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 OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 57 national and international labor organizations with a total membership of over 12 million working men and women.[1] The AFL-CIO has a strong interest in the Department of Labor's regulations interpreting the Fair Labor Standards Act's exemptions for employees employed in bona fide executive, administrative, or professional capacities. The AFL-CIO has thus routinely participated in DOL rulemakings regarding the exemptions. Most pertinently, the AFL-CIO submitted detailed comments in the 2004 rulemaking concerning the highly compensated employee regulation at issue in this case. Those comments were cited by the DOL in support of its decision to require payment on a salary basis as a prerequisite to finding that highly compensated executive employees are exempt from overtime requirements.

SUMMARY OF ARGUMENT

The Department of Labor ("DOL") has promulgated detailed regulations defining when certain executive, administrative, and professional employees are exempt from the Fair Labor Standards Act's overtime

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[1] Counsel for the Petitioners and counsel for the Respondent have each consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

requirements (the "EAP regulations"). Of particular relevance here, those regulations require exempt executive employees, including highly compensated executive employees, to be paid on a salary basis.

The question presented in this case is whether a specific EAP regulation addressing when highly compensated employees are exempt, 29 C.F.R. § 541.601 (the "HCE regulation"), is subject to the requirements of a neighboring regulation that addresses the circumstances in which an employer may pay an employee a guaranteed base salary plus additional performance- or time-based compensation without violating the salary basis requirement, *id.* § 541.604 (the "extras regulation").

The answer to that question is "yes." The extras regulation plainly applies to the salary basis test in all of its EAP applications, including with regard to highly compensated employees. Thus, an employer who wishes to pay a highly compensated employee a base salary plus additional performance- or time-based compensation, including an employer who wishes to compute an exempt employee's compensation on a daily basis, must comply with the requirements of the extras regulation. Most notably, such an employer must guarantee compensation approximating the employee's usual earnings at the daily rate for a normal workweek.

In this case, Helix Energy Solutions Group, Inc. ("Helix") employed Michael Hewitt ("Hewitt") in a supervisory position, and paid him a daily rate for the days he actually worked, as calculated at the end of each biweekly pay period. Because Helix did not guarantee Hewitt a predetermined amount of compensation roughly equivalent to his usual earnings at the daily rate for his normal workweek, the company did

not comply with the extras regulation. Consequently, Helix did not comply with the salary basis requirement. As a matter of ordinary English, payment that is calculated on a daily basis only after the work has been completed is a wage, not a salary. And DOL's regulations are fully in accord, defining payment on a salary basis to mean that an employee regularly receives a predetermined amount of compensation for each week in which any work is performed.

Helix contends that its method of paying Hewitt only for the days he worked constituted a salary because the daily rate the company paid him was substantial. That argument flies in the face of the regulatory text. Pursuant to Helix's reading, only salary level, not the basis on which the employee is paid, matters for exempt status, notwithstanding that the HCE regulation specifically requires payment on a salary basis. And Helix's reading renders the portion of the salary basis test that allows certain specified deductions from an employee's salary incomprehensible. There would be no reason for the regulation to carefully limit deductions from an employee's salary if the employer were not required to guarantee the employee a predetermined amount of weekly compensation in the first place.

Helix also argues that the extras regulation's reasonable relationship test does not apply to highly compensated employees because the test purportedly conflicts with the HCE regulation. The conflict Helix posits between the HCE regulation and the reasonable relationship test is illusory, based on the company's fundamental misunderstanding of the scope of that test. By its terms, the reasonable relationship test only applies to payments made on an hourly, daily, or shift basis, not to the commissions, bonuses, and

year-end catch-up payments on which Helix bases its claim of a conflict. These latter forms of payment, which, as Helix correctly notes, frequently make up a significant part of a highly compensated employee's compensation, do not count as part of the reasonable relationship calculation. Thus, there is no conflict between the regulations.

When the regulations are given their proper reading, it is clear that DOL's decision to make payment on a salary basis a requirement for exempt status for even highly compensated executive employees like Hewitt was entirely reasonable. Executive employees are, by definition, charged with managing the company and supervising employees. These responsibilities require a form of compensation that provides the employee with sufficient discretion to manage their own time and activities so that they, in turn, can ensure that the hourly employees they manage fulfill orders and complete tasks within allotted times and budgets. Because a key to executive status is that the manager or supervisor bears the risks and rewards of working whatever hours are necessary to effectuate the employer's operational goals, DOL correctly determined that payment on a salary basis is a prerequisite to the exemption regardless of the employee's level of compensation.

Finally, Helix's policy argument concerning the need for scheduling flexibility in the oil and gas industry falls flat in light of the significant flexibility that the extras regulation already provides the company. Helix needed only engage in simple arithmetic to calculate the average number of days that Hewitt worked each week while on a hitch and pay him that amount as a predetermined weekly salary. Alternatively, Helix could have continued to pay Hewitt on a daily-rate basis by providing him with a weekly guarantee

roughly equivalent to the average amount he earned each week. Notably, neither method would have prevented Helix from taking account of how often Hewitt worked less than a full week in setting his minimum guaranteed weekly payment.

ARGUMENT

Helix operates offshore oil rigs, where the company employed Hewitt as a "tool pusher," "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," and that involves supervising other employees. Pet. Br. 15. Hewitt typically worked "28-day 'hitches'" for Helix during which he was "on duty for 12-hours each day." *Ibid.*

Helix paid Hewitt only for those days he worked, at a rate that ranged from $963 to $1,341 per day, calculating his pay at the end of each two-week pay period. Pet. Br. 15-16. During the period Helix employed Hewitt as a tool pusher, the company paid him cumulatively more than $200,000 per year for the first two years and $143,680 for the final eight months of his employment. *Id.* at 16. On average, Hewitt thus worked for Helix approximately 197 days, or seven 28-day hitches, each year. *See generally* J.A. 104 (stating that the position involved "a rotation of four weeks on the vessel and four weeks off").

Helix claims that its method of compensating Hewitt only for the days he worked as calculated at the end of each two-week pay period constituted payment on a salary basis, a prerequisite to finding an employee FLSA-exempt under DOL regulations. That contention is meritless. Payment on a salary basis requires that an employee regularly receive on a weekly, or less frequent basis, a predetermined

amount of guaranteed salary for their normal scheduled workweek, not just payment limited to the days an employee actually worked, calculated after-the-fact. The fact that Hewitt cumulatively received a significant amount of pay for the work he completed for the company over the course of a year does not change this analysis. Rather, the fact that Helix employed Hewitt on such a regular schedule demonstrates that the company could have complied with the salary basis requirement without a significant loss of operating flexibility.

I. The Plain Language of the Department of Labor's Regulations Makes Clear that Helix Did Not Pay Hewitt on a Salary Basis

No ordinary speaker of the English language would consider Helix to have paid Hewitt a salary. *See*, *e.g.*, *Salary*, WEBSTER'S NEW WORLD DICTIONARY 1286 (College Edition, 1968) ("a fixed payment at regular intervals for services, usually other than manual or mechanical: distinguished from wages, fees"). Rather, most English speakers would consider Helix to have paid Hewitt a "[w]age," *i.e.*, "money paid to an employee for work done, and usually figured on an hourly, daily, or piecework basis: often distinguished from salary." *Wage*, WEBSTER'S at 1640.

While the DOL's regulations do not track dictionary definitions precisely, they incorporate this basic distinction. Payment on a salary basis means that "the employee regularly receives . . . on a weekly, or less frequent basis, a predetermined amount . . . of . . . compensation." 29 C.F.R. § 541.602(a). An "[a]mount" is a "sum" or "whole." *Amount*, WEBSTER'S at 50. A *predetermined* amount is a sum quantity of pay determined *before* the work is done. In contrast,

when "money [is] paid to an employee *for work done*, and . . . *figured on a[] . . . daily . . . basis*"—*i.e.*, when the quantity of pay is determined by the work actually completed and only calculated *after* the work is finished—that is ordinarily considered a "[w]age." *Wage*, WEBSTER'S at 1640 (emphasis added).

A. The Salary Basis Test Requires Guaranteed Payment of a Predetermined Amount of Compensation for the Employee's Normal Workweek

The FLSA's minimum wage and overtime requirements do not apply to "any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary . . .)." FLSA § 13(a)(1); 29 U.S.C. § 213(a)(1). These terms are left undefined in the FLSA itself; accordingly, this Court has held that this provision "grants the Secretary broad authority to 'defin[e] and delimi[t]' the scope of the exemption for executive, administrative, and professional employees." *Auer v. Robbins*, 519 U.S. 452, 456 (1997).

DOL's Wage and Hour Division has promulgated comprehensive regulations devoted to "Defining and Delimiting the Exemptions for Executive, Administrative, [and] Professional . . . Employees." 29 C.F.R. pt. 541.[2] Subpart B of those regulations addresses the executive employee exemption. That subpart states the "[g]eneral rule for executive employees" as follows:

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[2] As in the parties' briefing, the regulations cited in this brief are those applicable during the period in dispute. *See* Pet. App. 89-97.

"(a) The term 'employee employed in a bona fide executive capacity' in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary basis at a rate of not less than $455 per week . . . ;

(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

(b) The phrase 'salary basis' is defined at § 541.602[.]"

29 C.F.R. § 541.100(a).

As the court of appeals summarized, to meet the exemption for executive employees under this regulation, "three conditions must be met:" (1) "certain criteria concerning the performance of executive . . . duties," often referred to as "the duties test"; (2) "certain minimum income thresholds"; and (3) "the employee must be paid on a 'salary basis.'" Pet. App. 2-3. With regard to the first condition in particular, an employee must meet all three duty requirements to be eligible for the exemption. 29 C.F.R. §§ 541.100(a)(2)-(4).

The regulations provide a simplified duties test for "[h]ighly compensated employees." 29 C.F.R. § 541.601. "[A]n employee with total annual compensation of at

least $100,000 is deemed exempt under section 13(a)(1) of the Act if the employee customarily and regularly performs *any one* or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in subparts B, C or D of this part." *Id.* § 541.601(a) (emphasis added). Such an employee must still meet the executive employee exemption's other two requirements, however: the employee must (1) be paid "at least $455 per week . . . [(2)] on a salary [] basis." *Id.* § 541.601(b)(1).

Under the regulation, an employee is "paid on a salary basis" when he or she "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). Subject to certain specified exceptions, "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." *Ibid.*

Emphasizing the importance to the salary basis test that an employee "regularly receive[] . . . a predetermined amount," the regulations provide that an employer's improper deductions from an employee's salary can lead to a loss of the exemption altogether. 29 C.F.R. § 541.603. For example, an employer may not make "deductions from the employee's predetermined compensation . . . for absences occasioned by the employer or by the operating requirements of the business" or "when work is not available." 29 C.F.R. § 541.602(a). The regulations also prevent an employer from docking pay from a salaried employee for partial-day absences for personal reasons or for sickness or disability. *Id.* §§ 541.602(b)(1) and (2).

See id. § 541.602(b)(1) ("[I]f an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence.").

Recognizing that a salaried employee's "predetermined amount" may permissibly constitute only "part" of her compensation, the regulations also address the conditions under which an employee may receive non-salary compensation, referred to as "extras." In such cases, "[a]n employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement," as long as "the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis." 29 C.F.R. § 541.604(a). As long as the employee is "guaranteed at least $455 each week paid on a salary basis," she may also receive additional compensation, such as a "commission on sales," "a percentage of the sales or profits of the employer," or "additional compensation based on hours worked for work beyond the normal workweek." *Ibid.*

Immediately following this provision, the extras regulation further provides that "[a]n exempt employee's earnings may be computed on an hourly, a daily or a shift basis"—and thus may vary somewhat from week to week based on the quantity of work performed—"without losing the exemption or violating the salary basis requirement," under certain specified circumstances. 29 C.F.R. § 541.604(b). First, "the employment arrangement [must] include[] 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[.]" *Ibid.* And, second, "a reasonable relationship [must] exist[] between the guaran-

teed amount and the amount actually earned." *Ibid.* The reasonable relationship requirement is met when the employee receives a "weekly guarantee . . . roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek." *Ibid.*[3]

To summarize, the regulations provide that an employee is paid on a salary basis if:

> (a) the employee regularly receives a predetermined amount calculated on a weekly, or less frequent basis, that constitutes **all** of the employee's compensation and is not subject to deduction except as specifically provided in the regulations, *see* 29 C.F.R. § 541.602(a); or
>
> (b) the employee regularly receives a predetermined amount calculated on a weekly, or less frequent basis, that constitutes only **part** of the employee's overall compensation and is not subject to deduction except as specifically provided in the regulations, *see ibid.*, *and*:
>
> > (i) if the compensation arrangement is for a base salary plus commission, a percentage of sales or profits, or additional compensation for extra hours worked, the employee is guaranteed that full base salary for hours worked in a normal workweek, *see id.* § 541.604(a); or

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[3] The regulations provide for one specific circumstance where payment of a single day's pay without a weekly guarantee does qualify for the statutory exemption: for certain highly-paid employees in the motion picture producing industry. *See* 29 C.F.R. § 541.709 (stating that "[t]he requirement that the employee be paid 'on a salary basis' does not apply" to such employees). That regulation obviously does not apply to Hewitt.

(ii) if the employee's earnings are computed on an hourly, daily, or shift basis, the employee is guaranteed a full base salary roughly equivalent to the employee's usual earnings at the hourly, daily, or shift rate in a normal scheduled workweek that the employee receives regardless of how many days or hours the employee works in any given week, *see id.* § 541.604(b).

B. Helix Did Not Pay Hewitt on a Salary Basis Within the Plain Meaning of the Regulations

Helix admits that it paid Hewitt only for the days he worked—meaning that some weeks the company only paid him a single day's pay—even though his "standard workweek[]" consisted of seven 12-hour days when on a "hitch" for the company. Pet. Br. 2, 15. Paying an employee whose ordinary workweek consists of seven days per week only a single day's pay obviously does not constitute payment of "a predetermined amount constituting *all* . . . of the employee's compensation" on a weekly, or less frequent basis. 29 C.F.R. § 541.602(a) (emphasis added).

Helix's method of paying Hewitt also does not meet either of the salary basis test's requirements for an employee whose base salary constitutes only "*part* of the employee's compensation." *Ibid.* (emphasis added).

First, because Helix did not guarantee Hewitt a full base salary for his ordinary workweek—instead paying him only for the days he worked each week—the company did not comply with the requirements of the extras regulation for a compensation arrangement that provides a base salary plus "additional compensation based on hours worked for work beyond the normal workweek." 29 C.F.R. § 541.604(a). That pro-

vision permits payment of an otherwise-exempt employee in such a manner "without losing the exemption or violating the salary basis requirement" only if the employee is also guaranteed a base salary for their "normal workweek." *Ibid.* Because Helix did not guarantee Hewitt a base salary for a normal workweek, the company's method of paying Hewitt did not comply with this provision of the extras regulation.

Second, because Helix did not guarantee Hewitt a base salary "roughly equivalent to [his] usual earnings at the assigned . . . daily . . . rate for [Hewitt]'s normal scheduled workweek," the company did not comply with the requirements of the extras regulation that allows for "[a]n exempt employee's earnings [to] be computed on an hourly, a daily, or a shift basis." 29 C.F.R. § 541.604(b). That provision permits an employer to compute an employee's pay on a daily basis as long as the employer also "guarantee[s] . . . at least the minimum weekly required amount paid on a salary basis regardless of the number of . . . days . . . worked, and a reasonable relationship exists between the guaranteed amount and amount actually earned." *Ibid.* Because Helix only paid Hewitt for the days he worked, rather than provide him with a guaranteed salary "roughly equivalent to [Hewitt]'s usual earnings at the assigned . . . daily . . . rate for [his] normal scheduled workweek," *ibid.*, the company's method of paying Hewitt did not comply with this provision.

In sum, because Helix did not guarantee Hewitt a base salary consisting of "a predetermined amount constituting *all or part* of [his] compensation," 29 C.F.R. § 541.602(a) (emphasis added), the court of appeals correctly held that Helix did not pay Hewitt on a salary basis.

II. Helix's Contention that Paying Hewitt Only for Days Worked Constituted Payment on a Salary Basis Is Flatly Inconsistent with the Regulations

Helix nevertheless contends that its method of paying Hewitt complied with the salary basis test because the company paid Hewitt a high daily rate of pay that the company claims *was* his salary. That interpretation of what it means for an employee to be paid on a salary basis is directly contrary to the text of the regulations as well as the meaning DOL has consistently attributed to the salary basis test over many decades.

A. Helix's Argument Cannot Be Reconciled with the Regulatory Text

Helix contends that it complied with the salary basis test because in "any week in which he worked at all, [Hewitt] 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." Pet. Br. 26 (quoting 29 C.F.R. § 541.602(a)). According to the company, "[t]he definition of 'salary basis' in §541.602 treats *any* guaranteed predetermined amount above the threshold as payment on a salary basis." *Id.* at 27 (emphasis added).

Contrary to Helix's interpretation, DOL's salary basis regulation does not only require that "the employee arrives at work each week knowing that she is guaranteed to earn at least a certain, predetermined amount above the minimum threshold." Pet. Br. 25-26. Instead, it mandates that the employee "regularly receive[]" "a predetermined amount" of salary on a "weekly, or less frequent basis." 29 C.F.R. § 541.602(a). If that "predetermined amount" constitutes only "part"

of the employee's compensation, then any additional compensation must be paid in a manner that complies with the extras regulation. *Id.* § 541.604.

Helix's contrary position reads the salary basis requirement out of the HCE regulation altogether. On the company's reading, it would be enough that "'[t]otal annual compensation'" for a highly compensated employee "include at least $455 per week," 29 C.F.R. § 541.601(b)(1), no matter how that amount was paid. But the actual regulation requires that total annual compensation "include at least $455 per week *paid on a salary . . . basis*." *Ibid.* (emphasis added). Helix's interpretation thus fails to give effect to payment on a salary basis as a requirement for exempt status separate and independent from the employee's salary *level*.

Helix's textual argument rests on an erroneous interpretation of what it means for the "predetermined amount" of salary an employee must "regularly receive[]" on a "weekly, or less frequent basis" to "constitut[e]" only "*part* of the employee's compensation." 29 C.F.R. § 541.602(a). Helix claims that this phrase permits the company to vary Hewitt's pay from week to week based on "the vagaries of when a hitch began or ended"—*i.e.*, based on how many days the company required Hewitt to work each week—as long as the minimum amount he was paid exceeded the minimum salary level. Pet. Br. 26. *See ibid.* ("If [Hewitt] worked only part of one day in a week, . . . that predetermined amount would constitute 'all' of his compensation for the week. In any week that [Hewitt] worked more than one day, that predetermined amount constituted only 'part' of his compensation . . . . "). As we have shown, however, while an employer may pay an exempt employee based on "the number of . . . days . . . worked," to preserve the exemption such a compen-

sation method must ensure that the employee also receive a "weekly guarantee [that] is roughly equivalent to the employee's usual earnings at the assigned . . . daily . . . rate for the employee's normal scheduled workweek." 29 C.F.R. § 541.604(b). Helix's manner of paying Hewitt clearly did not meet this requirement.

Helix's interpretation of the salary basis regulation also wreaks havoc on the text of that regulation itself. Helix and its *amici* explain that the industry requires such flexibility because of the "unpredictability of the oil patch," where work often "shuts down early because of weather or operational problems." *See* Br. of Texas Oil and Gas Assoc., Inc. *et al.* 29-30. *See also* Pet. Br. 50 (similar). Helix admits, therefore, that its pay plan is designed to permit deductions to account for such unpredictability—precisely the sort of deductions "made for absences occasioned by the employer or by the operating requirements of the business" that the salary-basis regulation *expressly prohibits*. 29 C.F.R. § 541.602(a).

Similarly, the deductions that the regulation deems permissible presuppose that an employee receives a base salary that is computed on a weekly, or less frequent basis. Pursuant to Helix's logic—which would apply equally to employees paid on an hourly or shift basis as to daily-rate employees—an employer could guarantee a highly compensated employee only enough hours per week to meet the minimum salary level while leaving all additional hours to the employer's discretion. It would make no sense to protect a salaried employee against partial-day deductions for absences "to handle personal affairs," *id.* § 541.602(b)(1), if the employer were not required to guarantee the employee a predetermined amount of compensation on a weekly basis in the first place.

B. The Highly Compensated Employee Regulation Does Not Conflict with the Reasonable Relationship Test Applicable to Day-Rate Employees

Given these textual difficulties, Helix argues that the extras regulation, and specifically its requirements for employees paid on a daily basis, do not apply to highly compensated employees like Hewitt at all because, according to the company, "[s]everal of the HCE regulation's provisions conflict with §541.604(b)'s reasonable-relationship requirement." Pet. Br. 32. Specifically, Helix argues that the HCE regulation "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)." *Id.* at 33-34 (quoting *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. 51,230, 51,249 (Sept. 27, 2019) ("2019 Final Rule")). Similarly, the company argues that year-end catch-up payments made "toward the prior year's total annual compensation," which are permitted by the highly compensated employee regulation, 29 C.F.R. § 541.601(b)(2), might violate § 541.604(b)'s reasonable relationship requirement, and thus "frustrate[]" the HCE regulation's purpose. *Id.* at 35-36.

Helix's arguments rest on a basic misunderstanding of the scope of the reasonable relationship requirement. The requirement, by its terms, "applies only if the employee's pay is computed on an hourly, daily or shift basis," 29 C.F.R. § 541.604(b), and not to other

forms of employee compensation. The reasonable relationship requirement "does not apply, for example, to an exempt store manager paid a guaranteed salary of $650 per week who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary." *Ibid.* Rather, what the test demands is that the employee's guaranteed salary per week be "roughly equivalent to the employee's usual earnings *at the assigned hourly, daily or shift rate* for the employee's normal scheduled workweek." *Ibid.* (emphasis added).

The conflicts Helix asserts between the highly compensated employee regulation and the reasonable relationship requirement are thus illusory. Non-salary compensation—such as "commissions, nondiscretionary bonuses, and other nondiscretionary compensation," as well as catch-up payments made "toward the prior year's total annual compensation," 29 C.F.R. §§ 541.601(b)(1) and (2)—are performance-based payments which bear no relation to "the employee's usual earnings at the assigned hourly, daily or shift rate," *id.* § 541.604(b). Therefore, they simply do not count for purposes of the extras regulation's reasonable relationship test.

Finally, Helix contends that the extras regulation should not apply to highly compensated employees because of "[t]he HCE regulation's lack of a cross-reference to §541.604." Pet. Br. 31. That argument draws the wrong conclusion from the absence of a cross-reference in the HCE regulation. The extras regulation gives meaning to the salary basis test in *all* of that test's applications throughout the EAP regulations. Thus, even though the general tests for executive, administrative, and professional exemptions, like the

HCE test, do not cross-reference § 541.604 either, *see* 29 C.F.R. §§ 541.100, .200, .300, there is no doubt that the extras regulation applies to each of these provisions. Indeed, without the extras regulation, it would be unclear whether an employee who receives only a part of their compensation in salary and the balance in commissions or bonuses—as is frequently the case for highly compensated employees—could ever meet the salary basis test, as only § 541.604 makes clear. It is thus Helix's novel interpretation of the regulations, not Hewitt's, that creates irreconcilable conflicts in the regulatory scheme.

C. The Salary Basis Test's Regulatory History Supports the Plain Reading of the Text

The salary basis test's regulatory history affirms this straightforward reading of the regulatory text. That history amply demonstrates that payment on a salary basis is a prerequisite to finding that an employee—even a highly compensated employee who receives a significant portion of their pay in non-salary compensation—is "employed in a bona fide executive, administrative, or professional capacity," 29 U.S.C. § 213(a)(1), and that there is no conflict between the HCE regulation and the extras regulation.

The salary basis test dates back to the earliest days of the FLSA, and has always been held to apply to *all* executive, administrative, and professional employees exempt under Section 13(a)(1). *See* 29 C.F.R. § 541.1(e) (1940) (requiring that exempt executive employee be "compensated for his services on a salary basis at not less than $30 per week").[4] Moreover, its core defini-

[4] The requirement itself originates from an extensive set of hearings held before hearing officer Harold Stein, which led to the publication of the influential "Stein Report," cited extensively

tion has remained remarkably consistent over more than eight decades. *See* 29 C.F.R. § 541.118(a) (1950) (requiring that employee paid on a salary basis receive (1) a "predetermined amount"; (2) "constituting all or part of his compensation"; (3) "not subject to reduction because of variations . . . in the quality or quantity of the work performed,"; (4) "without regard to the number of days or hours worked").[5]

Not surprisingly, then, in the 2004 rulemaking in which DOL promulgated the HCE regulation, the agency made indisputably clear that "'total annual compensation' must include at least $455 per week paid on a salary . . . basis," adding this salary basis requirement to the Final Rule. *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,175 (Apr. 23, 2004) ("2004 Final Rule"). As DOL explained:

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in DOL's 2004 rulemaking. The Stein Report concluded that "the shortest pay period which can properly be understood to be appropriate for a person employed in an executive capacity is obviously a weekly pay period," insofar as "[t]he executive status in and of itself connotes at least the tenure implied by a weekly pay period as the very minimum." Harold Stein, U.S. Dep't of Lab., Wage & Hour Div., *"'Executive, Administrative, Professional . . . Outside Salesman' Redefined"* 23 (Oct. 10, 1940).

[5] In 1954, DOL revised the salary-basis regulation to clarify which deductions an employer can permissibly make from an employee's "predetermined amount" without losing the exemption. *See* 29 C.F.R. § 541.118(a)(1) (1954) (prohibiting deductions "for absences occasioned by the employer or by the operating requirements of the business," or for "time when work is not available" provided that "the employee is ready, willing, and able to work"). The agency made no further substantive changes to the salary-basis regulation—except for periodically adjusting the minimum salary level—until the 2004 rulemaking discussed in the text.

> "This change will ensure that highly compensated employees will receive at least the same base salary throughout the year as required for exempt employees under the standard tests, while still allowing highly compensated employees to receive additional income in the form of commissions and nondiscretionary bonuses. . . . [T]he salary basis requirement is a valuable and easily applied criterion that is a hallmark of exempt status." *Ibid.*

Any suggestion by Helix that the HCE regulation does not fully incorporate the salary basis requirement, *see*, *e.g.*, Pet. Br. 2, 12, 21 (repeatedly referring to the highly compensated employee regulation as a "self-contained" test), or incorporates it in some altered form, *see*, *e.g.*, *id.* at 22 (contending that it "would make no sense" to apply the daily rate regulation's reasonable relationship requirement to highly compensated employees) are thus meritless. DOL expressly incorporated the same salary basis requirement for highly compensated employees that it had long applied to "exempt employees under the standard tests." 2004 Final Rule, 69 Fed. Reg. at 22,175.

Just as the salary basis test is a longstanding component of the EAP regulations, the rules regarding whether and how an employer may provide additional compensation beyond a guaranteed salary to an employee without violating the salary basis requirement is a well-established aspect of the regulations as well. The first "minimum guarantees plus extras" provision held that an employee would not be deemed salaried "if the salary is divided into two parts for the purpose of circumventing the requirement that the full salary must be paid in any week in which any work is performed." 29 C.F.R. § 541.118(b) (1950). DOL subsequently developed the "reasonable rela-

tionship" test as a means to implement this regulatory requirement. *See* 2004 Final Rule, 69 Fed. Reg. at 22,184 (explaining that "the reasonable relationship requirement . . . has been a Wage and Hour Division policy for at least 30 years"). Under that test, whenever the "extras" were so great that the guaranteed portion of the salary no longer reasonably approximated the employee's ordinary compensation for a normal workweek, the salary guarantee became "nothing more than an illusion," *ibid.*, masking what was in fact a wage relationship.

In promulgating 29 C.F.R. § 541.604(b) as part of the 2004 rulemaking, DOL stated that it intended to work no substantive change, but rather to "incorporate[] in the regulation Wage and Hour's longstanding interpretation of the existing salary basis regulation, which is set forth in the agency's Field Operations Handbook and in opinion letters." 2004 Final Rule, 69 Fed. Reg. at 22,183.

Likewise, DOL made clear that its incorporation of the salary basis requirement into the HCE regulation included the specific rules contained in the extras regulation concerning the payment of additional compensation. For example, DOL explained that, consistent with its historical treatment of the reasonable relationship requirement, "if an employee receives a guaranteed salary plus a commission on each sale or a percentage of the employer's profits"—as is common among highly compensated employees—"the reasonable relationship requirement does not apply" because, although "[s]uch an employee's pay will understandably vary widely from one week to the next, . . . the employee's actual compensation is not computed based upon the employee's hours, days or shifts of work." 2004 Final Rule, 69 Fed. Reg. at 22,183.

At the same time, DOL also made clear that the anti-circumvention purpose underlying the reasonable relationship requirement remained an important aspect of the salary basis test, even for highly compensated employees:

> "If [the reasonable relationship requirement] were eliminated, an employer could establish a pay system that calculated exempt employees' pay based directly upon the number of hours they worked multiplied by a set hourly rate of pay; 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 employees for partial day absences). Such a pay system would be inconsistent with the salary basis concept and the salary guarantee would be nothing more than an illusion." 2004 Final Rule, 69 Fed. Reg. at 22,184.

Finally, DOL responded to public comments urging the agency to abandon the salary basis test by instead broadly reaffirming the importance of that test to determining exempt status, explaining that, "[a]fter considering the salary basis test in light of its historical context and judicial acceptance, the Department has decided that it should be retained," 2004 Final Rule, 69 Fed. Reg. at 22,176:

> "The Department . . . has determined over the course of many years that executive, administrative and professional employees are nearly universally paid on a salary basis. This practice 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. Such employees are not paid by the hour or task, but for the general value of services performed."

2004 Final Rule, 69 Fed. Reg. at 22,177 (citing *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993); *Brock v. Claridge Hotel & Casino*, 846 F.2d 180 (3d Cir. 1988), *cert. denied*, 488 U.S. 925).

As the authorities cited by DOL explain, "[s]alary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task." *Claridge Hotel*, 846 F.2d at 184. "Payment on salary basis . . . indicates employees who are given discretion in managing their time and their activities and who are not answerable merely for the number of hours worked or the number of tasks accomplished." *Kinney*, 994 F.2d at 11.

Those explanations accord with the required duties of executive employees, including that they "manage[] . . . the enterprise . . . or . . . a customarily recognized department or subdivision thereof" and "direct[] the work of two or more other employees." 29 C.F.R. §§ 541.100(a)(2) and (3). Because such executives are charged with managing and directing other employees who are paid based on "the number of hours worked or the number of tasks accomplished," they must have "discretion in managing their [own] time and their [own] activities," *Kinney*, 994 F.2d at 11, to ensure that the employees whom they supervise complete their assigned tasks within the allotted time and budget. *Cf. NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 288 (1974) (approving of "[t]he [National Labor Relations] Board's exclusion of 'managerial employees' defined as those who formulate and effectuate management policies by expressing and making operative the decisions of their employer" (quotation marks and footnote omitted)).

Unlike the employees they manage and supervise—who the FLSA guarantees a minimum wage for actual

hours worked, including overtime where required—executive employees bear the risk and reward of working whatever hours are necessary to "formulate and effectuate management policies." *Ibid.* The salary basis test's requirement that the employer guarantee such employees "a predetermined amount" that is unaffected by "the quality or quantity of the work performed," 29 C.F.R. § 541.602(a), reflects the executive employee's distinct role as an agent of the company tasked with "making operative the decisions of their employer," *Bell Aerospace*, 416 U.S. at 288, no matter how long it may take to undertake those endeavors.

DOL's conclusion that payment on a salary basis is an important "mark of [the] status of an exempt employee," 2004 Final Rule, 69 Fed. Reg. at 22,177 (internal quotation marks and citation omitted), including highly compensated employees, is thus well-founded. The HCE regulation makes clear that it is not compensation alone that is indicative of exempt status, as "employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt . . . *no matter how highly paid they might be*." 29 C.F.R. § 541.601(d) (emphasis added). An important mark of the distinction between a frontline supervisor or production manager and the hourly employees they supervise—who, as the regulation recognizes, may themselves be highly-compensated—is that the former is "given discretion in managing their time and their activities," including directing the work of employees within their charge, whereas the latter "are . . . answerable merely for the number of hours worked or the number of tasks accomplished," *Kinney*, 994 F.2d at 11, even if they are paid very handsomely for that work.

III. Helix's Policy Arguments Are Unpersuasive

Helix contends that the court of appeals' decision, "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." Pet. Br. 47-48. *See also id.* at 48 (citing "decades of settled practice in the exploration and production sector" with regard to "a daily-pay-rate model"). That contention is both historically inaccurate as a matter of the regulatory history and unpersuasive given the fact that Helix could have, but did not, comply with the salary basis requirement while also maintaining significant flexibility with regard to the scheduling of exempt employees like Hewitt.

As we have shown, the HCE exemption on which Helix relies was only promulgated in 2004, whereas the "reasonable relationship" test reflects DOL's "long-standing interpretation of the existing salary basis regulation" that, as of 2004, had "been a Wage and Hour Division policy for at least 30 years." 2004 Final Rule, 69 Fed. Reg. at 22,183-84. The supposedly "traditional[]" and decades-old "daily-pay-rate model" that Helix claims the court of appeals' decision disrupted, therefore, clearly would not have complied with the DOL's EAP regulations prior to 2004.

In that regard, this case could not be more different from *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016), or *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), cases in which this Court rejected DOL's interpretations of the FLSA's provisions on the basis that they upset long-held reliance interests. In this case, it is Helix who offers up a novel interpretation of the salary basis test, an interpretation that,

as we have shown, lacks any basis in the regulatory text, in the agency's longstanding interpretation of its regulations, or, for that matter, in what an ordinary English-speaker would understand to constitute payment of a salary.[6]

Helix's claim that affirmance of the court of appeals' decision "would pose tremendous practical problems . . . where employers traditionally have enjoyed flexibility when it comes to their highest-paid workers," Pet. Br. 47-48, fares no better. Helix needed only to employ simple arithmetic to calculate the average number of days per week that Hewitt normally works during a 28-day hitch and to pay that amount as his predetermined weekly salary. If Hewitt worked more than the average during a particular hitch, the extras regulation permits, but does not require, Helix to pay him "additional compensation based on hours worked for work beyond the normal workweek" in the form of a "flat

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[6] For similar reasons, the efforts by Helix and its *amici* to generate tension between the statutory text and the salary basis regulation, *see*, *e.g.*, Pet. Br. 41, Br. of States of Mississippi *et al.* 8, are unavailing. This Court, as well as numerous lower courts, have repeatedly treated the salary basis test as an appropriate exercise of the Secretary's delegated authority to "'defin[e] and delimi[t]' the scope of the exemption for executive, administrative, and professional employees." *Auer*, 519 U.S. at 456 (quoting 29 U.S.C. § 213(a)(1)). *See also Usery v. Associated Drugs, Inc.*, 538 F.2d 1191, 1193 (5th Cir. 1976) ("The regulation pertaining to 'salary basis' computation has been repeatedly upheld."); *Craig v. Far W. Eng'g Co.*, 265 F.2d 251, 259 (9th Cir. 1959) (salary-basis test was "sound and apparently the one practical method of 'defining and delimiting' the rather vague and ambiguous terms used in the statute," and one that enjoyed "nearly unanimous" approval by employers upon its adoption); *Walling v. Yeakley*, 140 F.2d 830, 833 (10th Cir. 1944) ("[S]alary is a pertinent criterion and we cannot say that it is irrational or unreasonable to include it in the definition and delimitation.").

sum, bonus payment, straight-time hourly amount, time and one-half or any other basis." 29 C.F.R. § 541.604(a). Or, if Helix preferred to continue to pay Hewitt on a daily-rate basis, it could do so by providing him a "weekly guarantee . . . roughly equivalent to [his] usual earnings at the assigned . . . daily rate . . . for [his] normal scheduled workweek." *Id.* § 541.604(b). That weekly guarantee could take account of the approximate number of weeks each year in which Hewitt worked less than seven days while still complying with the reasonable relationship test, since that test allows for some variance "between the guaranteed amount and the amount actually earned." *Ibid.*

To be sure, each of these alternatives is somewhat less flexible than Helix's preferred pay-as-you-go approach, since in each scenario outlined above Helix would have to guarantee a predetermined amount of compensation that at least approximates Hewitt's normal workweek. But that is a modest limitation that the DOL has long and reasonably held necessary to distinguish bona fide exempt executive employees from hourly wage earners.

If even this limited incursion on operational flexibility is more than Helix desires, the company is free to seek industry-specific treatment from the DOL in a manner similar to that granted to the motion picture producing industry. *See* 29 C.F.R. § 541.709 (expressly permitting payment of a daily rate without a weekly guaranteed salary as long as the daily rate meets or exceeds the industry-specific minimum). "[P]etition[ing] [the agency] for the issuance . . . of . . . [such] a rule," 5 U.S.C. § 553(e), rather than asking this Court to issue a strained interpretation of the regulatory text, is the appropriate mechanism for Helix to pursue the relief it seeks in this case.

CONCLUSION

The Court should affirm the decision of the court of appeals.

Respectfully submitted,

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