No. 21-984

In The
Supreme Court of the United States

HELIX ENERGY SOLUTIONS GROUP, INC. ET AL.,
Petitioners,

v.

MICHAEL J. HEWITT,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE NATIONAL NURSES UNITED AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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AMICUS CURIAE NATIONAL NURSES UNITED[1]

National Nurses United ("NNU") is the country's largest federation of registered nurse associations. NNU's affiliates include the California Nurses Association, D.C. Nurses Association, Michigan Nurses Association, and Minnesota Nurses Association, as well as National Nurses Organizing Committee state affiliates in Alabama, Arizona, Colorado, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Maine, Missouri, Nevada, North Carolina, Ohio, Texas, Virginia, West Virginia, District of Columbia, and Puerto Rico. NNU represents approximately 175,000 nurses nationally.

NNU and our affiliates represent RNs as patient advocates in their hospitals and in their efforts to realize sound healthcare policy on a national level. We advocate for working conditions that enable nurses to deliver the care patients deserve. During the pandemic, our members have not only staffed the frontlines, but also led the charge for the safety, nursing practice, and patient care standards necessary to ensure quality care for all patients, as well as to protect nurses and their families. As a result, NNU and our affiliates are recognized leaders in this country's fight against the COVID pandemic. For example, we have testified

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties consented to this filing.

multiple times before Congress and OSHA about COVID-related nursing issues.

National Nurses United submits this brief to shed light on how Petitioner's proffered interpretation of the Highly Compensated Employee ("HCE") Rule would encourage hospitals to circumvent overtime for the most qualified and experienced nurses, thereby exacerbating already existing industry-driven problems with nurse attrition.

SUMMARY OF THE ARGUMENT

When bedside nurses have too many patients, it undermines the care they can deliver. That demoralizing reality drives nurses out of hospitals and drives up patient assignments for the remaining nurses. This negative feedback loop is easily exacerbated by other negative working conditions. The reverse is also true. Safe staffing and good working conditions lead to high nurse retention and bolster quality patient care. Unfortunately, we are already in the middle of a working-condition driven exodus of nurses from the bedside.

And Petitioner's proffered reading of the HCE Rule would make this problem worse. At their normal hourly rate, many of the most qualified and experienced bedside nurses earn more than $684 for single twelve-hour shift and more than $107,432 annually. Therefore, under Petitioner's proffered reading, hospitals would be able to guarantee these RNs just one 12/hour shift per week and then avoid paying the nurses overtime they would otherwise be entitled to for additional shifts. At the time the DOL first promulgated the HCE Rule, public commentators and members of Congress alike raised just this concern about how a skewed reading might impact the nursing workforce. And the DOL plainly explained that the salary basis and reasonable relationship tests would preclude such an outcome. That interpretation merits deference and forecloses Petitioner's position.

ARGUMENT

I. ALLOWING HOSPITALS TO AVOID OVERTIME FOR THE HIGHEST PAID NURSES WOULD EXACERBATE SHORT STAFFING IN HOSPITALS, NEGATIVELY IMPACTING PATIENT CARE

A. Nurse Workload Is a Primary Factor in Retention and Patient Care

The connection between the number of patients assigned to nurses, retention, and patient care is long established. In the 1980s and 90s, managed care fundamentally changed the nature of hospitals in this country by pushing profits into decisions about patient care to an extent previously unheard of. *See, e.g.,* Beth Wilson, et al., *Nurses Respond to Healthcare Restructuring*, J. OF HEALTH & SOCIAL POLICY, Vol. 214, at 51-72 (2006). As part of this heightened emphasis on maximizing profits, hospitals made steady cuts to nurse staffing levels. *Id.* at 54. Workloads increased. *Id.* at 55. Nurse attrition escalated. *Id.* And patient care suffered. *Id.* at 56.

One study revealed that at the peak of this problem, 66% of nurses in the United States "believe[d] that staffing in their hospitals is inadequate to provide high-quality care." Cal. Dept. of Health Serv., Final Statement of Reasons for R-37-01, p. 4, ¶ 2, https://www.dhcs.ca.gov/services/medical/Documents/HHA%20Rate%20Review/Binder%20Section%20C.pdf (citing and reproducing study). Another study surveyed 7,500 RNs, of whom 60% reported a reduction in RNs providing direct patient

care. FSOR at p. 4, ¶ 4 - p.5, ¶ 1. That study also found a marked increase in patient readmissions, complications, medical errors, wound infections, patient injuries, and patient deaths. *Id.* Thirty-six percent of the nurses surveyed in that study reported that they would not recommend a family member receive care in their hospitals. *Id.* A third study surveyed 7,300 RNs, seventy-five percent of whom reported a decline in the quality of nursing care, which sixty-nine percent blamed on inadequate staffing. FSOR at p. 4, ¶ 2. Doctors shared this assessment, with 64% rating nurse staffing levels at their hospital as "fair" or "poor." FSOR at p. 4, ¶ 2.

Ultimately, nurse advocacy about this industry manufactured short staffing crisis led to California's 1999 passage of the nation's first nurse-to-patient ratio law, California Health and Safety Code § 1276.4. And the impact of California's ratio law shows that these problems are not intractable. When nurses are assigned fewer patients, the quality of patient care increases.

Percentage of Nurses Reporting Patient Assignments At or Below California's Minimum Ratios by Specialty

Unit Type	*CA Mandatory Ratio*	*% at Ratio*		
		CA	NJ	PA
Medical-surgical	5:1	88	19	33
Pediatric	4:1	85	52	66
Intensive care units	2:1	85	63	71
Telemetry	5:1	93	35	52
Oncology	5:1	90	29	55
Psychiatric	6:1	81	56	42

Percentage of Nurses Reporting Enough RNs to Provide Quality Patient Care

CA	NJ	PA
58	**41**	**44**

Linda H. Aiken, et al., *Implications of the California Nurse Staffing Mandate for Other States*, HEALTH SERV. RESEARCH, Vol. 45(4), at 904-21 (2010). As these charts demonstrate, California nurses are significantly more likely to report that there are enough RNs in their departments to provide quality patient care than their counterparts in New Jersey and Pennsylvania, states without mandatory ratios. *Id.* California nurses also reported significant improvements in working conditions and job

satisfaction after implementation of the ratios. Joanne Spetz, *Nurse Satisfaction and the Implementation of Minimum Nurse Staffing Regulations*, POLICY, POLITICS & NURSING PRACTICE (2008); *see also* M.D. McHugh, et al., *Better Nurse Staffing and Nurse Work Environments Associated with Increased Survival of In-Hospital Cardiac Arrest Patients*, MEDICAL CARE, Vol. 54 (2016); M.D. McHugh, *Hospital Nursing and 30-Day Readmissions Among Medicare Patients with Heart Failure, Acute Myocardial Infarction, and Pneumonia*, MEDICAL CARE Vol. 51 (2013).

At this point, it is beyond reasonable dispute that nurse staffing in acute care hospitals has a direct impact on patient care outcomes, both for better and worse. *See also*, e.g., Linda H. Aiken, et al., *Hospital Nurse Staffing and Patient Mortality, Nurse Burnout, and Job Dissatisfaction*, J. OF THE AMERICAN MEDICAL ASS'N, Vol. 288 (2002) (43% of RNs surveyed had high burnout scores, and a similar proportion were dissatisfied with their current job); S.H. Bae, et al., *Impact of Nursing Unit Turnover on Patient Outcomes in Hospitals*, J. NURSING SCHOLARSHIP, VOL. 42 (2010) (finding that nursing units with lower levels of nurse turnover had fewer occurrences of severe medication errors).

B. Nurses Face Deteriorating Working Conditions that Are Negatively Impacting Retention and Patient Care

Just as safe staffing impacts nurses and patients, so too do the broader issues of nurse burnout and negative working conditions. Jin Jun, et al., *Relationship Between Nurse Burnout, Patient*

and Organization Outcomes: Systemic Review, INT'L J. OF NURSING STUDIES, Vol. 119 (2021) (finding that nurse burnout is associated with worsening safety and quality of care, as well as decreased patient satisfaction). The worse working conditions are, the more burnt-out nurses become and the more likely they are to leave their jobs. *Id.*

Unfortunately, at this very moment, unprecedented numbers of bedside nurses are already being driven from the workforce. A recent analysis of 400,000 nursing profiles on a staffing agency website revealed that more than 34% of nurses plan to leave their jobs by the end of 2022. *See* Incredible Health, Study of Registered Nurse Profiles (Mar. 16, 2022), https://www.incrediblehealth.com/wp-content/uploads/2022/03/IH-COVID-19-2022-Summary-1.pdf. This result echoed a broader of healthcare workers: nearly one in five have left their jobs since the advent of the pandemic. *See* Gaby Galvin, *Nearly 1 in 5 Health Care Workers Have Quit Their Jobs During the Pandemic*, MORNING CONSULT (Oct. 4, 2021).

Despite their dedication to patients, these nurses and healthcare workers are being driven out by the moral distress that arises from not being given the tools necessary to take proper care of their patients (i.e., safe staffing and personal protective equipment), the trauma of being the frontline of a pandemic in which more than a million Americans have died, and by hospitals simultaneously making cuts to salary and benefits, despite remaining as profitable as before the pandemic. Of the 34% of

nurses who plan to leave their jobs this year, 44% cited burnout and a high-stress environment as the reason, while 27% cited compensation. *See* Incredible Health, Study of Registered Nurse Profiles (Mar. 16, 2022). In the broader study, the reasons most health care workers cited were COVID-19, poor pay, and burnout. *See* Gaby Galvin, *Nearly 1 in 5 Health Care Workers Have Quit Their Jobs During the Pandemic*, MORNING CONSULT (Oct. 4, 2021). Another canvass of the problem reported the same findings:

> [A]mid the most grueling working conditions of their careers, their hospitals cut salaries, reduced benefits, and canceled raises; forced staff to work more shifts with longer hours; offered trite wellness tips, such as keeping gratitude journals, while denying paid time off or reduced hours; failed to provide adequate personal protective equipment; and downplayed the severity of their experiences.

Ed Yong, *Why Health-care Workers Are Quitting in Droves*, THE ATLANTIC (Nov. 16, 2021). All this while hospitals have remained as profitable or better than before the pandemic. *See* Yang Wang, BS, et al, *COVID-19 and Hospital Financial Viability in the US*, JAMA HEALTH FORUM (May 13, 2022) (a study of 2,163 US hospitals).

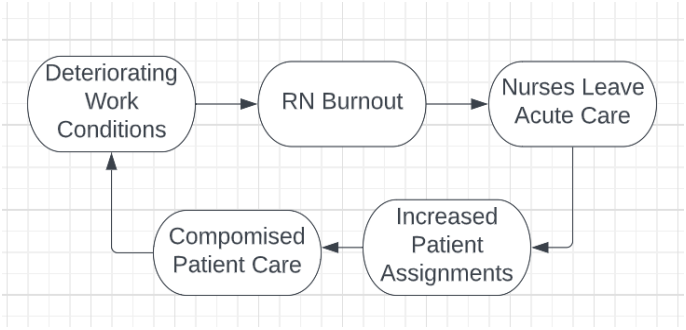
California provides a good example of this exodus. Close to 500,000 actively licensed RNs reside in California. Cal. Board of Registered Nursing, Monthly Statistics (Aug. 2022),

https://rn.ca.gov/consumers/stats.shtml. Of these, only 324,400 are currently practicing. *See* Bureau of Labor Statistics, Occupational Employment & Wages, 29-1141 Registered Nurses (May 2021), https://www.bls.gov/oes/current/oes291141.htm. As these two numbers show, to the extent that there is a nursing shortage in California hospitals, it is not because there are not enough actively licensed nurses in the state. Rather, it is because such a large portion of actively licensed nurses are not willing to work in hospitals under current conditions. That makes sense. As outlined above, the hospital industry has maintained practices such as short staffing and pay cuts that drive nurses from the workforce. And in California, hospitals then used that artificially created nursing shortage to seek ratio waivers from the state, further driving up the number of patients assigned to the remaining nurses and further fueling nurse burnout and moral distress. *See*, *e.g.*, California Hospital Association, *FAQs: Staffing* (Apr. 8, 2020), https://calhospital.org/faqs-staffing-0/ (California Hospital Association website page encouraging hospitals to seek ratio waivers from the state); Associated Press, *California Bypasses Nurse Staffing Ratio Rules Amid Virus Surge*, THE MERCURY NEWS (Jan. 8, 2021).

As one bedside nurse explained: "We are given 50 percent more patients and we're expected to do 50 percent more things with the same amount of time, I go home and I feel like I could have done more. I don't feel like I'm giving the care to my patients like a human being deserves." Erica Carbajal, *California nurses struggle as nurse-to-patient ratios stretched*

amid COVID-19 surge, BECKER'S HOSPITAL REVIEW (Dec. 28, 2020) (quoting Nerissa Black, RN, a telemetry nurse at Valencia, Calif.-based Henry Mayo Newhall Hospital).

In short, the nursing workforce is already under acute negative pressure due to patient workloads, salary and benefit cuts, and the moral fatigue of not being given the tools necessary to provide the level of care patients deserve.



C. Allowing Hospitals to Avoid Overtime for the Most Qualified Bedside Nurses Would Exacerbate Current Negative Pressures on the Workforce

Petitioner's proffered interpretation of the Highly Compensated Employee Rule would eliminate the salary basis and reasonable relationship requirements. *See*, *e.g.*, *Hewitt v. Helix Energy Sols. Grp., Inc.*, 15 F.4th 289, 291-92 (5th Cir. 2021). By eliminating these requirements, Petitioner's reading of the HCE Rule would allow hospitals to pay nurses on an hourly, daily, or per shift basis, and yet still avoid overtime obligations so long as (1) the nurse's total annual compensation reached $107,432, and (2) the hospital guaranteed at least $684 per week

(even where there is no reasonable relationship between the actual expected normal pay per workweek and the guarantee).

According to data available from the Bureau of Labor Statistics, the highest paid RNs working fulltime earn more than the minimum annual compensation required by the HCE Rule (40hour/week at $51.65 = $107,432 annually).

Area name	Hourly 90th Percentile
Alaska	$61.07
California	$79.63
Connecticut	$53.16
District of Columbia	$62.34
Hawaii	$62.34
Massachusetts	$72.75
Nevada	$57.47
New Jersey	$56.73
New York	$61.09
Oregon	$61.39
Washington	$61.21

See Bureau of Labor Statistics, Occupational Employment & Wages, May 2021, 29-1141, Geographic profile for Registered Nurses, Create Customized Table Function,

https://data.bls.gov/oes/#/home.[2] A majority of these states rely on the federal EAP exemption rules.[3, 4]

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[2] Once within the Customized Table Function, this data-set was produced by selection: One occupation for multiple geographical areas, Healthcare Practitioner and Technical Occupations, Registered Nurses, Select Geographical Area, By State, Selecting these 11 States, and Limiting to Hourly 90 Percentile Wage, May 2021.

[3] 29 CFR § 541.601 (Highly compensated employees) is a subsection of Part 541 (Defining and Delimiting exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees).

[4] Alaska, D.C., Massachusetts, Nevada, New Jersey, and Oregon all incorporate the federal EAP/HCE rules. *See,* Alaska, Dept. of Labor and Workforce Development, Minimum Wage Standard and Overtime Hours, https://labor.alaska.gov/lss/whact.htm (explaining that Alaska incorporates the sections of the FSLA pertaining to executives, administrators, and professionals); *McCoy v. N. Slope Borough*, 2014 U.S. Dist. LEXIS 95551 (D. Alaska, July 14, 2014) (applying the federal HCE to analysis of Alaskan overtime case); D.C. Code § 32-1003 (incorporating § 201 et seq. of the Fair Labor Standards Act); D.C. Bar, *Overtime Eligibility Set to Expand on January 1, 2020*, https://www.dcbar.org/pro-bono/about-the-center/pro-bono-center-nonprofit-newsletter/nonprofit-newsletter-fall-2019/overtime-eligibility-set-to-expand-on-january-1,-2 (explaining the increased thresholds in the HCE Rule); 1 Labor and Employment in Massachusetts, appx. B (2022) (reproducing Opinion Letter in which MA DOL explains that the state incorporated the federal EAP/HEC Rules into its laws); Nevada Office of Labor Commissioner, *Frequently Asked Questions,* https://labor.nv.gov/About/Frequently_Asked_Questions/Frequently_Asked_Questions_-_About_Us/) (explaining that overtime exemptions in NV are set forth in NRS 608.018 and the FLSA); N.J.A.C. 12:56-7.3, Exemptions from Overtime (incorporating 29 CFR Part 541 by reference except those individuals employed by government employers); Oregon Bureau of Labor & Industries, Salaried Exempt Employees, *The "White Collar" Exemptions,*

And the nurses who earn these top tier wages are the nurses with the most skills, qualification, and experience. *See, e.g.*, Memorandum of Understanding between Monterrey County and the Monterrey County Nurses Association, https://www.co.monterey.ca.us/home/showpublisheddocument/62877/636571551604970000 (including Educational Differential for Advanced Degrees, Certification Pay, and Longevity Premium Pay) (last accessed Sept. 1, 2022).[5]

Thus, under Petitioners proffered interpretation of the HCE Rule, hospitals could avoid federal overtime requirements for these highly qualified nurses who earn more than $107,432/annually by merely guaranteeing one 12/hour shift per week at the nurses' normal straight time (12 hours at $57/hour is $684). Hospitals could then require additional hours that would previously have crossed the overtime threshold but pay those additional hours at straight time. Such an outcome would place more negative pressure on nurse attrition, in turn further increasing workloads for remaining nurses, and thus further eroding the quality of patient care. Moreover, when the nurses with the most longevity leave the profession, the most junior nurses don't have the opportunity to learn from that experience. And as was

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https://www.oregon.gov/boli/employers/Pages/salaried-exempt-employees.aspx (explaining that Oregon follows the FLSA rules for exemptions, and cross-referencing the DOL website).

[5] While nurse wages, including the right to overtime, can be guaranteed by collective bargaining agreements despite any prevailing interpretation of the HCE Rule, a majority of nurses remain unrepresented.

demonstrated by industry practices in the period preceding California's adoption of mandatory ratios and during the pandemic, hospitals can't be counted on to forego the lure of cost saving practices, even where the practice negatively impacts patient care. For these reasons especially, NNU urges the Court to reject Petitioner's proffered interpretation of the HCE Rule.

D. At the Time the Streamlined HCE Rule Was First Adopted, the DOL Repeatedly Explained that the Salary Basis and Reasonable Relationship Tests Would Prevent the Rule from Negatively Impacting Nurse Overtime

In 2004, at the time the DOL first promulgated the current, streamlined HCE Rule, 29 CFR § 541.601, public commentators and members of Congress alike shared the concerns outlined above about how a skewed interpretation of the Rule could allow hospitals to avoid overtime requirements for otherwise non-exempt nurses. To address these concerns, in both the regulatory preamble to the Rule and a written submission to Congress, the DOL explained that the salary basis and reasonable relationship requirements would prevent such an outcome:

> One commenter states that the "minimum guarantee plus extras" concept allows too much flexibility and essentially allows an employer to circumvent the prohibition against docking [salaried employees] for absences due to a lack of work. The

> commenter gives the example of registered nurses whose average pay is $ 30 per hour, who would earn the guaranteed minimum in two shifts. The commenter believes that the entire balance of the workweek could be compensated as "extra compensation." Thus, the commenter expresses concern that a nurse could be paid for all additional shifts on a straight time basis, with no overtime, and if the hospital had a lack of work, the nurse might not receive more than the two shifts required to earn the minimum guarantee. * * * However, under the final rule, if an employee is compensated on an hourly basis, or on a shift basis, there must be a reasonable relationship between the amount guaranteed per week and the amount the employee typically earns per week. Thus, if a nurse whose actual compensation is determined on a shift or hourly basis usually earns $ 1,200 per week, the amount guaranteed must be roughly equivalent to $ 1,200; the employer could not guarantee such an employee only the minimum salary required by the regulation.

See 69 Fed. Reg. at 22184.

The DOL repeated this assurance in its written submission to Congressional hearings on the issue:

> The final rules make no change to current law regarding overtime protection for RNs. RNs paid on an hourly basis are entitled to overtime pay under the final rules. * * * *
>
> The final rule also preserves the requirement that RNs be paid on a salary basis to be treated as exempt from overtime. Under final rule § 541.604, an employer may pay an exempt employee additional amounts beyond the required salary, but there must be a "reasonable relationship" between the guaranteed amount and what is actually received.

Assessing the Impact of the Labor Department's Final Overtime Regulations on Workers and Employers, Hearing before the Committee on Education and the Workforce, U.S. House of Representatives, One Hundred Eighth Congress, Second Session, Serial No. 108-54, at p. 85 (Department of Labor, Fair Pay Facts, Overtime Security for the 21st Century) (Apr. 28, 2004).

The bottom line is that DOL's contemporaneous interpretation of how the HCE Rule functions clearly state that the HCE Rule incorporates the salary basis and reasonable relationship requirements. And as explained in detail in Respondent's Brief at p. 27, this interpretation is due deference under *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416-18 (2019). Accordingly, the DOL's interpretation forecloses Petitioner's proffered reading of the rule.

CONCLUSION

We are already in the middle of an industry-driven nurse shortage in our acute care hospitals. The shortage is being fueled by inadequate staffing and worsening working conditions. Nurses are suffering burnout and deep moral distress over not having the necessary tools to provide the care their patients deserve. These burnout and attrition issues undermine patient care and need to be reversed to ensure quality care moving forward.

Petitioner's proffered interpretation of the HCE Rule, however, would do just the opposite. It would create opportunities for hospital to avoid overtime for many of the most senior and qualified nurses, thus further deteriorating working conditions. This potential impact is so implicit in this proffered reading that Congress raised these same concerns at the time the DOL first promulgated the HCE Rule. And in that very context of concerns about how the rule might impact the nurse workforce, the DOL explained to Congress that the salary basis and reasonable relationship tests would prevent hospitals from using the HCE Rule to circumvent overtime for otherwise qualifying nurses. That interpretation merits deference. And it forecloses Petitioner's proffered interpretation.

For all these reasons, National Nurses United respectfully urges this Court to uphold the Fifth Circuit decision in this matter.

Respectfully submitted,

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