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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Respondent was a supervisor on Helix's offshore vessels and was compensated commensurate with his high-ranking position. Every two weeks, Helix paid Respondent at least $963 for each day that he worked. In all, Respondent earned $248,053 in 2015, $218,863 in 2016, and $143,680 in the eight months he worked for Helix in 2017. After his performance-related release, Respondent sued Helix under the Fair Labor Standards Act ("FLSA"), claiming that he was also entitled to substantially more in retroactive overtime pay.

The FLSA sensibly exempts many highly compensated supervisors from the Act's overtime requirements. Specifically, employees who perform executive duties, earn at least $100,000 per year, and receive at least $455 per week paid on a salary basis are "deemed exempt." 29 C.F.R. §541.601(a). It is undisputed that Respondent performed executive duties and met the annual earnings threshold. Nevertheless, a sharply divided *en banc* Fifth Circuit ruled that Respondent was non-exempt and entitled to retroactive overtime pay because he was paid based on a daily rate, not a weekly rate, even though his daily rate was more than twice the weekly minimum. The majority reached that counterintuitive conclusion only by applying a separate provision, 29 C.F.R. §541.604, that the First and Second Circuits have both held inapplicable when determining whether highly compensated employees are exempt.

The question presented is:

Whether a supervisor making over $200,000 each year is entitled to overtime pay because the

standalone regulatory exemption set forth in 29 C.F.R. §541.601 remains subject to the detailed requirements of 29 C.F.R. §541.604 when determining whether highly compensated supervisors are exempt from the FLSA's overtime-pay requirements.

CORPORATE DISCLOSURE STATEMENT

Petitioner Helix Well Ops, Inc. is wholly owned by Petitioner Helix Energy Solutions Group, Inc. BlackRock, Inc. owns 10% or more of the stock of Helix Energy Solutions Group, Inc. No other publicly held company owns 10% or more of the stock of either Petitioner.

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INTRODUCTION

Respondent is a highly skilled supervisor who earned over $200,000 annually while managing operations and supervising employees on Helix's offshore well intervention vessels. He emphatically is not, and does not claim to be, the type of blue-collar laborer whom the overtime provisions of the Fair Labor Standards Act ("FLSA") were designed to protect. Indeed, the FLSA exempts from its overtime-pay requirements anyone "employed in a bona fide executive, administrative, or professional capacity," 29 U.S.C. §213(a)(1), and under what is known as the "HCE regulation"—standing for "highly compensated employees"—the Secretary of Labor has interpreted this statutory exemption to include employees who earn at least $100,000 per year, are paid at least $455 each week that they work on a "salary basis," and who perform any of several enumerated supervisory executive duties. 29 C.F.R. §541.601. Such employees are sensibly "deemed exempt" from the Act's overtime requirements. *Id.*

Respondent falls squarely within that exemption: he concedes that he performed executive duties; he concedes that he earned well over $100,000 per year; and he concedes that he was guaranteed and paid well over $455 in any week in which he performed any work without regard to how many hours he actually worked. Indeed, his annual compensation dwarfed the annual threshold and his daily rate more than doubled the $455 weekly salary minimum. Nevertheless, after Helix fired him for performance issues, Respondent filed this action, alleging for the first time that he was entitled to overtime compensation under the FLSA

whenever he worked more than 40 hours in a week (which, given his high salary and the standard workweeks on offshore rigs, would result in an enormous windfall). Respondent claimed, *inter alia*, that because his substantial pay was calculated based on a daily, not weekly, minimum, he could not be deemed exempt without also satisfying a separate provision that requires a specified relationship between the guaranteed and variable weekly pay, 29 C.F.R. §541.604. The district court rejected that claim.

That decision was ultimately reversed by a sharply divided *en banc* Fifth Circuit. The *en banc* majority rejected the holdings of the First and Second Circuits and instead held that an employee who satisfies the requirements set forth in the HCE regulation is not exempt unless he also satisfies the separate reasonable-relationship requirement in 29 C.F.R. §541.604. The majority acknowledged the anomaly of treating a supervisor making over $200,000 a year, and roughly $1,000 a day, as overtime-eligible, but it believed the text compelled that counterintuitive result. Judge Jones, writing for an equally textually committed minority, begged to differ, viewing the majority's reading as not just "counterintuitive" but "incorrect." Pet.App.36. Judge Wiener put matters more colorfully: "I imagine that the original proponents of the FLSA … are turning over in their respective graves." Pet.App.66-67.

The decision below is wrong as a matter of text, context, and common sense. The HCE regulation is a self-contained provision intended to streamline the exemption analysis. It *deems* highly compensated

employees exempt if they perform any of several listed duties and if their total compensation includes at least $455 paid on a salary basis in each week they work. Even setting aside the absurdity of mandating overtime pay for executives paid over $200,000 annually and guaranteed $1,000 in any week in which they work, the text, structure, and history of the HCE regulation make crystal clear that §541.604 never enters the picture: The HCE regulation uses self-contained deeming language, is structurally separate, expressly incorporates other provisions without mentioning §541.604, and contains provisions that conflict with those in §541.604. The HCE regulation and §541.604 are separate and different parallel regulatory paths to the statutory exemption that apply to different groups of employees and impose different and inconsistent requirements. Satisfying either regulatory path is sufficient; there is no need for employees to be doubly exempt.

The decision below is not just wrong but deeply problematic. The statutory text exempts employees based on their job duties, *i.e.*, if they are "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1). While an employee's salary may be a relevant factor in a regulatory safe harbor designed to exempt especially well-paid supervisors, nothing in the text of the statute empowers the agency to treat such bona fide executives, administrators, and professionals as non-exempt solely because of the details of how and when their handsome pay is calculated and received. By reading §541.604(b) as doing exactly that, the Fifth Circuit's decision divorces the regulations from the statute they purport to implement.

The decision below is troubling from a practical standpoint as well. The Fifth Circuit's reading would reward supervisors already making hundreds of thousands of dollars with massive windfalls and would impose significant retroactive liability on employers for long-settled practices. This Court has repeatedly rejected plaintiffs' attempts to impose significant FLSA liability on employers who have done nothing more than pay well-compensated workers in conformity with industry practice. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134 (2018); *Christopher v. SmithKline Beecham*, 567 U.S. 142 (2012). The same result should follow here. This Court should correct the Fifth Circuit's flawed interpretation, restore coherence to the regulatory scheme, and prevent the FLSA's protections for blue-collar laborers from being leveraged by plaintiff's lawyers for the benefit of white-collar supervisors already making six figures.

OPINIONS BELOW

The *en banc* Fifth Circuit's opinion is reported at 15 F.4th 289 and reproduced at Pet.App.1-76. The district court's opinion is available at 2018 WL 6725267 and reproduced at Pet.App.77-87.

JURISDICTION

The Fifth Circuit entered its judgment on September 9, 2021. A petition was timely filed thereafter, and this Court granted the petition on May 2, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced at Pet.App.88-97.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The Fair Labor Standards Act

Congress enacted the FLSA in 1938, during the Great Depression, to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). The statute's declared objectives were "to improve … the standard of living of those who are now undernourished, poorly clad, and ill-housed," and to "protect this Nation from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health." S. Rep. No. 75-884, at 3-4 (1937). To those ends, the FLSA proscribed the use of child labor, imposed a minimum wage for many jobs, and established a general rule requiring employers to pay overtime compensation at a rate of one-and-a-half times an employee's regular rate of pay for all hours worked in excess of 40 in a week. *See* 29 U.S.C. §§206, 207, 212. An employer that violates the FLSA can be subject to civil liability for back pay, double damages, and attorney's fees. *Id.* §216(b).

Because Congress' aim was to improve working conditions for "undernourished, poorly clad, and ill-housed" blue-collar laborers, not to enrich white-collar professionals, the FLSA has always provided that its time-and-a-half requirement "shall not apply with

respect to … any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1). This statutory exemption is often referred to as the "EAP exemption."

2. The EAP regulations

Congress authorized the Administrator of the Wage and Hour Division of the Labor Department ("DOL"), *see* Pub. L. No. 75-718, §12, 52 Stat. 1060, 1067 (1938), and later the Secretary of Labor, *see* Pub. L. No. 87-30, §9, 75 Stat. 65, 71 (1961), to promulgate regulations implementing the EAP exemption. Since 1940, those regulations have included separate provisions defining "employee employed in a bona fide executive capacity," 29 C.F.R. §541.100, "employee employed in a bona fide administrative capacity," *id.* §541.200, and "employee employed in a bona fide professional capacity," *id.* §541.300. The regulations are collectively known as the "EAP regulations" (or the "traditional EAP regulations").[1]

Each of these regulations includes a "duties" test that outlines the general duties an employee must discharge to be classified as an exempt executive, administrator, or professional. *See id.* §541.100(a)(2)-(4); *id.* §541.200(a)(2)-(3); *id.* §541.300(a)(2). For example, employees may be classified as executives if

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[1] Unless otherwise noted, the regulations cited in this brief are those applicable during the period in dispute, which are reproduced at Pet.App.89-97. The regulations were revised and the salary thresholds increased in September 2019, effective January 1, 2020. The revisions did not involve any relevant substantive changes, and Respondent's weekly guaranteed pay and total annual compensation exceeded even the newer higher thresholds by a considerable margin.

their "primary duty is management of the enterprise … or of a customarily recognized department or subdivision thereof," *id.* §541.100(a)(2), they "customarily and regularly direct[] the work of two or more other employees," *id.* §541.100(a)(3), and they have either "the authority to hire or fire other employees" or significant influence over such decisions, *id.* §541.100(a)(4).

In addition to evaluating an employee's duties, the EAP regulations examine the employee's compensation. Relying on the statutory term "bona fide," 29 U.S.C. §213(a)(1), the agency's longstanding view is that the EAP exemption does not include all employees performing executive, administrative, and professional duties, but only those who "enjoy a certain prestige, status, and importance within their employer's organization." *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,237 (Apr. 23, 2004) ("2004 Final Rule"). As the influential 1940 Stein Report explained, "a salary criterion constitutes the best and most easily applied test of the employer's good faith in claiming that the person whose exemption is desired is actually of such importance to the firm" as to justify the exemption. Harold Stein, U.S. Dep't of Lab., Wage & Hour Div., *"Executive, Administrative, Professional ... Outside Salesman" Redefined* 26 (Oct. 10, 1940) ("Stein Report"). Without a salary test, the Stein Report observed, the EAP exemption would "invite evasion of [the minimum-wage and overtime provisions] for large numbers of workers to whom the wage-and-hour provisions should apply." *Id.* at 19; *see also* Harry S. Kantor, U.S. Dep't of Lab., Wage &

Hour Div., *Report and Recommendations on Proposed Revisions of Regulations* 2 (Mar. 3, 1958) ("[T]he salary tests are guides to assist in distinguishing bona fide executive, administrative, and professional employees from those who were not intended by the Congress to come within these categories.").

Moreover, as a check on employers' good faith in classifying their employees as exempt, the EAP regulations include both a salary-basis and salary-level test. The salary-basis test "reflects the widely-held understanding that employees with the requisite status to be bona fide executives, administrators or professionals have discretion to manage their time." 2004 Final Rule at 22,177. To that end, the salary-basis test requires an exempt employee to "regularly receive[] each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation," and which may not be "subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. §541.602(a). The salary-basis test does not require employers to pay employees for periods in which they perform no work. *Id.* In short, the "salary-basis test" is a term of art defined by the regulations to ensure that in each week in which they work, exempt employees receive a guaranteed significant payment that cannot be reduced at their employer's discretion.[2]

The salary-level test, in turn, requires that the guaranteed payment be at least $455 per week (equivalent to just $23,660 annually). *Id.*

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[2] Administrative and professional employees compensated on a fee basis instead of a salary basis may also be exempt. *See* 29 C.F.R. §541.605.

§541.600(a).[3] The agency has explained that "[i]n an overwhelming majority of cases," personnel guaranteed less than this amount on a salary basis do not qualify as exempt upon a "careful inspection" of their duties. Harry Weiss, U.S. Dep't of Lab., Wage & Hour Div., *Report and Recommendations on Proposed Revisions of Regulations* 8-9 (June 30, 1949) ("Weiss Report"). The salary-level test thus streamlines the classification process by "screening out the obviously nonexempt employees" whose low levels of guaranteed pay calls into question that they are bona fide executive, administrative, or professional employees. *Id.*

The EAP regulations include additional provisions addressing the exemption's applicability in specific circumstances. One such provision is at issue here: 29 C.F.R. §541.604, which is entitled "[m]inimum guarantee plus extras." Subsection (a) of that provision makes clear that employers may provide their employees with "extra" compensation on top of the amounts they are paid on a salary basis, as long as the employee continues to be guaranteed "at least the minimum weekly-required amount paid on a salary basis." *Id.* §541.604(a); *see also id.* ("Such additional compensation may be paid on any basis (*e.g.*, flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.").

Subsection (b) of §541.604 addresses certain employees whose normal mode of payment would not

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[3] The weekly requirement is now $684 (equivalent to $35,568 annually). *See supra* note 1.

satisfy the salary-basis test—namely, those paid based on an hourly rate, per-shift rate, or daily rate that is below the required weekly guarantee. *See id.* §541.604(b) (using example of employee paid $150 per shift). Because such employees could be scheduled for only one hour, shift, or day in a given week, they typically would not be guaranteed weekly pay above the regulatory minimum. Subsection (b), however, allows employers to treat those employees as exempt nonetheless, if two conditions are satisfied. First, the employer must promise to pay the employees at least the regulatory minimum every week regardless of how many hours, days, or shifts they work—*i.e.*, "the employment arrangement [must] also include[] a guarantee of at least the minimum weekly required amount." *Id.* §541.604(b). As long as the employer promises such a minimum guarantee, the employee may also be paid "extras" on top of that guarantee, which can be "computed on an hourly, a daily or a shift basis." *Id.*

The second condition, known as the reasonable-relationship requirement, protects against the potential abuse of employer discretion. The agency's concern was that an employer could promise an employee substantial compensation, for example, the equivalent of $1,500 per week, but guarantee only the first $455, while treating the rest as discretionary "extras." *See* 2004 Final Rule at 22,184. The regulations prohibit employers from reducing an exempt employee's guaranteed salary for "variations in the quality or quantity of the work performed," 29 C.F.R. §541.602, and reflect a concern that employers could engage in a sham by offering a low-guarantee arrangement and then docking the employee's

outsized "extras," leaving the employee vulnerable to discretionary deductions to an extent inconsistent with exempt status. *See* 2004 Final Rule at 22,184. Section §541.604(b) addresses this concern by requiring "a reasonable relationship … between the guaranteed amount and the [total] amount actually earned," 29 C.F.R. §541.604(b), which means that under the reasonable-relationship requirement, the bulk of the employee's total compensation must be part of his guaranteed weekly pay (and thus protected from discretionary deductions) rather than being called "extras."[4]

Together, the various tests in the EAP regulations permit employers to classify their white-collar employees as exempt only if they compensate those employees at or above a minimum threshold commensurate with the importance implied by exempt status—*i.e.*, only if those employees are paid above the federal minimum wage, are guaranteed a regular paycheck above the minimum threshold, have discretion to manage their time, and cannot have their regular pay docked below the minimum threshold because of the quality or quantity of their work. 2004

[4] The agency informally applied a version of the reasonable-relationship requirement before it was formally added to the regulations, *see* 2004 Final Rule at 22,183 (noting that the requirement was previously "in the agency's Field Operations Handbook"), but there was no textual basis in the regulations for such a requirement until the 2004 rule, *see, e.g.*, *Brock v. Claridge Hotel & Casino*, 846 F.2d 180, 191 (3d Cir. 1988) (Stapleton, J., concurring) ("Nothing resembling a 'reasonable relationship' requirement can be found in the Secretary's regulations.").

Final Rule at 22,177; *see also* 29 C.F.R. §§541.601, 541.602.

3. The HCE regulation

In 2004, the DOL created a new, streamlined, and self-contained test for deeming "highly compensated employees" as exempt executives, administrators, or professionals. *See* 2004 Final Rule at 22,172-76. This "short-cut test of exemption" reflected the agency's determination that the detailed tests in the traditional EAP regulations were unnecessarily complicated and imprecise when it came to especially well-compensated white-collar employees. *Id.* at 22,173-74. In the agency's experience, such highly compensated employees "have almost invariably been found to meet all the other requirements of the regulations for exemption." *Id.* at 22,173. That reality made careful scrutiny of other aspects of their employment not only unnecessary, but wasteful: "[T]he higher the salaries paid the more likely the employees are to meet all the requirements for exemption, and the less productive are the hours of inspection time spent in analysis of the duties performed." *Id.* Accordingly, the agency dispensed with the EAP regulations' detailed analyses in favor of a simpler test for deeming highly compensated employees exempt. *See* 29 C.F.R. §541.601.

Under the HCE regulation, an employee "with total annual compensation of at least $100,000 is deemed exempt" as long as her compensation includes "at least $455 per week paid on a salary or fee basis" and she customarily and regularly performs any one of the duties in the traditional duties tests for executive, administrative, or professional employees.

29 C.F.R. §541.601(a)-(b).[5] The HCE regulation makes clear that the pathway it provides to exempt status is distinct from the analysis required by the traditional EAP regulations: An employee who satisfies the HCE regulation's requirements is thereby "deemed exempt" without regard to the various other provisions in Chapter 541 applicable to the EAP regulations, 29 C.F.R. §541.601(a), and an employee who does not qualify as exempt under the HCE regulation "may still qualify as exempt under [the EAP regulations]," *id.* §541.601(b)(2).

Like the EAP regulations, the HCE regulation recognizes that an employee's compensation might combine a guaranteed amount paid on a salary-basis with additional, more variable types of compensation, but it expresses little concern about such details for workers clearing more than $100,000 annually. Instead of cross-referencing the "reasonable relationship" provision at 29 C.F.R. §541.604, the HCE regulation itself addresses and unqualifiedly approves of "extras": As long as the employee is guaranteed at least $455 every week in which she works (on a salary or fee basis) and makes at least $100,000 in total annual compensation, that "[t]otal annual compensation may … include commissions, nondiscretionary bonuses and other nondiscretionary compensation." 29 C.F.R. §541.601(b)(1). Focusing instead on the employee's total annual compensation, the HCE regulation does not impose a reasonable-

[5] The HCE regulation carves out from its coverage all employees whose primary duties involve manual labor, "no matter how highly paid they might be." 29 C.F.R. §541.601(d). It is undisputed that this carve-out is not applicable in this case.

relationship requirement each pay period or otherwise restrict the ratio between the amount the employee receives on a salary basis and the amount she receives in extras. *See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. 51,230, 51,249 (Sept. 27, 2019) (codified at 29 C.F.R. 541) ("2019 Final Rule") (noting that employers may "fulfill more than three quarters of the HCE total annual compensation requirement [*i.e.*, everything other than the required $455/week] with commissions, nondiscretionary bonuses, and other forms of nondiscretionary deferred compensation").

The HCE regulation provides employers with flexibility and certainty with respect to highly compensated employees in other ways as well. For example, a catch-up provision allows employers, "during the last pay period or within one month after the end of the 52-week period, [to] make one final payment sufficient to achieve the required [compensation] level." *Id.* §541.601(b)(2). The HCE regulation places no limit on the size of this catch-up payment, meaning that employers could theoretically pay an exempt employee the minimum $455 per week on a salary basis all year (for a salary of $23,660) and then make a final catch-up payment of $76,340 at the end of the year. Put another way, as long as total annual compensation is at least $100,000 and the employee is guaranteed at least $455 in every week in which she works, the regulation is largely indifferent about the details of how that compensation is structured or paid out. This flexibility underscores that employers need certainty when it comes to their

highly compensated workers, lest the employees least in need of overtime receive the largest windfalls.

B. Factual and Procedural History

Respondent Michael Hewitt worked from 2015-17 as a supervisor in support of Helix's offshore oil-and-gas operations, earning over $200,000 annually for supervising twelve to fourteen workers. Pet.App.35. His job title was "toolpusher," which is a position typically filled by a senior, experienced individual who has worked his way up through the various drilling crew positions over the course of his career. Pet.App.35 n.1; Pet.App.36 n.4. The toolpusher's job "is largely administrative, including ensuring that the rig has sufficient materials, spare parts and skilled personnel to continue efficient operations." Pet.App.35 n.1. As Respondent put it, he "oversaw, operationally, any aspects of the rig and how it was run." JA54. The toolpusher is typically second-in-command on the entire vessel, reporting directly to the superintendent and overseeing the drill crew, the deck crew, and the subsea crew. Pet.App.36. Indeed, Respondent occasionally filled in as superintendent of the entire rig during his employment with Helix. JA53.

Consistent with standard industry practice, Respondent worked 28-day "hitches," living on the vessel for 28 days at a time and being on-duty for 12 hours each day during the hitch. Helix paid Respondent on a bi-weekly basis (*i.e.*, every two weeks), based on a daily rate that ranged from $963 to $1,341 over the course of his employment. *See*

Pet.App.79 & n.2.[6] Helix paid Respondent at that predetermined daily rate regardless of how many hours he actually spent working each day, and Helix never deducted any amounts from Respondent's pay based on the quantity or quality of his work on any given day. *See* JA51-53. Thus, in any week in which he worked, Hewitt received at least $963, regardless of the exact hours worked, and in most weeks he made far more. For example, because each hitch lasted 28 days, a day rate of $963 would guarantee Respondent approximately $27,000 for a single hitch, plus pay for travel days to and from the vessel. In all, Respondent earned $248,053 in 2015, $218,863 in 2016, and $143,680 ($215,520 annualized) for the eight months he worked in 2017. JA114.

After Helix fired Respondent for performance-related reasons, Respondent filed a putative class-action complaint alleging that the FLSA entitled him and similarly situated employees to overtime. After discovery, both parties moved for summary judgment. Helix argued that Respondent was exempt from overtime pay as a "bona fide executive, administrative, or professional employee" under 29 U.S.C. §213(a)(1). The district court agreed, ruling that Respondent was exempt under both the traditional EAP regulation for executive employees and the streamlined test for highly compensated employees. Pet.App.77-87. The district court

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[6] Respondent also received substantial benefits, including the ability to participate in Helix's 401(k) plan with matching up to 5%, eligibility to participate in Helix's stock purchase plan, eligibility for a medical insurance plan, and travel pay. JA99-100.

explained that Respondent received the requisite weekly minimum amount on a "salary basis" because he was paid a predetermined amount, not subject to reduction, in excess of $455 in any week in which he worked regardless of how long he worked (namely, his day rate of $963 or more). Pet.App.84. The district court noted that Respondent conceded every other part of both tests—*i.e.*, that he earned at least $100,000 each year and that he performed all of the duties in the "executive" regulation, 29 C.F.R. §541.100(a)(2)-(4). Pet.App.85-86. Accordingly, the district court ruled that Respondent was exempt twice over. *Id.*

Respondent appealed to the Fifth Circuit. In an opinion by Judge Ho, the panel found Respondent not exempt under either the EAP regulation or the HCE regulation because, in the panel's view, he was not paid on a "salary basis." *Hewitt v. Helix Energy Sols. Grp., Inc.*, 956 F.3d 341, 343 (5th Cir. 2020), *opinion withdrawn and superseded*.

Helix petitioned for rehearing *en banc*, emphasizing the flaws in the panel's salary-basis reasoning. In response, the panel withdrew its prior opinion and issued a new one with new reasoning and a dissent from Judge Wiener. The new majority opinion, again authored by Judge Ho, abandoned the previous opinion's salary-basis reasoning, but it still found Respondent non-exempt. This time, the panel held that Respondent was not exempt because, in its view, 29 C.F.R. §541.604 applies when determining whether a highly compensated employee is exempt under §541.601, and Helix did not satisfy §541.604(b)'s reasonable-relationship requirement.

Hewitt v. Helix Energy Sols. Grp., Inc., 983 F.3d 789, 789-97 (5th Cir. 2020), *opinion vacated*. The panel denied that its holding conflicted 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), and claimed that its reasoning was supported by *Coates v. Dassault Falcon Jet Corp.*, 961 F.3d 1039 (8th Cir. 2020), and *Hughes v. Gulf Interstate Field Servs. Inc.*, 878 F.3d 183 (6th Cir. 2017). *Hewitt*, 983 F.3d at 793, 795. Judge Ho also wrote a separate concurrence to his own opinion. *Id.* at 797-802 (Ho., J., concurring). Judge Wiener's dissent called on his colleagues to take the case *en banc*, because the majority's determination that §541.604 applied to highly compensated employees satisfying the requirements of §541.601 conflicted "with two other circuits" and portended "devastating effects on all employers, especially in the oil and gas arena." *Id.* at 802-09 (Wiener, J., dissenting).

The full court granted *en banc* review and vacated the panel opinion. The court then split 12-6 and held that the reasonable-relationship test of §541.604(b) applies to highly compensated employees who satisfy the requirements of §541.601 and thus that Respondent was entitled to overtime on top of his handsome pay. Judge Ho again wrote the majority opinion (and again a separate concurrence to his own opinion). The *en banc* majority "accept[ed] Helix's premise" that Respondent was paid on a salary basis, but held that highly compensated day-rate employees like Respondent, even if their compensation satisfies every element of the HCE regulation itself, are exempt only if their compensation *also* satisfies the reasonable-relationship requirement of §541.604(b).

Pet.App.16. As the majority put it, "the only way" to satisfy the HCE regulation "is to comply with §541.604(b)." *Id.*; *see* Pet.App.5 ("[A] daily-rate worker can be exempt from overtime—but only 'if' … conditions [in §541.604] are met."). The majority justified its conclusion that §541.604 applies not just to employees whose exempt status is governed by the traditional EAP regulations, but also when determining whether a highly compensated employee is exempt under the HCE regulation, by characterizing §541.604 as an "exception[] or proviso[]" to the salary-basis test of §541.602. Pet.App.8.

Judge Jones dissented in an opinion joined by Chief Judge Richman and Judges Wiener, Elrod, and Southwick. Judge Jones explained that Respondent "satisfies the regulations' HCE provision, §541.601," and that "the HCE provision, taken together with the regulatory text, structure, and history, plainly does not incorporate the separate provision, §541.604, that is the textual sine qua non of the majority's analysis." Pet.App.37-38 (Jones, J., dissenting). Judge Jones further explained that her "construction of the regulations harmonizes with the statute, while the majority's reasoning creates discord" by making "fundamental textual errors [that] were not committed by two sister circuits." Pet.App.38, 42.

Judge Wiener also wrote a dissenting opinion, which was joined by Chief Judge Richman and Judges Jones, Dennis, and Elrod. Judge Wiener agreed with Judge Jones that Respondent "is excluded from overtime by §601 for his high salary alone, so we should both start and stop there, never reaching

§604." Pet.App.64 (Wiener, J., dissenting); *see also* Pet.App.73 ("[T]here is an easy and logical way to read §601 and §604(b) in harmony: *Each section applies to an entirely different subset of employees!*"). Judge Wiener emphasized: "I cannot fathom how a majority of the active judges of this court can vote to require Helix to pay overtime to [Respondent], the supervisor of 12 to 13 hourly, hands-on workers, when he was already paid more than twice the cap of $100,000 per annum for overtime eligibility." Pet.App.63 (emphasis omitted).

SUMMARY OF ARGUMENT

The FLSA was enacted to protect low-wage, blue-collar workers from workplace exploitation, not to give massive windfalls to white-collar supervisors already making six figures. The Act's text reflects its aims: While it establishes a general rule requiring employers to pay time-and-a-half rates for all hours worked in excess of 40 in a week, it exempts from that requirement anyone employed in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1). To implement that statutory text, the Secretary of Labor has created both a fact-intensive test focused on the employee's specific duties and pay arrangements and a streamlined test, the HCE regulation, applicable to executives who earn at least $100,000 per year, as their executive duties and handsome compensation obviate the need to flyspeck other details of their employment.

Respondent, a highly skilled supervisor who earned over $200,000 annually while managing operations on Helix's offshore well intervention vessels, is exempt under the HCE regulation and its

streamlined test. The HCE regulation deems an employee exempt as long as (1) he receives at least $100,000 in "total annual compensation," (2) his "total annual compensation" includes at least $455 per week paid on a salary basis, and (3) he performs "one or more of the exempt duties or responsibilities of an executive, administrative or professional employee." 29 C.F.R. §541.601. All three components of that test are satisfied here; indeed, Respondent concedes two of them. The disputed component, which requires that Respondent's compensation include at least $455 each week paid on a salary basis, is also satisfied as Respondent was guaranteed roughly twice that amount for every week in which he worked. But more to the point, the *en banc* decision assumed he satisfied every element of the HCE regulation, including the salary-basis requirement, and still found him non-exempt because he failed to satisfy the requirements of 29 C.F.R. §541.604. That conclusion is plainly erroneous.

The HCE regulation is not subject to the more detailed requirements of §541.604. By specifying that employees who satisfy the HCE regulation are thereby "deemed exempt," the regulatory text makes clear that the HCE regulation is self-contained and that a highly compensated worker can be "deemed exempt" simply by satisfying the terms of the HCE regulation (and the provisions expressly cross-referenced therein). While the HCE regulation carefully cross-references other sections of the EAP regulations, it does not cross-reference §541.604, making clear that the latter provision has no role to play.

The absence of a cross-reference is no oversight. Making the HCE regulation subject to the more detailed provisions of §541.604 would create multiple incongruities in the regulatory scheme. For example, §541.604(b)'s reasonable-relationship requirement requires that at least two-thirds of a covered employee's total compensation come in the form of a weekly guarantee. The HCE regulation covers the same ground but sets out a different rule, requiring only *one-fourth* (or less) of total compensation to come from a weekly guarantee. Applying §541.604(b)'s restrictive rule to highly compensated employees would strip the HCE regulation's permissive rule of all effect. Applying §541.604(b) to render highly compensated employees non-exempt also flouts the regulatory design at a more basic level. Section 541.604(b) is designed to *expand* the EAP exemption by exempting certain employees with an hourly, daily, or per-shift wage *below* the weekly minimum. It would make no sense to use a provision designed to expand the exemption to disqualify someone making well over six figures and double the weekly minimum, and satisfying every requirement of §541.601.

Treating the HCE regulation as subject to §541.604 would also undermine the core policy goals behind the HCE regulation. The HCE regulation was designed as a simple and streamlined test for white-collar supervisors whose compensation is substantial enough to dispel any reasonable doubt about whether their white-collar roles are "bona fide." It would make no sense for the agency to have created this streamlined test only to add the complication of the reasonable-relationship requirement. Doing so not only would defeat the HCE regulation's intended

simplicity, but also would undermine its bright-line nature, which is the *raison d'être* of the separate HCE gateway to exemption. It defies reason to believe that the agency went to the trouble of designing an easy-to-administer HCE regulation with a bright-line salary test, only to subject that same regulation to a new provision whose key term—"reasonable relationship"—would remain undefined for 14 years.

Holding that Respondent is entitled to overtime pay because his compensation did not satisfy the reasonable-relationship requirement would also divorce the regulations from the statutory text. The FLSA exempts from its overtime requirements any employee working in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1). The statutory text focuses on the "capacity" in which an employee performs her job duties, not on the details of her pay. While an employee's high salary may eliminate any reasonable doubt about the bona fides of her classification, nothing in the text of the FLSA authorizes the agency to treat bona fide executives, administrators, and professionals as non-exempt solely because of the details of how and when their handsome pay is calculated and received.

The Fifth Circuit's reading of the HCE regulation would render unlawful a longstanding and heretofore unquestioned practice in the resource exploration and production industry, imposing significant retroactive liability and rewarding highly paid supervisors with massive windfalls. The consequences would be equally troubling on a going-forward basis, as this is not an industry in which day-rate employees can be

easily converted into week-rate employees or in which operations can easily be restructured to accommodate the Fifth Circuit's anomalous interpretation. The whole point of the HCE regulation was to provide employers with a simple, streamlined test for exemption that frees them from the administrative burdens of the traditional EAP regulations and allows them to focus their energies on productive work. The decision below accomplishes exactly the opposite by forcing employers to alter longstanding aspects of their operations or else pay overtime windfalls to their highest-earning employees. This Court should reverse the decision below and restore the clarity, certainty, and simplicity the HCE regulation was designed to provide.

ARGUMENT

I. Respondent Satisfies The HCE Regulation And Is Therefore Deemed Exempt.

The FLSA exempts from its overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1). The HCE regulation provides employers with "a short-cut test of exemption" for employees whose total annual compensation is high enough to all but guarantee that they enjoy the requisite "prestige, status, and importance within their employer's organization." 2004 Final Rule at 22,173, 22,237. There is little reason to doubt the organizational "prestige, status, and importance" of employees earning six figures, and little reason to worry that the precise breakdown or details of their handsome pay will undermine those same factors. Accordingly, under the HCE regulation, an employee

is "deemed exempt" if (1) she receives at least $100,000 in "total annual compensation," (2) her "total annual compensation … include[s] at least $455 per week paid on a salary … basis," and (3) she performs "one or more of the exempt duties or responsibilities of an executive, administrative or professional employee." 29 C.F.R. §541.601. Nothing else is required.

Respondent concedes that the first and third components are satisfied, as he made over $200,000 annually and performed numerous executive functions. *See* Pet.App.85-86. And the *en banc* decision assumed the second factor was satisfied, despite Respondent's contrary argument, but nonetheless found him non-exempt by importing additional requirements from §541.604. *See* Pet.App.16 (holding that Respondent was non-exempt "even accepting Helix's premise" that he satisfied the requirements of §541.601 including a weekly guaranteed minimum payment on a salary basis).

The court's assumption was well-taken, as Respondent was guaranteed approximately double the weekly minimum "on a salary … basis." 29 C.F.R. §541.601(b)(1). The term "salary basis" is a defined term of art in §541.602. That provision states that an employee is paid on a "salary basis" as long as he "[1] regularly receives each pay period on a weekly, or less frequent basis, [2] a predetermined amount constituting all *or part* of the employee's compensation, [3] 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). In short, the salary-

basis test is satisfied when the employee arrives at work each week knowing that she is guaranteed to earn at least a certain, predetermined amount above the minimum threshold, regardless of how much work she does that week or how well she performs that work.

Applying that test, it is clear that Respondent was guaranteed and paid at least $455 each week he worked on a salary basis, which is all that the HCE regulation requires. First, Respondent received paychecks bi-weekly, *i.e.*, every two weeks, *see* JA48, satisfying the requirement that he "receive[]" pay "on a weekly, or less frequent basis." 29 C.F.R. §541.602(a). Second, in any week in which he worked at all, Respondent was guaranteed a "predetermined amount constituting all or part of [his] compensation," and that amount always dwarfed $455—specifically, his substantial daily rate of $963 to $1,341. If Respondent worked only part of one day in a week, because of the vagaries of when a hitch began or ended, that predetermined amount would constitute "all" of his compensation for the week. In any week that Respondent worked more than one day, that predetermined amount constituted only "part" of his compensation—with the remainder permissibly constituting "other nondiscretionary compensation," *id.* §541.601(b)(1). Third, his predetermined weekly guarantee was not subject to reduction because of variations in the quality or quantity of the work that Respondent performed. In sum, Respondent received paychecks every two weeks, was guaranteed and paid at least a predetermined amount that more-than-doubled the minimum salary of $455 per week, and

that minimum-guaranteed amount was not subject to reduction. §541.602 was therefore satisfied.

Any suggestion that an employee paid a daily rate is *ipso facto* not paid on a "salary basis" under §541.602 is flawed. The definition of "salary basis" in §541.602 treats any guaranteed predetermined amount above the threshold as payment on a salary basis. That guaranteed predetermined amount—whether generated by a daily or weekly guarantee—can then be compared to the relevant regulatory minimum set forth elsewhere, here §541.601(b)(1). As long as the predetermined guaranteed amount satisfies the applicable regulatory minimum, the fact that the amount is the product of a day rate is not disqualifying. After all, the point of the weekly minimum paid on a salary basis requirement is to ensure that employees classified as exempt have "the requisite status to be bona fide executives, administrators or professionals," 2004 Final Rule at 22,177, and the idea that an executive guaranteed over $1,000 a day would lack the requisite status, while an employee guaranteed $700 a week would satisfy the test, defies both the regulatory text and common sense.

In the end, however, the flaw in the decision below has nothing to do with the salary-basis test and everything to do with the Fifth Circuit's misguided conclusion that Respondent could satisfy every element of §541.601 and still not qualify as exempt, because it imported additional inapposite requirements from §541.604. That is the issue that has divided the circuits and on which this Court granted certiorari. And, as shown next, that is the

issue on which the analysis below is flawed as a matter of text, context, and common sense.

II. The Separate Requirements Of 29 C.F.R. §541.604 Do Not Apply To The HCE Regulation.

The Fifth Circuit assumed that Respondent fully satisfied the HCE regulation, but held that Respondent is nevertheless non-exempt because, in its view, highly compensated employees must also satisfy the separate requirements of 29 C.F.R. §541.604, including its requirement of a reasonable relationship between an employee's guaranteed weekly minimum and her total compensation. And because Helix did not argue that its compensation of Respondent satisfied §541.604, the court held that Respondent was non-exempt. The Fifth Circuit's analysis is wrong; an employee who satisfies the HCE regulation need not also satisfy §541.604. The HCE regulation provides a standalone and streamlined path to exemption for highly compensated executives like Respondent. It recognizes that an employee's six-figure compensation is confirmation enough that his white-collar duties are "bona fide," obviating any need to apply the more detailed requirements of the traditional EAP regulations generally or §541.604(b) in particular—which in all events has application to employees whose hourly, daily, or per-shift rate is *less than* the weekly minimum. The text, structure, history, and purpose of the HCE regulation and the FLSA make that conclusion abundantly clear.

A. The Regulatory Text, Structure, and History Make Clear That §541.604 Does Not Apply to the HCE Regulation.

The HCE regulation provides a standalone and streamlined path to exemption for highly compensated supervisors that is not subject to the detailed requirements of §541.604. The HCE regulation makes its standalone nature clear by providing that an employee who satisfies its provisions "is *deemed* exempt." 29 C.F.R. §541.601(a) (emphasis added). Deeming reflects a judgment of definitive equivalence. *See, e.g.*, Black's Law Dictionary (11th ed. 2019) (defining "deem" to mean, *inter alia*, "treat … as if"); Cambridge Dictionary (10th ed. 2007) (defining "deem" to mean "to consider or judge something in a particular way"). When someone is deemed to have a certain status, there is no room for further inquiry or the application of additional criteria. *See Webster v. Doe*, 486 U.S. 592, 600 (1988) (holding Congress' use of "deems" rather than "is" foreclosed judicial review); *Dameron v. Brodhead*, 345 U.S. 322, 326 (1953) (rejecting argument "that the word 'deemed' … implies a rebuttable presumption"). By specifying that employees who satisfy the HCE regulation are thereby "deemed exempt," full stop, the regulatory text makes clear that the HCE regulation is self-contained and that the only provisions relevant to determining whether a highly compensated employee is exempt are those within the HCE regulation itself or expressly cross-referenced therein.

The HCE regulation does not cross-reference or otherwise incorporate §541.604. That omission is particularly obvious in light of the fact that the HCE

regulation affirmatively cross-references several other provisions. The current HCE regulation expressly incorporates most of §541.602 (while explicitly carving out §541.602(a)(3)), as well as §541.605 and §541.606. *See* 29 C.F.R. §541.601(b)(1) (2020).[7] But the HCE regulation does not follow suit with respect to §541.604, and with good reason. The HCE regulation covers some of the same territory as §541.604, but in a much more permissive manner. Whereas §541.604 protects against certain employees receiving too much of their overall compensation in "extras" subject to employer reduction—a reasonable concern with employees making as little as $23,660 a year—the HCE regulation permissively and unqualifiedly provides that for workers making over four times as much, total annual compensation "may also include" such "extras." 29 C.F.R. §541.601(b)(1). When a regulation carefully incorporates some provisions but not others, the omissions must be treated as intentional, *see* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 107-11 (2012), especially where, as here, deeming language makes clear that the regulation is self-contained. In light of the HCE regulation's deeming language and its express cross-references to §§541.602, 541.605, and 541.606, the lack of any cross-reference to §541.604 is powerful textual evidence that an employee who satisfies the HCE regulation need not also satisfy

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[7] The version of the HCE regulation in effect during the period at issue here did not expressly cite §541.602 or §541.605, but expressly invoked those provisions' salary-basis and fee-basis tests. That version of the HCE regulation, like the current version, did not reference §541.604 by either citation or subject matter. *See* Pet.App.89-91.

§541.604. *See Litz*, 772 F.3d at 5 ("[W]e see no reason why [§541.604(b)'s] requirements should be grafted onto [§541.601].").

The HCE regulation's standalone nature is confirmed by its subsection (d). Subsection (d) states that the HCE regulation does not apply to blue-collar workers like "carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, [or] laborers," no matter how highly they are paid. 29 C.F.R. §541.601(d). That provision duplicates, almost word-for-word, a provision in 29 C.F.R. §541.3, which states that the entire EAP exemption does not apply to blue-collar workers and provides the exact same list of examples as §541.601(d). If non-cross-referenced provisions applicable to the traditional EAP regulations automatically applied to the HCE regulation (as the Fifth Circuit held with respect to §541.604), there would have been no reason to repeat §541.3(a)'s exclusions in §541.601(d); those exclusions would have already applied. Repeating those exclusions in §541.601(d) makes sense only if the HCE regulation is a standalone provision. *See* Scalia & Garner, *Reading Law* 176 (explaining that a provision should not be "given an interpretation that causes it to duplicate another").

The HCE regulation's lack of a cross-reference to §541.604 is especially meaningful in light of the regulatory history. Before the agency promulgated the HCE regulation in 2004, the "[m]inimum guarantee plus extras" provision (*i.e.*, current §541.604) did not have its own subsection but instead

was part of the salary-basis regulation.[8] When the agency promulgated the HCE regulation in 2004, it separated the "[m]inimum guarantee plus extras" provision from the salary-basis regulation and placed it in its own subsection, §541.604. The new HCE regulation then expressly referenced the salary-basis test at §541.602 but did not say a word about the new §541.604. If the agency wanted the new §541.604 to apply to the HCE regulation, there would have been no reason to decouple it from the salary-basis regulation. The only sensible reason for doing so was to allow the new HCE regulation to incorporate the salary-basis test (of §541.602) *without* also incorporating the "[m]inimum guarantee plus extras" provision (newly separately codified in §541.604). As Judge Jones aptly observed below: "Why spin off §541.604 only to have courts effectively re-incorporate it back *sub silentio* into the new highly compensated employee exemption?" Pet.App.55 (Jones, J., dissenting).

The failure of the HCE regulation to incorporate §541.604 was no accident: Several of the HCE regulation's provisions conflict with §541.604(b)'s reasonable-relationship requirement. As noted, the HCE regulation contains its own permissive rules for well-compensated supervisors who make a "minimum guarantee plus extras," and they differ from the more

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[8] At the time, the salary-basis regulation was at 29 C.F.R. §541.118. Subpart (a) was the predecessor to today's salary-basis test now found at §541.602, while subpart (b) was entitled "Minimum guarantee plus extras" and was the predecessor to today's §541.604, minus the "reasonable relationship" requirement.

detailed and restrictive rules in §541.604. Section 541.604(b) reflects a concern that employers could characterize a disproportionate share of their exempt employees' compensation as non-guaranteed "extras," which would allow them to retain substantial control over their employees' regular pay and make deductions inconsistent with bona fide exempt status. Section 541.604(b) accordingly grants only *qualified* permission for employers to pay employees such "extras," *i.e.*, only to the extent there is a "reasonable relationship … between the guaranteed amount and the [total] amount actually earned." 29 C.F.R. §541.604(b). In practice, this means that "extras" cannot be more than one-third of total compensation. *See* Dep't of Labor, Opinion Letter FLSA2018-25, at 2 (Nov. 8, 2018) (1.5-to-1 ratio of total earnings to guaranteed salary "reasonable").

The HCE regulation, in contrast, does not share this concern when it comes to highly compensated supervisors, whose six-figure compensation provides ample assurance that they are working in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1). The HCE regulation thus grants employers *unqualified* permission to count "extras" toward their highly compensated employees' total compensation: "Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period." 29 C.F.R. §541.601(b)(1). As the agency has explained, this provision allows employers "to fulfill more than three quarters of the HCE total annual compensation requirement"—*i.e.*, all amounts above the minimum weekly guarantee of $455—"with commissions, nondiscretionary bonuses, and other

forms of nondiscretionary deferred compensation," even though the resulting ratio would not be "reasonable" under §541.604(b). 2019 Final Rule at 51,249.

To summarize, then, whereas §541.604(b) applies to lower-earning employees and requires that more than two-thirds of their overall earnings come from a weekly guarantee, §541.601 requires only about one-fourth of highly compensated employees' overall earnings to come from the weekly guarantee. That differential treatment makes good sense: Lower-compensated workers are far more plentiful and provide a greater temptation for sham classification. While the agency was thus understandably concerned about employers using low base salaries and substantial "extras" to overwork their lower-earning staff—after all, the EAP regulations can apply to workers earning as little as $23,660 per year—such concerns dissipate when the employees reach six figures and above. More to the point, the fact that the two provisions create different rules regarding "extras" confirms that they do not both apply to the same employees. *See Nat'l Ass'n of Home Builders v. Def's of Wildlife*, 551 U.S. 644, 669 (2007) ("[W]e have cautioned against reading a text in a way that makes part of it redundant."). The HCE regulation applies to highly compensated employees guaranteed at least the weekly minimum. The office of §541.604(b), by contrast, is to address employees making less than the HCE threshold and whose hourly, daily, or per-shift rate is less than the weekly minimum (and it still allows some of those relatively low-paid employees to be treated as exempt). *See Anani*, 730 F.3d at 149 ("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.'").

Applying the reasonable-relationship requirement to the HCE regulation would create other conflicts as well. Underscoring its relative lack of concern over when and how highly compensated employees receive their six-figure pay, the HCE regulation permits employers to make a sizable final payment to ensure that an employee crosses the annual compensation threshold and does not lose her exempt status. If, at year end, an employee's total annual compensation has not reached $100,000, "the employer may … make one final payment sufficient to achieve the required level." 29 C.F.R. §541.601(b)(2). The HCE regulation places no limits on the size of that final payment, meaning that an employer could "satisfy the HCE provision by paying a weekly amount of $455 (resulting an annual salary of only $23,660) and make up the entire remainder at the end of the year to achieve total annual compensation of $100,000." Pet.App.51 (Jones, J., dissenting). That payment structure would plainly violate any applicable reasonable-relationship requirement, but it is permissible under the HCE regulation because a sufficiently high level of total compensation, however structured, ensures that the employee has the requisite importance to the organization to be properly classified as exempt. That catch-up provision would be frustrated if a large final paycheck that fully complied with §541.601 nonetheless rendered a highly compensated worker non-exempt by virtue of

§541.604(b) and its reasonable-relationship requirement.[9]

Superimposing §541.604's reasonable-relationship requirement on the HCE regulation would create conflict between those two provisions at a more granular level as well. The Department of Labor has recently taken the view that the reasonable-relationship requirement is satisfied only if "extras" do not exceed 33% of the employee's guaranteed weekly pay. *See* Opinion Letter FLSA2018-25, at 2. If that rule applied to highly compensated employees, it would mean that an employee with total annual compensation of $100,000—the minimum necessary to trigger the HCE regulation—would need a minimum weekly guarantee of $1,282.05 (for a total of $66,666.67 per year), as any lesser guarantee would make extras exceed 33%. But the HCE regulation, by its express terms, requires a minimum weekly guarantee of only $455. *See* 29 C.F.R. §541.601(b)(1). The Fifth Circuit's reading thus places the regulation at war with itself, effectively imposing two different minimum weekly guarantees on the same employees and overriding the more specific and textually expressed judgment that highly compensated employees should be exempt so long as they have a weekly guarantee of just $455. *See Roberts v. Sea-*

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[9] The 2019 Final Rule added a provision to the traditional EAP regulations that allows employers to satisfy "[u]p to ten percent" of the annualized weekly salary requirement through a year-end catch-up payment. 29 C.F.R. §541.602(a)(3)(i) (2020). The ten-percent cap on such payments underscores the agency's closer scrutiny of pay structure for lower-earning EAP employees as compared to its largely hands-off approach to pay structure for highly compensated employees.

Land Servs., Inc., 566 U.S. 93, 100 (2012) ("[O]ur task is to fit, if possible, all parts into an harmonious whole.").

Finally, treating the HCE regulation as subject to §541.604(b) in a way that would limit the HCE exemption makes no sense in light of §541.604(b)'s function in the regulatory scheme. Section 541.604(b) *expands* the group of employees to whom the statutory exemption applies. It does so by providing an alternative path to satisfying the salary-basis test for employees whose normal mode of payment falls short of the weekly-minimum requirement—*i.e.*, those with an hourly, daily, or per-shift wage *below* the weekly minimum. As the regulatory example shows, a worker paid a relatively low daily rate of $150 can still satisfy the salary-basis test if he is guaranteed weekly pay above the weekly minimum and his weekly compensation complies with the reasonable-relationship requirement. 29 C.F.R. §541.604(b). It would make no sense to use a provision designed to exempt otherwise non-exempt employees to disqualify someone who is already deemed exempt under §541.601 (and enjoys a day rate above the weekly minimum). Whether such a deemed-exempt employee also satisfies §541.604(b) is no more relevant than whether he also satisfies the regulatory exemptions for computer employees, *id.* §541.400, or outside sales employees, *id.* §541.500. A highly compensated computer worker may be doubly exempt, but once she qualifies as exempt under one provision, she cannot lose that exemption by falling short of the requirements of another exemption, and thus further inquiry is unnecessary. *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."). The HCE regulation and §541.604 are two different paths to exemption that apply to different groups of employees and impose different and inconsistent requirements. Employees exempt under one of them need not also satisfy the other.

B. The Regulatory Text Comports With the Regulatory Purpose.

Treating the HCE regulation as subject to §541.604 not only would defy text and structure, but also would undermine the core policy goals the HCE regulation was designed to achieve. The whole point of the HCE regulation was to create a simple and streamlined test for the white-collar workers least in need of overtime or a fact-intensive and time-consuming test for confirming their exempt status: those earning six figures and above. The complex regulatory framework designed to prevent the tactical misclassification of workers making as little as $23,660 had proven a waste of time and resources when applied to employees making more than four times that amount, who had "almost invariably been found to meet all the other requirements of the regulations for exemption." 2004 Final Rule at 22,173. Accordingly, the agency adopted a streamlined alternative to the EAP regulations' detailed analysis when it came to highly compensated employees. The agency explained that this streamlined test would "facilitate the administration of the regulations" and generate "considerable saving of time for the employer." *Id.* at 22,173-74.

The agency's focus on simplicity is evident not only in the HCE regulation's text—which sets forth a much simpler test than that applicable to lower-paid employees—but also in the various proposals the agency rejected before settling on that text. After the agency issued a relatively straightforward proposed rule, several commenters suggested that "employers should be permitted to prorate the total annual compensation amount if an employee uses leave without pay." 2004 Final Rule at 22,175. The agency rejected that suggestion because it would undermine the regulation's intended simplicity: "[T]he test for highly compensated employees should remain straightforward and easy to administer," and such prorating "would unnecessarily complicate this rule." *Id.* Similarly, commenters suggested that "the costs of employee benefits … should be included in computing total annual compensation." *Id.* The agency rejected that suggestion for the same reason: including fringe benefits in calculating total annual compensation "would make the test administratively unwieldy," contrary to the agency's desired simplicity. *Id.*

It would make no sense for the agency to create a streamlined test for highly compensated employees, and to reject various proposals that would complicate it, only to undo that careful work by incorporating the reasonable-relationship test. The kind of detailed scrutiny inherent in the reasonable-relationship test is precisely what the agency deemed unnecessary and wasteful when it comes to highly compensated employees, whose high salary moots the need to undertake some of the more detailed regulatory inquiries appropriate for workers making one-fourth as much. Subjecting highly compensated employees

to the detailed and uncertain requirements of §541.604(b) would undermine the basic regulatory judgment underlying the separate HCE pathway.

Treating the HCE regulation as subject to the reasonable-relationship requirement would also destroy the certainty the agency intended to provide to employers through the HCE regulation. With its clear $100,000 threshold, the HCE regulation provides employers with a bright-line rule with respect to their highly compensated employees. The reasonable-relationship requirement, however, is anything but a bright-line rule. When the agency added the reasonable-relationship requirement to the regulations in 2004, it did not define "reasonable relationship" other than by saying that such a relationship would exist if the employee's weekly guarantee was "'roughly equivalent' to the employee's actual usual earnings," 2004 Final Rule at 22,183, and by providing one example, *see* 29 C.F.R. §541.604(b). It was not until 2018—fourteen years after the Rule's promulgation—that the agency finally issued an opinion letter stating its view that the reasonable-relationship requirement is satisfied only if "extras" do not exceed 50% of the employee's guaranteed weekly pay. Opinion Letter FLSA2018-25, at 2. It defies reason to believe that the agency went to the trouble of designing an easy-to-administer HCE regulation with a bright-line salary rule focusing on total annual compensation, only to simultaneously blur that bright line by making the new regulation subject to a different regulatory provision whose key term would remain undefined for 14 years.

C. Requiring Overtime Pay for Highly Compensated Supervisors Would Divorce the Regulations From the Statute.

The Fifth Circuit's interpretation suffers a deeper flaw: It divorces the Labor Department regulations from the statutory text. Regulations derive their authority from duly enacted legislation that, unlike the regulations, complies with the requirements of bicameralism and presentment. Accordingly, the regulations must be interpreted in the way that harmonizes them with the statute they implement, not in a way that would put them "in considerable tension with the structure and purposes" of that statute. *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 401 (2008); *accord Christopher*, 567 U.S. at 159; *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 169 (2007). Here, holding that Respondent is entitled to overtime pay because his compensation did not satisfy the reasonable-relationship requirement would decouple the regulations from the FLSA exemption they purport to implement.

The FLSA exempts from its overtime requirements any employee working in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1). This statutory exemption focuses on an employee's job duties, not the details of her pay. The statute does not impose a salary floor, mandate a weekly pay period, limit bonuses, or otherwise dictate the details of whether pay is calculated on a weekly or daily basis or whether employees are paid in fixed sums or variable bonuses. *See id.* The statutory exemption focuses instead on

the "capacity" in which an employee works—executive, administrative, or professional. As this Court has already emphasized, the FLSA's focus on "capacity" means that the applicability of exemptions turns, above all, on the employee's job duties and responsibilities. *See Christopher*, 567 U.S. at 161.

To be sure, the statute limits the exemption to workers who serve in a *bona fide* executive, administrative, or professional capacity, and an employee's salary might be useful as a proxy to screen out obviously non-exempt employees for whom there is little reason to doubt bona fides or inquire further. After all, when workers are paid little more than the minimum wage in many jurisdictions, there may be good cause to dig into the details of their pay structure, as §541.604 authorizes, to ensure that they are not misclassified blue-collar workers. But nothing in the statute's text authorizes the agency to use salary structure to render non-exempt employees who are undisputedly performing executive, administrative, or professional job duties and are paid more than enough to dispel any reasonable doubt that those duties are "bona fide." The agency's authority to "define[]" and "delimit[]" the types of job functions that qualify as executive, administrative, or professional, 29 U.S.C. §213(a)(1), hardly authorizes flyspecking the details by which a worker receives her handsome pay in ways that render statutorily exempt employees eligible for massive regulatory windfalls.

Indeed, that is the very insight behind the HCE regulation, which correctly recognizes that such details are irrelevant when an employee's unusually high compensation sufficiently dispels any doubt that

her exempt status is "bona fide." 29 U.S.C. §213(a)(1). The HCE regulation provides a streamlined pathway for highly compensated supervisors in which the details of how that high compensation is delivered play little role. Properly interpreted as a standalone safe harbor, the HCE regulation wisely avoids narrowing the regulatory exemption in ways that the statutory exemption neither justifies nor supports. Engrafting §541.604 onto the HCE regulation, by contrast, needlessly puts the regulations and statute at cross-purposes. If the regulations deny an exemption to a whole class of employees who are statutorily exempt, there is no question that the regulations, and not the duly enacted statute, must give way. Thus, the choice between reading the HCE regulation as a standalone pathway that harmonizes the regulations and statute and engrafting requirements that serve no valid statutory purpose when it comes to workers making six figures is not close.

Nor would reading the regulations in a way that puts employers to the choice between restructuring long-established compensation structures or paying high-earning supervisors like Respondent time-and-half overtime advance the purposes of the FLSA more broadly. By definition, the employees whose compensation is affected by this case are those earning six figures and working white-collar jobs. This is simply not a circumstance implicating the FLSA's core concern of protecting workers from "wages too low to buy the bare necessities of life," S. Rep. No. 75-884, at 4, or "to help those who toil in factory and on farm," Message from the President of the United States, H.R. Doc. No. 75-255 (1st Sess.1937); *see also Christopher*,

567 U.S. at 166 (noting that employees making "more than $70,000 per year … are hardly the kind of employees that the FLSA was intended to protect."). The framers of the FLSA would indeed be "turning over in their respective graves," Pet.App.66-67 (Wiener, J., dissenting), at the idea of highly compensated executives being entitled to overtime windfalls, and the fault lies not in the text of the FLSA or its implementing regulations, but in the decision below, which puts those two texts on a collision course.

D. The Fifth Circuit's Anomalous Decision Is Badly Misguided.

Unsurprisingly in light of the anomalous result it reached and the circuit split it created, the *en banc* majority's interpretation rested on multiple flawed suppositions and interpretive *non sequiturs*.

First, the Fifth Circuit emphasized this Court's statement that "employees are not to be deprived of the benefits of the [FLSA] simply because they are well paid." Pet.App.2 (quoting *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 161, 167 (1945)); *see* Pet.App.18-19; Pet.App.28 (Ho, J., concurring). But no one is arguing that Respondent is exempt "simply because [he is] well paid." Respondent is exempt because of his job duties—*i.e.*, because he was "employed in a bona fide executive … capacity." 29 U.S.C. §213(a)(1). There is no question that non-supervisory and manual workers are not exempt "no matter how highly paid they might be," as the HCE regulation specifically provides (duplicatively under the Fifth Circuit's reading, *see* p.31, *supra*). 29 C.F.R. §541.601(d). But when, as here, an employee concededly works in an "executive, administrative, or

professional capacity," the fact that he was "well paid" removes any reasonable doubt about the "bona fides" of his supervisory duties.

Second, the Fifth Circuit mistakenly substituted its own conception of "salary" for the specific definition provided by the regulation. In describing the salary-basis test, the court stated that "[a]s a matter of common parlance, we typically associate the concept of 'salary' with the stability and security of a regular weekly, monthly, or annual pay structure … [and] do not ordinarily think of daily or hourly wage earners … as 'salaried employees.'" Pet.App.4. While the *en banc* court decided the case on the assumption that Respondent satisfied every requirement of the HCE regulation (including that he received a weekly guaranteed minimum on a salary basis), its views about day rates and weekly salaries appeared to fuel skepticism about the exemption's applicability here, given that Respondent was paid based on a day rate. But the Fifth Circuit's view of "common parlance" does not control over a regulatory definition: "When a statute includes an explicit definition, we must follow that definition." *Tanzin v. Tanvir*, 141 S.Ct. 486, 490 (2020). The regulation defines the term "salary basis" to permit any pay structure that guarantees the employee a regular, reliable paycheck above the regulatory minimum. The point of the salary-basis test in the HCE regulation is decidedly not to ensure that high earners receive their compensation in uniform weekly or monthly increments. The point of the test is simply to confirm that employees classified as exempt have "the requisite status to be bona fide executives, administrators or professionals"—*i.e.*, that they receive a weekly guarantee above a regulatory

minimum, have discretion over how to manage their time, and cannot have their regular pay docked because of the quality or quantity of their work. 2004 Final Rule at 22,177. That end is equally achieved through a $1,000 day "rate" or a $1,000 weekly "salary," and the worker entitled to the former is both better compensated and less in need of an exemption.

Third, in trying to explain away the HCE regulation's lack of a cross-reference to §541.604, Judge Ho's solo concurrence misreads the regulation. Judge Ho excused the lack of such a cross-reference by claiming that the traditional EAP regulations also do not cross-reference §541.604, even though all agree that the EAP regulations are subject to §541.604. Pet.App.25 (Ho, J., concurring). As Judge Jones pointed out in dissent, that claim ignores the introductory statement to Part 541, which expressly states that Subpart G (which contains §541.604) applies to all of the traditional EAP regulations. *See* 29 C.F.R. §541.0; *see* also Pet.App.47 (Jones, J., dissenting). Furthermore, even if Judge Ho's premise were correct, it would be irrelevant, because only the HCE regulation includes a deeming provision that underscores the HCE regulation's self-contained nature and makes all non-cross-referenced provisions presumptively inapplicable. *See* Part II.A, *supra*. The EAP regulations that provide an alternative route to exempt status for lower-paid workers, in contrast, have no deeming provision and are general definitional provisions presumptively subject to more specific rules elsewhere in the regulation. *See, e.g.*, 29 C.F.R. §541.100 (titled "General rule for executive employees").

Fourth, the majority opinion characterized §541.604 as an "exception[] or proviso[]" to the salary-basis test in §541.602, and thus claimed that the HCE regulation's reference to the salary-basis test automatically encompasses §541.604. Pet.App.8. That characterization is untenable. Section 541.602 sets out the "[g]eneral rule" for the salary-basis test in subpart (a), and then enumerates seven "[e]xceptions" in subpart (b). None of those exceptions mentions §541.604. If the agency intended for §541.604 and its reasonable-relationship requirement to be an "exception[] or proviso[]" to the salary-basis test, it would have made that clear by including it with the "[e]xceptions" in §541.602(b). And if §541.604 and its reasonable-relationship requirement really were an additional proviso to §541.602, the regulations would have had to reconcile the obvious tension between the reasonable-relationship test and the HCE regulation's much more permissive authorization for "other non-discretionary compensation." As noted, however, because §541.604 was carved out from §541.602 and placed in a separate provision at the precise moment the HCE regulation was promulgated, the HCE regulation could expressly cross-reference §541.602 without creating any tension between the any-relationship-will-do direction in the HCE regulation and the reasonable-relationship test of §541.604.

III. If Allowed To Stand, The Fifth Circuit's Decision Will Upset Longstanding Practices And Provide Windfalls For High Earners.

The Fifth Circuit's reading of the HCE regulation, if affirmed, would pose tremendous practical problems for the resource exploration and production industry

in particular and a broad range of industries where employers traditionally have enjoyed flexibility when it comes to their highest-paid workers. There is nothing company-specific or particularly idiosyncratic about Helix's decision to pay even its supervisors based on day rates. That structure follows decades of settled practice in the exploration and production sector, where employers historically have paid managers based on a daily-pay-rate model that reflects "the historic economic balance the industry must maintain given the highly unpredictable nature of oil patch work." Pet.App.75 (Wiener, J., dissenting). The Fifth Circuit's decision would render that long-standing practice unlawful, imposing significant retroactive liability and rewarding highly paid supervisors with massive windfalls despite no change in their job duties, working conditions, or substantial regular pay. Making matters worse, the fact that the affected supervisors are already making six figures means that they will be entitled to especially outsized time-and-a-half awards, especially for supervisors working hitches that can involve 84-hour workweeks (followed by multiple weeks off). Simply put, under the decision below, the workers least entitled to overtime pay will receive the largest windfalls.

This Court has not looked favorably upon attempts by plaintiffs to use novel theories of FLSA liability to upset long-settled industry practices. As the Court has explained, it may be "possible for an entire industry to be in violation of the [FLSA] for a long time" with no one noticing, but the "more plausible hypothesis" is that the industry's practices simply were not unlawful. *Christopher*, 567 U.S. at 158. The Court has thus repeatedly rejected wage-

and-hour claims that would have exposed settled practices to potentially significant retroactive liability. *See, e.g.*, *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S.Ct. 1881 (2019) (rejecting novel attempt to apply state wage-and-hour law on the outer continental shelf); *Encino Motorcars*, 138 S. Ct. 1134 (rejecting novel attempt to treat service advisors at car dealerships as non-exempt); *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27 (2014) (rejecting novel attempt to impose FLSA liability for time spent in security screenings); *Christopher*, 567 U.S. at 157 (rejecting FLSA liability for pharmaceutical sales representatives where "the pharmaceutical industry had little reason to suspect that its longstanding practice … transgressed the FLSA").

The practical problems with the decision below are not limited to awards of substantial retroactive relief but extend to operational matters going forward. The offshore drilling industry is not one in which day-rate employees can be easily converted into week-rate employees to satisfy the Fifth Circuit's anomalous take on the regulations. The hitches that Respondent and other employees on the rig work do not correspond with calendar weeks. A 28-day hitch can span four weeks, five weeks, or even six weeks when factoring in travel days on both ends of the hitch. Furthermore, employees on a rig do not all work the same 28-day periods. Employees join and depart the rig potentially every day of any given week, and there is no uniform weekly changeover of a rig crew on any one predetermined day. That variability would make it extremely difficult to set weekly rates that would consistently approximate the daily rates on which these employees' pay has historically been based.

Moreover, it would make little sense to compensate an employee the same for seven days spent on the rig away from family and friends and a single day on the rig with the balance of the week spent entirely at leisure.

Relatedly, using weekly rates instead of daily rates could affect operational decisions in a manner not intended by the regulations. For example, a decision to delay operations by one day because of inclement weather would have far more dramatic consequences on costs and the overall success of a project if such a delay would push operations into another calendar week and thus require a full week of additional labor costs. Forcing a weekly salary onto an industry that has adopted a different model for very good reason could cause employers to structure every hitch around a weekly calendar even if practicalities dictated otherwise. The regulations are not intended to be the tail that wags the dog in such scenarios. The upshot is that if the decision below is allowed to stand, employers in the industry will be forced to either continually pay overtime to some of their most highly compensated white-collar employees or to restructure their complex operations to prevent wage-and-hour regulations from unduly influencing operational decisions.

This issue, moreover, is not limited to the resource exploration and production industry. As the variety of contexts in which this issue has arisen make clear, there are myriad fields in which paying high-earning consultants or other experts on an hourly, daily, or per-shift basis makes the most practical and economic sense. And given that these high-earning white-collar

workers—whether the pharmacists in *Anani*, the consultants in *Litz*, the inspectors in *Hughes*, or the production supervisors in *Coates*—generally have ample bargaining power, there is no reason to read the regulations in a way that provides them with unexpected windfalls and renders their heretofore preferred method of compensation non-feasible.

If a statute designed to ensure a minimal standard of fair treatment for blue-collar workers really required windfalls for supervisors already making well over six figures, it would be an issue that cried out for congressional attention. And if a regulation meant to implement the FLSA has strayed so far from the statutory design that it mandates such a result, it would call the entire regulatory regime into doubt. Fortunately, those counterintuitive results are not compelled by the statute or the regulations. This Court should reverse the decision below.

CONCLUSION

For the foregoing reasons, the Court should reverse.

Respectfully submitted,

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