the work performed."[16] Hewitt could have been less productive than Helix desired, but he would still be paid his daily rate for any day during which he performed *any* work. And he could have significant variations in the quantity of days and hours he worked, but his guaranteed daily minimum of $963 would not vary.

A final requirement of the salary basis test is that "an exempt employee must receive the full salary for any week *in which the employee performs any work* without regard to the number of days or hours worked."[17] The panel majority concludes that Hewitt was paid *with* regard to the number of days worked. This is a flawed reading of the regulation. If Hewitt performed any work—even for just one hour—he was paid his full daily rate. He was thus paid at least $963 for each and every week he worked—even if he worked only one hour—*without* regard to the number of days or hours worked. He clearly met the requirements of 29 C.F.R. § 541.602(a).

The First and Second Circuits have similarly concluded that an employee who is guaranteed an amount each week that exceeds the $455 weekly threshold is paid on a salary basis. In *Litz*, the employees earned between $40 and $60 for every hour billed but were guaranteed a weekly "stipend" of $1,000, regardless of hours worked.[18] The First Circuit concluded that the

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[16] 29 C.F.R. § 541.602(a).

[17] *Id.* § 541.602(a)(1) (emphasis added).

[18] 772 F.3d at 2.

employee was paid on a salary basis because the $1,000 weekly guarantee was both (1) "predetermined" and (2) "not subject to reduction because of variations in the quality or quantity of the work performed."[19] The Second Circuit in *Anani* concluded that a pharmacist who received a guaranteed $1,250 weekly salary and significant additional compensation based on number of hours worked was paid on a salary basis.[20] Similarly, Hewitt's $963 daily rate was a guarantee if he performed any work at all. His rate was predetermined and not subject to reduction absent operational changes.

The panel majority distinguishes *Litz* and *Anani* by focusing on the weekly guarantee in those cases. But the panel majority misses the forest for the trees. The weekly "stipend" in *Litz* and the "weekly guarantee" in *Anani* are analogous to Hewitt's $963 daily rate, which was also guaranteed if he performed any work at all. The regulations require only that the employee be paid on a "weekly, or less frequent basis."[21] And Hewitt was paid his daily rate every week in which he performed any work at all. The fact that the "stipend" in *Litz* and the "weekly guarantee" in *Anani* were guaranteed makes no difference. These opinions focused less on the guarantee and more on the fact that the sum was paid on a weekly (or bi-weekly) basis. And Hewitt's $963 daily rate was guaranteed as well if he performed any

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[19] *Id.* at 5 (quoting 29 C.F.R. § 541.602(a)).

[20] 730 F.3d at 147–48.

[21] 29 C.F.R. § 541.602(a)

work at all. Furthermore, the regulation requires only that the guarantee not be subject to reduction because of the variations in the quality or quantity of work performed.[22] So too here. Hewitt's guaranteed $963 was not subject to reduction based on the quantity or quality of the work he performed. Finally, the *Litz* and *Anani* courts *did not* rely on § 541.604(b) in requiring a weekly guarantee; they simply relied on § 541.602, which requires no weekly guarantee.[23] The weekly guarantee is thus immaterial. But even if it was material, Hewitt also had a weekly guarantee if he performed any work at all, as explained above.

The panel majority relies heavily on *Hughes* and *Coates* for the principle that a court must apply § 541.604(b)—specifically a weekly guarantee—to daily rate employees. It states that *Coates* was decided after *Hughes* and thus it is entitled to more authority than *Litz* and *Anani*. I disagree.

For one thing, the *Hughes* court misinterpreted § 541.602(a) because it held that a daily rate pay cannot be paid on a weekly or less frequent basis.[24] It therefore begins with a false premise because a daily rate *can* be paid on a weekly or less frequent basis. The *Coates* court was thus misguided when it relied on that opinion. Furthermore, the *Coates* court merely concluded that there was insufficient evidence before the district court to decide the case as a matter of law

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[22] *See id.*

[23] *See Litz*, 772 F.3d at 5; *Anani*, 730 F.3d at 147–48.

[24] 878 F.3d at 189.

when there was evidence of reductions in salary.[25] The *Hughes* court reached a similar conclusion.[26] When looking to § 541.604(b), the *Coates* court focused only on the fact that a salary must be "guaranteed" at a minimum amount not subject to reduction.[27] It did not focus on the second clause of the reasonable relationship test, as the panel majority does in this case.

The panel majority makes much of an August 2020 opinion letter issued by the Department of Labor ("DOL"). After our now withdrawn opinion was entered, the Wage and Hour Division of the Department of Labor ("WHD") issued an opinion letter directly addressing the question presented in this case.[28] The WHD concluded that a daily rate employee does not meet the salary basis test. This conclusion, however, was based on our subsequently-revoked opinion. The DOL opinion letter did not "call the play"—it is merely cheerleading after the fact.

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[25] 961 F.3d at 1045–46.

[26] *See Hughes*, 878 F.3d at 189 (reversing grant of summary judgment in favor of employer because the record did not establish that "the employment arrangement also include[d] a guarantee of at least the minimum weekly required amount paid on a salary basis" (quoting 29 C.F.R. § 541.604(b))).

[27] 961 F.3d at 1048.

[28] *See* Opinion Letter FLSA2020-13, 2020 WL 5367070, at *3–4 (Aug. 31, 2020) (citing *Hewitt v. Helix Energy Sols. Grp.*, 956 F.3d 341 (5th Cir. 2020)).

Furthermore, because neither the panel majority nor I deem the regulation ambiguous, we need not provide *Chevron* deference to the opinion letter.[29] (In fact, it is questionable whether we even need to provide *Skidmore* deference to the opinion letter. Here, the 2020 opinion letter does not have the "power to persuade" because it is based on our now-revoked opinion; furthermore, the regulation at issue is not ambiguous.)[30]

A report issued by the DOL addressing this specific issue—the Weiss Report—is even more instructive,[31] and the DOL continues to rely on it.[32] The Weiss Report

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[29] *See Owsley v. San Antonio Indep. Sch. Dist.*, 187 F.3d 521, 525 (5th Cir. 1999) ("Opinion letters, which are issued without the formal notice and rulemaking procedures of the Administrative Procedure Act, do not receive the same kind of *Chevron* deference as do administrative regulations."); *accord Christensen v. Harris Cnty.*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000); *see also Belt v. EmCare, Inc.*, 444 F.3d 403, 408 (5th Cir. 2006) ("If the regulation is unambiguous, we may still consider agency interpretation, but only according to its persuasive power.").

[30] *Cf. Christensen*, 529 U.S. at 587, 120 S.Ct. 1655 (granting *Skidmore* deference to an opinion letter based on its "power to persuade" (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944))).

[31] *See* Reports and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage & Hour & Pub. Contracts Divs., U.S. Dep't of Labor (June 30, 1949) [hereinafter the "Weiss Report"].

[32] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22124 (Apr. 23, 2004) ("The

states that, for "an employee paid on a daily or shift basis" (as was Hewitt), the salary basis test will be met "if the employment arrangement includes a provision that he will receive not less than the amount specified in the regulations in any week in which he performs any work."[33] As stated above, Hewitt was a daily rate employee who would receive $963—more than twice the regulatory threshold amount—for any week in which he performed any work at all.

Finally, the panel majority looks to the regulatory purpose of the reasonable relationship test to justify its position that Hewitt was not paid on a salary basis. Again, I disagree. We must be wary of the dangers of looking to regulatory purpose when the text of the regulation clearly demands a different outcome. And here, the text of § 541.601 is devoid of any reference to § 541.604(b). It instead mentions only § 541.602.[34] Furthermore, purpose and policy *do* support Hewitt's salary satisfying the salary basis test. The panel majority's holding is in fact inconsistent with Congress's express intent under the FLSA. Congress has stated that "there is no reason that the FLSA, which was passed to protect laborers who 'toil in factory and on farm,' and who are 'helpless victims of their own bargaining weakness,' should ever be interpreted to protect workers making high five-figure

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Department notes, however, that much of the reasoning of the Stein, Weiss and Kantor reports remains as relevant as ever.").

[33] Weiss Report at 26.

[34] *See* 29 C.F.R. § 541.601(b)(1).

or six-figure incomes."[35] Congress went on to say that "the courts need to refocus their efforts" away from protecting these highly paid workers.[36]

Hewitt was a very highly paid worker, and I seriously doubt that Congress's purpose was to allow him overtime under the FLSA.

Finally, the panel majority states that § 541.604(b)

> sets a *ceiling* on how much the employee can expect to work in exchange for his normal paycheck, by preventing the employer from purporting to pay a stable weekly amount without regard to hours worked, while in reality routinely overworking the employee far in excess of the time the weekly guarantee contemplates.[37]

But here, Helix *did not* routinely overwork Hewitt without providing him adequate pay. In fact, it did just the opposite: Hewitt worked on a "hitch" that lasted about a month, and he made a staggering $200,000 or more per year.

The panel majority correctly states that the FLSA was enacted to encourage employers to hire more employees. It creates a "penalty" for not doing so, *viz.*, overtime wages. But that regulatory purpose falls flat on its face in the fact pattern before us. Hewitt was

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[35] 143 Cong. Rec. E317-04, E317-18, 1997 WL 79643, at *2 (Feb. 26, 1997).

[36] *Id.*

[37] Majority Opinion ("*Ante*") at 793–94.

paid more than $200,000 per annum as a tool pusher. He would have been paid significantly more with overtime. So why not hire more tool pushers? The answer is clear: Tool pushers are employed as overseers, not as manual laborers. It would be redundant and a waste of resources to hire multiple overseers to perform the work of this particular position. Furthermore, if a company, such as Helix, had to employ multiple tool pushers at $200,000 per year, they could very likely go bankrupt. And then Hewitt would be out of work. Surely, this is not the purpose behind the FLSA. In fact, Congress has *confirmed* that this is so.[38]

In sum, the district court was correct in concluding that Hewitt's salary satisfied the highly compensated employee exemption because he was paid on a salary basis.

* * *

I respectfully submit that this case should be reheard by our *en banc* court. If the panel majority's opinion is allowed to stand, it will likely have devastating effects on all employers, especially in the oil and gas arena, in our circuit. Employers like Helix will have to pay highly skilled supervisors like Hewitt considerable overtime wages. *Amici* estimate that Hewitt, who already makes more than $200,000 per year, would have overtime wages of at least $52,000 per year if the panel majority's holding stands. As *amici* aptly point out, "[a]ppending these types of costs to expensive

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[38] *See supra* notes 806–07 – ——— and accompanying text.

hydrocarbon exploration in the Fifth Circuit will put the region, and the industry, at a significant disadvantage to other exploration operations elsewhere in the country and the world."

Consistent with two other circuits, I would not apply the reasonable relationship test to highly compensated employees. And there is no question in my mind that Hewitt was a highly compensated employee because he clearly was paid on a salary basis. Neither is it disputed that Hewitt met the other requirements to be considered a highly compensated employee. The district court held as much, and I would affirm the judgment of that court.

Finally, with utmost respect for my friend and colleague who authored the special concurrence, my only response is to quote Macbeth: "full of sound and fury, signifying nothing."[39]

For the foregoing reasons, I respectfully dissent.

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[39] William Shakespeare, Macbeth act 5, sc. 5, lines 15–17. To be sure, the harshness of the full quotation is unwarranted, and, thus, I only quote what is appropriate.

## APPENDIX 3

**U.S. Department of Labor**

**Wage and Hour Division**
**Washington, DC 20210**

**[SEAL]**

**FLSA2020-13**

**[Filed: September 1, 2020]**

August 31, 2020

Dear **Name*:**

This letter responds to your request for an opinion regarding the applicability of the learned professional exemption and the highly compensated employee test to part-time employees who provide corporate-management training and are paid a day rate with additional hourly compensation. This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in litigation that began before your request. We conclude that the employees likely perform learned professional duties; that their day rate does not constitute payment on a salary basis; that if the employees were otherwise exempt, the payment of additional hourly compensation would not affect their exempt status; and that they would not qualify as highly compensated

employees if they receive only a pro rata portion of the required total annual compensation amount based on the number of weeks worked.

**BACKGROUND**

You write on behalf of a company that furnishes executive education to a variety of companies. The company's employees perform two types of duties. The first, which you refer to as delivery work, generally consists of presenting the education program to the client companies, operating the interactive models that are part of the program, and evaluating the results of the participants' activities. The second, which you refer to as development work, consists of creating new content and interactive models for the programs. You state that the delivery work is the employees' primary duty and that it requires "a constant and consistent exercise of discretion and judgment[.]"

The employees' work for the company is almost exclusively part time, though some work on a nearly full-time basis and others work as few as 15 days per year. You describe them as highly educated and state that they must have advanced knowledge in business finance and adult education. Among the qualifications prescribed for the employees are a master's degree in finance, accounting, adult learning, or "business discipline"; a Ph.D. is preferred, but not required. The employees are also required to have, among other qualifications, at least 10 years of practical business experience in an executive leadership role and "deep hands-on experience in Microsoft Word, PowerPoint, and Excel, including VBA programming."

The company's employment agreement states that the company will offer to each employee opportunities for delivery or development work "from time to time." The employees are not required to accept an offered opportunity; the company is not required to offer a minimum number of opportunities. For delivery work, the company pays a flat daily rate of $1,500, exclusive of board, lodging, and other facilities. Each delivery work program lasts at least one day. For development work, the company pays $50 per hour, again exclusive of board, lodging, and other facilities. Employees are not paid during weeks in which they perform neither delivery nor development work.

You ask four related questions. First, are the employees' primary duties those of learned professionals under 29 C.F.R. § 541.301?[1] Second, do the company's payments for delivery work satisfy the salary basis requirement of 29 C.F.R. § 541.300(a)(1) for the learned professional exemption? Third, assuming the employees are otherwise exempt from the Fair Labor Standards Act's (FLSA) overtime pay requirements, does the hourly development work compensation affect their exempt status? Fourth, can a part-time employee qualify as exempt if the employee's pay for the number of weeks worked is proportional to the minimum annual amount required under the highly compensated employee test as set forth in 29 C.F .R. § 541.601?

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[1] You phrase this as, "Are the Company's employees learned professionals[?]" Because this phrasing subsumes your second question, we rephrase it as indicated.

Based on the facts as you have represented them, we conclude that the employees likely satisfy the duties test required to qualify as exempt learned professionals, but do not satisfy the salary basis test for that exemption or the highly compensated employee test under any of the scenarios you present.

**GENERAL LEGAL PRINCIPLES**

Under the FLSA, employees are entitled to be paid a minimum wage for each hour worked and to be paid one and a half times their regular rate of pay for each hour in excess of 40 hours worked in a workweek.[2] Certain employees are exempt from these requirements, including employees who are "employed in a bona fide executive, administrative, or professional capacity ... or in the capacity of outside salesman."[3] The Secretary of Labor, exercising the power delegated to define and delimit those terms, created a three-part test to determine which employees qualify as exempt professionals.[4]

- First, the *salary basis test*: With certain exceptions not applicable here, the employee must be compensated on a salary or fee basis.[5] Compensation on a salary basis means receiving each pay period (1) a predetermined amount

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[2] 29 U.S.C. §§ 206(a), 207(a).

[3] 29 U.S.C. § 213(a)(1).

[4] *Id.*; 29 C.F.R. § 541.300.

[5] 29 C.F.R. § 541.300(a)(1).

that is all or part of the employee's compensation (2) on a weekly or less frequent basis (3) that is not subject to reduction because of variations in the quantity or quality of work performed.[6]

- Second, the *salary level test*: The salary paid must meet a minimum specified amount. With certain exceptions not applicable here, that amount must be at least $684 per week.[7]
- Third, the *duties test*: The employee's primary duty must be to perform work that requires either (1) "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction" or (2) "invention, imagination, originality[,] or talent in a recognized field of artistic or creative endeavor."[8]

An alternative to this three-part test is the highly compensated employee test. Because a "high level of compensation is a strong indicator of an employee's exempt status," the highly compensated employee test "eliminate[s] the need for a detailed analysis of the employee's job duties."[9] Under that test, an employee qualifies as exempt if the employee customarily and

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[6] 29 C.F.R. § 541.602(a).

[7] 29 C.F.R. § 541.300(a)(1).

[8] 29 C.F.R. § 541.300(a)(2).

[9] 29 C.F.R. § 541.601(c).

regularly performs at least one exempt executive, administrative, or professional duty and receives total annual compensation of at least $107,432.[10] The total annual compensation must include at least $684 per week paid on a salary or fee basis.[11]

The FLSA's exemptions are "as much a part of the FLSA's purpose as the [minimum-wage] and overtime-pay requirement[s]," and, therefore, must receive a "fair (rather than a narrow) interpretation[.]"[12] WHD, therefore, interprets the Act neither expansively nor narrowly, but according to conventional canons of statutory construction.

**OPINION**

**A. The employees likely perform exempt learned professional duties.**

Learned professional duties are those that (1) require advanced knowledge (2) in a field of science or learning (3) that is customarily acquired by a prolonged course of specialized intellectual instruction.[13] Based on your description, we conclude that the employees' duties likely qualify.

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[10] 29 C.F.R.. § 541.601(a)-(b).

[11] *Id.*

[12] *Encino Motorcars, LLC v. Navarro,* 138 S. Ct. 1134, 1142 (2018) (internal citations and quotation marks omitted).

[13] 29 C.F.R. § 541.301(a).

- *Advanced knowledge*: Work requires advanced knowledge if it is predominantly intellectual in character and includes the consistent exercise of discretion and judgment.[14] This work generally includes analyzing, interpreting, or making deductions from varying facts or circumstances.[15] The employees' primary duty here—delivery work—which involves lecturing on a number of leadership and related business disciplines, presenting hypothetical scenarios to corporate executives, and critiquing and evaluating the executives' responses, meets these criteria.[16]

- *Field of science or learning*: These include traditional professions and occupations similar to those professions that have a recognized professional status, as distinguished from the mechanical arts or skilled trades. Our regulations cite accounting, teaching, and actuarial computation as examples.[17] As the employees' delivery duties include teaching

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[14] 29 C.F.R. § 541.301(b).

[15] *Id.*

[16] While you ask us to assume that the employee's delivery duties involve the "constant and consistent exercise of discretion and judgment," we note WHD's longstanding position that teaching, by its very nature, requires exercising discretion and judgment. *See, e.g.,* WHD Opinion Letter FLSA2008-11, 2008 WL 5483049, at *1 (Dec. 1, 2008) (*quoting* WHD Fact Sheet 17D).

[17] 29 C.F.R. § 541.301(c).

advanced, finance- and business-related material to executives, and evaluating and quantifying the executives' work, we conclude that the advanced knowledge required to perform those duties is in a field of science or learning.

- *Specialized intellectual instruction*: This restricts the learned professional exemption to occupations where "specialized academic training is a standard prerequisite...."[18] This prerequisite is satisfied here, as the employees are required to have a master's degree in a relevant field to qualify for employment. We have routinely concluded that a position that requires a degree in a specific field directly related to the position's duties and requires the employee to apply the advanced knowledge gained in the course of earning that degree satisfies this requirement.[19]

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[18] 29 C.F.R. § 541.301(d).

[19] *See, e.g.,* WHD Opinion Letter FLSA2005-28, 2005 WL 3308599, at *3-4 (Aug. 26, 2005) (sales engineers who were required to have engineering degrees and whose primary duties could not be performed without that specific knowledge); WHD Opinion Letter FLSA2005-50, 2005 WL 3308621, at *2 (Nov. 4, 2005) (social workers who were required to have master's degrees in one of six specific fields and who worked in the field of their degree); *see also* 29 C.F.R. § 541.301(e)(1)-(9) (examples of employees who generally do or do not meet the duties test for learned professionals).

**B. The company's payments for delivery work do not satisfy the salary basis test.**

Under the plain language of the regulation, to satisfy the salary basis test, an employee must receive each pay period a predetermined amount that is all or part of the employee's compensation on a weekly or less frequent basis that is not subject to reduction because of variations in the quantity or quality of work performed.[20] The company's payments for delivery work do not meet this test. First, the payments for delivery work are not a predetermined amount. They may be as low as $1,500 during a workweek in which the employee performs one day of work; they may be more than $10,000 per week. Second, the amounts are not calculated on a weekly or less frequent basis. They are based instead on the number of days worked.

The Fifth Circuit recently addressed a similar question, holding that an employee paid a daily rate, with no minimum weekly guarantee, is not paid on a salary basis.[21] The *Hewitt* plaintiff, like the employees here, was paid per day of work.[22] The court summarized the plain language of the salary basis test as requiring "that an employee know the amount of his compensation for each weekly (or less frequent) pay

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[20] 29 C.F.R. § 541.602(a).

[21] *Hewitt v. Helix Energy Sols. Group, Inc.,* 956 F.3d 341 (5th Cir. 2020).

[22] *Id.* at 342.

period during which he works, *before* he works."[23] The *Hewitt* plaintiff, however, "had to take the number of days he worked (past tense) and multiply by the operative daily rate to determine how much he earned," thus knowing "his pay only *after* he worked through the pay period."[24] "[H]e did *not* receive a 'predetermined amount' 'on a weekly, or less frequent basis'—rather, he received an amount contingent on the number of days he worked each week" and was therefore "not paid on a 'salary basis[.]'"[25]

The court further supported its conclusion by noting that an "exempt employee must receive the *full* salary for any week in which the employee performs any work *without regard to the number of days or hours worked*."[26] The *Hewitt* plaintiff, however, like the employees here, "was paid on a daily rate—so he was paid '*with*' (not 'without') 'regard to the number of days or hours worked,' in direct conflict with the plain language" of the salary basis test.[27]

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[23] *Id.* at 343 (*citing* 29 C.F.R. § 514.602(a)).

[24] *Id.* at 344 (emphasis in original).

[25] *Id.* (emphasis in original).

[26] *Id.* (*quoting* 29 C.F.R. § 541.602(a)(1)) (emphasis added in opinion).

[27] *Id.* (emphasis in original). Our conclusion is further supported by WHD's having specified certain instances when exempt executive, administrative, or professional employees may be paid a daily rate while not more generally permitting a day rate to satisfy the salary basis test. In some circumstances, employees in the motion-picture industry who are paid per day of work may qualify as exempt

### C. The development work payments would not affect the status of an otherwise exempt employee.

If the employees were otherwise exempt learned professionals, the development work payments would not affect that status. We take your use of "otherwise exempt" to mean only that: If the employees qualified as exempt learned professionals (i.e., if they satisfied the salary and duties tests) when the development work payments were not considered, would they retain that status if those hourly payments were considered? If the employees were exempt, they would be paid a fixed amount on a weekly or less frequent basis that would not vary based on the quantity or quality of their work. Adding to that fixed salary amount additional payments for each hour of development work they performed would not change their status. As long as the employee is guaranteed to receive at least the minimum required salary for each workweek on a salary basis, the employer may pay the employee additional compensation on a commission, flat, bonus,

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executive, administrative, or professional employees. 29 C.F.R. § 541.709. That is, WHD knows how to include in the exemption certain employees whose pay is calculated on a daily basis; it has chosen not to do so broadly. *Compare* 29 C.F.R. § 541.602(a) *with* 29 C.F.R. § 541.709. "The familiar 'easy-to-say-so-if-that-is-what-was-meant' rule of [] interpretation has full force here." *C.I.R. v. Beck's Estate,* 129 F.2d 243, 244 (2d Cir. 1942) (footnote omitted). *See also Amazon.com, Inc. v. C.I.R.,* 934 F.3d 976, 991 (9th Cir. 2019) (agency's express use of certain language in one provision showed that it "clearly knew how to write its regulations" to accomplish a certain goal, and supported a conclusion that the language did not apply to provisions from which it was absent).

straight-time, or other basis.[28] This would include a per-hour payment for each hour of development work performed. The employees here, however, are not paid on a salary basis, so the premise of this question would not be satisfied.

### D. Proportional payments to part-time employees do not satisfy the highly compensated employee test.

There are two compensation requirements to qualify as exempt under the highly compensated employee test. Neither of them varies based on an employee's part-time or full-time status. First, the employee must receive at least the minimum salary level, currently $684 per week, on a salary or fee basis.[29] Second, the employee must receive annual compensation of at least $107,432.[30] The only exception to this requirement is that an employee who begins work after the year starts or leaves work before the year ends may be paid total compensation proportional to the amount of the year that the employee worked for the employer.[31]

The regulations include no exception for part-time employees—neither in the sense of working fewer than 40 hours per week nor in the sense of working during some weeks but not others. An employee satisfies the

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[28] 29 C.F.R. § 541.604(a).

[29] 29 C.F.R. § 541.601(b)(1).

[30] 29 C.F.R. § 541.601(a)(1).

[31] 29 C.F.R. § 541.601(b)(3).

highly compensated employee test only by satisfying in full the weekly and annual compensation requirements.

**CONCLUSION**

For these reasons, we conclude that the employees likely perform exempt learned professional duties, that the employer's payments for delivery work do not satisfy the salary basis test, that the development work payments would not result in the loss of an otherwise-applicable professional exemption, and that the highly compensated employee test cannot be satisfied by payments proportional to the amount of work performed by a part-time employee.

This letter is an official interpretation by the Administrator of WHD for purposes of the Portal-to-Portal Act.[32] This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is "modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."[33]

We trust that this letter responds to your inquiry.

Sincerely,

/s/ Cheryl M. Stanton
Cheryl M. Stanton
Administrator

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[32] *See* 29 U.S.C. § 259.

[33] *Id.*

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b).**