



1           IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -  
3   HELIX ENERGY SOLUTIONS GROUP,           )  
4   INC., ET AL.,                                )  
5                                    Petitioners,            )  
6                                    v.                                ) No. 21-984  
7   MICHAEL J. HEWITT,                        )  
8                                    Respondent.                )  
9   - - - - -  
10                                   Washington, D.C.  
11                                   Wednesday, October 12, 2022  
12  
13           The above-entitled matter came on for  
14   oral argument before the Supreme Court of the  
15   United States at 11:45 a.m.  
16  
17   APPEARANCES:  
18   PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; on  
19       behalf of the Petitioners.  
20   EDWIN SULLIVAN, ESQUIRE, Houston, Texas; on behalf of  
21       the Respondent.  
22   ANTHONY A. YANG, Assistant to the Solicitor General,  
23       Department of Justice, Washington, D.C.; for the  
24       United States, as amicus curiae, supporting the  
25       Respondent.

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1 P R O C E E D I N G S

2 (11:45 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 21-984, Helix Energy  
5 Solutions Group versus Hewitt.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONERS

9 MR. CLEMENT: Mr. Chief Justice, and  
10 may it please the Court:

11 Respondent earned over \$200,000 a year  
12 and concededly performed executive functions in  
13 supervising a dozen or more workers. He  
14 likewise was guaranteed at least \$963 in any  
15 week in which he worked a minute. He is thus  
16 exempt from the overtime laws under the  
17 specialized streamlined exemption for highly  
18 compensated workers set forth in Section 601.

19 Respondent nonetheless insists that  
20 he's entitled to hundreds of thousands of  
21 dollars in overtime because his substantial pay  
22 was calculated based on a day rate and, in many  
23 weeks, his total compensation was much larger  
24 than his guaranteed pay and, thus, he flunked  
25 the test of Section 604(b) and its reasonable

1 relationship test.

2 But Section 601 incorporates only the  
3 salary basis test of Section 602 and not the  
4 separate minimum guarantee plus extra rules of  
5 Section 604. Indeed, at the very moment that  
6 Section 601 was promulgated, the agency broke  
7 apart Section 602 and Section 604.

8 Section 601 has never incorporated  
9 this minimum guarantee plus extra rules of  
10 Section 604 for very good reason. Section 601  
11 itself addresses the questions of extras on top  
12 of the minimum guarantee and addresses them in  
13 terms that are both duplicative of Section  
14 604(a) and contradictory of Section 604(b).

15 In particular, the -- Section 601  
16 authorizes total compensation to dwarf the  
17 minimum guarantee in terms that Section 604(b)  
18 would deem unreasonable. Worse still, Section  
19 604 looks unfavorably on compensation in excess  
20 of the minimum guarantee, while Section 601  
21 looks at the same thing, compensation in excess  
22 of the minimum guarantee, and says that's  
23 precisely what makes you highly compensated and,  
24 therefore, exempt.

25 Respondent's position would put the

1 regulations on a collision course. It would  
2 ignore the streamlined nature of 601. And it  
3 would divorce the regulations from the statutory  
4 text. The Court should reverse.

5 JUSTICE THOMAS: Mr. Clement, the  
6 government says that its starting point is  
7 whether or not this is -- you've established  
8 that you -- that the Respondent is -- or -- is  
9 salaried. And he argues that he does not  
10 receive his compensation on a salary basis.

11 I guess the government's argument is  
12 that once you make that determination, you're on  
13 an entirely different track from being on a wage  
14 basis. And although your case -- in this case,  
15 Respondent makes quite a bit of money, we --  
16 you're suggesting that we can bypass determining  
17 whether or not he is on a salary basis.

18 So, one, is being -- that  
19 determination of being on a salary basis a sine  
20 qua non of bypassing all of these regs that  
21 you're talking about? If not, how do we  
22 establish that your highly paid -- why don't we  
23 just consider your highly paid Respondent here  
24 to simply be a wage earner but a highly paid  
25 wage earner?

1           MR. CLEMENT: So, Justice Thomas, the  
2 way I'd respond to that is that Section 601 does  
3 not require a worker to be a salaried worker or  
4 to get any particular -- sort of like be in  
5 general or mostly paid on a salary basis. It's  
6 very specific. It says the total annual  
7 compensation has to include at least \$455 a week  
8 on a fee or salary basis.

9           So that requires you to look at  
10 Section 602, but then, to figure out how much  
11 you get on a salary basis, Section 602 doesn't,  
12 again, tell you whether you're mostly a salaried  
13 worker or a salaried worker in the abstract.  
14 It's very specific. And the test is really,  
15 what is the amount that you receive in any week  
16 in which you work at least one minute?

17           And for this worker, that was \$963 or  
18 more, and that \$963 was a guarantee. So, if you  
19 work any -- even a minute in a week, you're  
20 going to get \$963. That's a predetermined  
21 amount. That satisfies what -- the only  
22 requirement vis-a-vis a salary basis in Section  
23 601, which is that your total annual  
24 compensation include at least \$455 on a fee or  
25 salary basis. So we can --

1 JUSTICE JACKSON: Counsel, I -- I  
2 don't read the regulation that way. So can you  
3 -- can you help us to understand why you are  
4 saying that the amount is the only relevant  
5 marker of the applicability of 601?

6 I thought it said that the person's  
7 total annual compensation must include at least  
8 \$455 per week paid on a salary or fee basis.  
9 And then we have a separate regulation, 602,  
10 which I thought at the beginning you conceded  
11 applied. I -- maybe I misheard you, but I  
12 thought you said that 601 incorporated 602's  
13 salary basis test. Am I right about that?

14 MR. CLEMENT: You're right about that,  
15 Justice Jackson.

16 JUSTICE JACKSON: All right. And so  
17 salary basis, I think, then becomes the  
18 question. And what it means to be on a salary  
19 basis under 602 is not just some sort of minimum  
20 level of compensation. In fact, the \$455, I  
21 think, doesn't even appear in that section. In  
22 fact, when it talks about what it means to be  
23 paid on a salary basis, it appears to be looking  
24 at the predictability and the regularity of the  
25 payment, not the amount.



1 MR. CLEMENT: So -- but -- but the  
2 predictability it's looking for is the -- is the  
3 guaranteed amount that you know you'll get paid  
4 at a minimum if you work a minute in a week.

5 JUSTICE JACKSON: No. I don't think  
6 so. And let me tell you why. Isn't the  
7 predictability that they're talking about and  
8 the regularity that they're talking about the  
9 total amount that you make in a week? So that,  
10 for example, a salaried employee is one who you  
11 could conceive of as being eligible for direct  
12 deposit, that it's someone who knows at the end  
13 of every week the predetermined amount that  
14 they're going to make.

15 Whereas Mr. Hewitt -- whatever his  
16 name is -- not Hewitt -- what's your --

17 MR. CLEMENT: It is Hewitt.

18 JUSTICE JACKSON: Hewitt, okay.  
19 Whereas Mr. Hewitt, at the end of the week,  
20 doesn't know. One week, it could be the minimum  
21 amount because he worked a minute. Another  
22 week, it could be much more than that because he  
23 worked more than a minute. Why is that not the  
24 way we should think about salary basis given  
25 this regulation?

1           MR. CLEMENT: Because, with all due  
2 respect, the regulation is quite specific that  
3 there's a difference between salary, which is a  
4 concept, and compensation. And 602 itself is  
5 absolutely specific that the compensation --  
6 that the salary can be all or part of the  
7 employee's compensation.

8           So this is, with all due respect, not  
9 a provision that's trying to say we want a -- a  
10 steady stream of your top-line income over the  
11 course of the year. What it's concerned about  
12 is your bottom-line inquiry, your bottom-line  
13 income. So all it asks you is, if you work a  
14 minute, what are you guaranteed to get that  
15 week? And if that amount is over 455, then --  
16 which -- and I -- and I grant you, 602 itself  
17 doesn't tell you the level, but that comes right  
18 from 601.

19           JUSTICE KAVANAUGH: Your --

20           MR. CLEMENT: And 601 tells you that  
21 what you're looking for is not whether the  
22 employee gets most of his compensation on a  
23 salaried basis or the lion's share of his or her  
24 compensation on a salaried basis. It's asking  
25 you a single question, does the total annual

1 compensation include at least \$455 on a salary  
2 basis? And the answer for Respondent is yes  
3 because every week in which he worked he knew at  
4 the beginning of the week that he was going to  
5 get at least \$963.

6 And, with all due respect, the  
7 regulation doesn't ask for stability above that.  
8 And to the extent --

9 JUSTICE KAVANAUGH: Your -- your point  
10 is the two words "or part" in 602. If it said  
11 constituting all of the employee's compensation,  
12 then you would -- that would be different?

13 MR. CLEMENT: Absolutely, Justice  
14 Kavanaugh.

15 JUSTICE KAVANAUGH: But "or" -- "or  
16 part" is critical to your 602 argument?

17 MR. CLEMENT: It is critical, but it  
18 doesn't stand alone, of course, because 601  
19 itself draws the distinction between  
20 compensation, total annual compensation, and  
21 only \$455 a week has to be paid on a salaried  
22 basis. And that's very important because, if  
23 you multiply 455 by 52, that gets you a number  
24 less than \$24,000.

25 JUSTICE JACKSON: Well, why doesn't

1 that "or part" reference other things that could  
2 be added? I mean, we have this other concept  
3 happening in the regulation about, you know,  
4 your sort of predetermined amount, that would be  
5 your salary, plus other bonuses and things that  
6 are coming in.

7 I just don't understand why "or part"  
8 eviscerates the sort of common-sense  
9 understanding of the distinction between  
10 salaried workers being those who have the -- a  
11 steady stream of predetermined amounts week to  
12 week versus daily workers or shift workers or  
13 hourly workers, whose weekly amounts can vary  
14 dramatically.

15 And I think that's what -- the  
16 Department of Labor cared not only about the  
17 minimum amount I would think in this EAP  
18 regulation, the way it's set up, but also about  
19 this predictability, because you have -- 455 is  
20 a -- is -- is not a very high number in terms of  
21 people who would be exempted. So it seemed to  
22 me from the way that this is constructed what  
23 they're trying to do is make sure that there's a  
24 steady stream of income coming in no matter how  
25 much you work for this category of workers.

1           MR. CLEMENT: So let me say this. I  
2 think that might be one of the purposes behind  
3 604(b), but it's not one of the purposes behind  
4 602, and it is demonstrably not the purpose  
5 behind 601 because, under 601, you're right,  
6 \$455 a week guaranteed isn't that much. It's  
7 \$24,000 a year. So the prototypical worker who  
8 qualifies under the high compensation exemption  
9 under 601 is going to make three-quarters more  
10 than that or more.

11           And all of that, as the regulation  
12 provides, can be additional non-discretionary  
13 income. So they are decidedly not concerned  
14 under 601 about the highly paid workers for  
15 evening it out over the year.

16           JUSTICE JACKSON: But what about 600?  
17 600 has the same 455 level. So you -- you're  
18 now suggesting that 601 is distinguishing highly  
19 compensated at the 455 level, but I see that in  
20 600, which is not in the highly compensated. So  
21 it seems to me they weren't making a distinction  
22 about the minimum amount.

23           MR. CLEMENT: Well, I -- I -- they  
24 were making a distinction about it for 601  
25 purposes. And 601 doesn't incorporate just 600.

1 It's got its own language. It's slightly  
2 different. I'm not going to make a big deal out  
3 of the difference, but 600 says that the  
4 person's salary is -- their compensation is  
5 they're compensated on a salary basis, where 601  
6 simply says it includes \$455 a week paid on a  
7 salary basis.

8 But what's so significant about 601  
9 and sets it apart is that the prototypical  
10 worker who is covered by the exemption is making  
11 \$100,000 or more. Yet all the regulators cared  
12 about is that the base be \$24,000.

13 JUSTICE SOTOMAYOR: Mr. Clement --

14 JUSTICE KAGAN: Well, Mr. Clement --

15 JUSTICE SOTOMAYOR: Mr. Clement,  
16 salary basis. I think of salary basis as, what  
17 am I paid for the week? I think of fee, what am  
18 I given as an amount? I think of hourly or  
19 shift in their ordinary meaning. What am I paid  
20 for the hour? What am I paid for the day?

21 Your reading of this takes out basis  
22 completely. You're -- you're thinking that if I  
23 work an hour and get the minimum, that's my  
24 salary. But I read 602 and it says, "receives  
25 each pay period on a weekly or less frequent

1 basis a predetermined amount constituting all or  
2 part of the employee's compensation, which  
3 amount is not subject to reduction because of  
4 variations in the quality or quantity of the  
5 work performed."

6 So you're requiring a hour of work or  
7 a minute of work, but that's not what the  
8 regulation says. The regulation says what are  
9 you paying me for the week.

10 MR. CLEMENT: Well, what it's saying  
11 is that it's a predetermined amount that can't  
12 be subject, as you say, to reductions for the  
13 quality or the quantity of the work. And that  
14 perfectly describes the \$963 that this worker  
15 was guaranteed in a week.

16 Now he could make more on top of that,  
17 but that's not the concern of this regulation.

18 JUSTICE SOTOMAYOR: So how do we --

19 MR. CLEMENT: That's additional  
20 compensation.

21 JUSTICE SOTOMAYOR: What do we do with  
22 the second part of purpose of 602, which is to  
23 ensure -- I thought the reason for 602 was to  
24 ensure that an employee who wanted to take a  
25 Friday afternoon off wouldn't be penalized or

1 wanted to do something else or didn't want to  
2 start on Monday but on whatever day they wanted  
3 to start.

4 These employees don't have that  
5 discretion. They're not paid for any hour they  
6 take off. They're not paid for any part of a  
7 day they miss. So how does that fit the  
8 question of a salaried basis?

9 MR. CLEMENT: Again --

10 JUSTICE SOTOMAYOR: Or how does that  
11 fit the definition of a salaried basis?

12 MR. CLEMENT: -- I think -- with --  
13 with all due respect, I think the problem is  
14 that -- that -- that 601 doesn't ask is this  
15 employee primarily paid on a salary basis. It  
16 doesn't ask whether they can take a day off and  
17 how it will affect their way.

18 JUSTICE SOTOMAYOR: But you tell --

19 MR. CLEMENT: It asks --

20 JUSTICE SOTOMAYOR: -- you told me 601  
21 says you have to fit 602, that 602 is  
22 incorporated.

23 MR. CLEMENT: But -- but only for a  
24 very limited purpose, which is to figure out  
25 whether total annual compensation includes at



1 least \$455 a week paid on a salary basis. And  
2 then, if you go through 602, 602 does not  
3 address the concern that your salary -- your  
4 guaranteed amount is too low vis-à-vis your  
5 total compensation. That's addressed if at all  
6 only in 604.

7 JUSTICE SOTOMAYOR: Exactly.

8 MR. CLEMENT: Right.

9 JUSTICE SOTOMAYOR: And so what you're  
10 asking us to do is take an hourly wage earner  
11 and take them out of 604 -- and take them out of  
12 604, which is the only provision that deals with  
13 someone who's not paid on a salary basis.

14 MR. CLEMENT: So, with -- with  
15 respect, I'm not asking you to do anything in  
16 particular with an hourly worker. The -- the --  
17 the people who our position will affect --

18 JUSTICE SOTOMAYOR: This -- this guy  
19 is an hourly worker.

20 MR. CLEMENT: Well, he's a daily  
21 worker.

22 JUSTICE SOTOMAYOR: Daily or hourly --

23 MR. CLEMENT: And -- and -- and --

24 JUSTICE SOTOMAYOR: -- but he's not --  
25 he's not a weekly worker.

1 MR. CLEMENT: His pay -- his pay --

2 JUSTICE SOTOMAYOR: Meaning only if he  
3 decides to stay that way.

4 MR. CLEMENT: -- his pay is calculated  
5 on a daily basis, but our position affects two  
6 classes of people just to be clear. There's a  
7 class of people, and Respondent is prototypical,  
8 who have a day rate that's above the weekly  
9 minimum that's specified in 601.

10 There's another group of worker that's  
11 really the second half of the circuit split, and  
12 this is the Anani case from the Second Circuit  
13 and the Litz case from the First Circuit, and  
14 these are individuals whose pay is calculated on  
15 an hourly basis, but they're given a minimum  
16 guarantee on top of that, a thousand dollars,  
17 \$2,000, whatever it is.

18 And I think, if you go through the  
19 regulation and look at what 602 requires, you  
20 would see that whether it's a person whose daily  
21 rate is above the weekly minimum or somebody who  
22 gets that kind of weekly guarantee, they satisfy  
23 the terms of 602.

24 Again, 602 doesn't say are you  
25 generally paid in a salary basis. It has a

1 definition of salary basis that allows you to  
2 answer the question that's relevant under 601 --

3 JUSTICE BARRETT: Which is the --

4 MR. CLEMENT: -- how much --

5 JUSTICE BARRETT: -- except --

6 JUSTICE KAGAN: So I'm not sure I get  
7 it, Mr. Clement. So 601 sends you to 602  
8 because 602 tells you what salary basis means.  
9 That we can all agree on.

10 MR. CLEMENT: Okay. But can I just  
11 stop you to say --

12 JUSTICE KAGAN: Not really.

13 MR. CLEMENT: -- but it's sent --  
14 okay.

15 JUSTICE KAGAN: So what does salary  
16 basis mean according to 602? And 602 is a  
17 clunker of a sentence, right, so you have to,  
18 you know, read it pretty carefully, but there's  
19 this language here which says on a weekly or  
20 less frequent basis.

21 And the question is, you know, should  
22 we understand it the way I think Justice  
23 Sotomayor was understanding it is, is the  
24 predetermined amount calculated on a weekly or  
25 less frequent basis? In which case he doesn't

1 get it because -- because his pay is calculated  
2 on a daily basis.

3 Or does it mean something else? And,  
4 if so, what else does -- could it mean given  
5 this language that's right here in Section 602  
6 starting us off that the predetermined amount  
7 should be on a weekly or less frequent basis?

8 MR. CLEMENT: So, Justice Kagan, it --  
9 the -- the -- the -- the West -- the -- the sort  
10 of frequency of the basis or week or -- is not  
11 modifying "calculation," which is not a word  
12 that appears in 602 at all. It's modifying the  
13 word "received," which happens to dovetail  
14 perfectly with the word in 601, which is paid on  
15 a salary basis.

16 JUSTICE KAGAN: Yeah, so I think --

17 MR. CLEMENT: And so what --

18 JUSTICE KAGAN: -- that that's what  
19 this depends on, is -- is what is the weekly  
20 basis modifying. Is it modifying the  
21 predetermined amount or is it modifying the  
22 receipt? That seems right to me.

23 MR. CLEMENT: Well, can --

24 JUSTICE KAGAN: And -- and, you know,  
25 this is a clunker of a sentence, but I would

1 think, given all the different ways that this  
2 regulation uses the idea of weekly basis, daily  
3 basis, you know, et cetera, et cetera, hourly  
4 basis, et cetera, et cetera, that what this  
5 regulation is talking about is how is your pay  
6 calculated.

7 Is it calculated on a daily basis? In  
8 which case you can still be exempted because you  
9 can go to 604 and be exempted. But you don't  
10 fit under Section 604.

11 So, if -- if a daily basis, you can be  
12 exempted under Section 604. 602 says here's the  
13 -- here's -- it's an exemption for people whose  
14 pay is on a weekly basis, and you don't fit that  
15 either because Mr. Hewitt's pay is not on a  
16 weekly basis. So you're out of 602. You're out  
17 of 604. You're out.

18 MR. CLEMENT: So a funny thing happens  
19 when you go to 604, though, which is it has this  
20 phrase "may be computed on an hourly, daily, or  
21 a shift basis." And so I think, if you just  
22 look at 602 alone, "received" means "received"  
23 and not "calculated" or "computed."

24 But I think that inference is strongly  
25 supported -- this is not an agency that didn't

1 know how to use the words "computed" or  
2 "calculated." They used that in 604. So I  
3 don't think it's a fight between whether "on a  
4 weekly basis" modifies "predetermined amount" or  
5 "received." It's really their position requires  
6 you to stick an entirely different word in the  
7 sentence, which is "calculated."

8 JUSTICE KAVANAUGH: How often did he  
9 receive pay?

10 MR. CLEMENT: He received pay on a  
11 biweekly basis, so every other week. And --

12 JUSTICE KAVANAUGH: And in that  
13 biweekly, how much was he -- what was the  
14 minimum he would receive?

15 MR. CLEMENT: He knew he would receive  
16 -- if he worked two weeks during that period, he  
17 knew he would receive at least \$963 times two.

18 JUSTICE KAVANAUGH: Yeah, 1926.

19 MR. CLEMENT: And if he only worked  
20 one, he'd know he'd receive 963. And the  
21 regulation is explicit, which I think also  
22 underscores that it's not a stability  
23 regulation. The regulation is explicit, if you  
24 don't work a minute in a week, it's fine for you  
25 to get nothing.

1 JUSTICE KAGAN: If you tell a client,  
2 Mr. Clement, that he has to pay you on an hourly  
3 basis, are you -- is -- are you referring to  
4 your hourly billable rate, or are you saying  
5 that the client has to give you a check every  
6 hour?

7 MR. CLEMENT: Well, I -- I would  
8 probably mean that he needs to ultimately pay  
9 me, but if I tell him I need --

10 JUSTICE KAGAN: Right.

11 MR. CLEMENT: -- but if I told him --

12 JUSTICE KAGAN: So it has nothing to  
13 do with --

14 MR. CLEMENT: -- I need to receive --

15 JUSTICE KAGAN: -- it has nothing to  
16 do with the receipt every hour. It has  
17 something to do with, in the end, when he pays  
18 you, every two weeks, every month, every year,  
19 it's going to be on an hourly basis.

20 MR. CLEMENT: Not if I --

21 JUSTICE KAGAN: That's exactly what  
22 this regulation says.

23 MR. CLEMENT: If -- if -- if I'm  
24 providing legal services to somebody who I think  
25 is on the verge of bankruptcy, I might well tell

1       them, look, I need to receive the -- the money  
2       every day. So I think the key word is  
3       "receive."

4                   JUSTICE KAGAN: Well, you might tell  
5       them that, but then you would say considerably  
6       more.

7                   MR. CLEMENT: No, no. I would say the  
8       word --

9                   JUSTICE KAGAN: You would not just say  
10      --

11                  MR. CLEMENT: -- I would use the word  
12      "receive."

13                  JUSTICE KAGAN: -- pay me on an hourly  
14      basis. You would say, really, I mean that you  
15      have to give me a check on an hourly basis. And  
16      if you don't say that, everybody knows that an  
17      hourly basis means you're getting paid X  
18      dollars, you fill in the blank, you know, per  
19      hour.

20                  MR. CLEMENT: I -- I respectfully  
21      disagree. I think you're -- you're -- you're  
22      giving insufficient weight to the word  
23      "receive." If I tell the client I need to  
24      receive on an hourly basis \$600, boy, I think --  
25      I mean, I'm probably not going to get that



1 client because that's a pretty, you know, tough  
2 demand. But I think, if I use the word  
3 "receive," I'm making clear I need to receive  
4 it.

5 And, again, this dovetails perfectly  
6 with 601 because 601 says paid on -- on -- on a  
7 weekly or fee -- rather, on a salary or fee  
8 basis. So, from the perspective of the  
9 employer, it's what you pay. From the  
10 inspective -- perspective of the employee, it's  
11 what you receive.

12 JUSTICE JACKSON: Mr. Clement, can I  
13 ask you about the relationship between 601 and  
14 the rest of the EAP exemption regulation? Your  
15 question presented suggests that it's  
16 stand-alone and you use that term.

17 And I was a little concerned about it  
18 because, when I look at the structure of the  
19 entire regulation, when you start at the  
20 beginning, at its title, it says this is  
21 defining and delimiting the exemptions for  
22 executive, administrative, professional,  
23 computer, and outside sales employees. It  
24 doesn't say highly compensated employees.

25 When you look at the subparts of the

1 regulation, they have a subpart for executive, a  
2 subpart for administrative, a subpart for  
3 professional, a subpart for computer. There's  
4 no subpart for highly compensated.

5 And the government says highly  
6 compensated is actually just a subset of these  
7 other categories. It is the fact that, you  
8 know, a person who is in each of these other  
9 categories, with the exception of computers, has  
10 to be paid on a salary basis. And some of those  
11 people are going to be making much more than the  
12 \$455 minimum. Those are the ones we'll call  
13 highly compensated for the purpose of 601 and  
14 allow them to have this shortcut through.

15 So can you talk a little bit about why  
16 it is -- first of all, does Mr. Hewitt satisfy  
17 any of the other parts of this regulation? You  
18 hone right in on 601. And what is -- how are we  
19 to understand that this is really about the kind  
20 of employee who, in my view, would have the  
21 regularity and predictability of a salary versus  
22 what some people have called the kind of "eat  
23 what you kill" dynamic, that you only get paid  
24 when you work and not a dollar more?

25 MR. CLEMENT: So, Justice Jackson, I

1 think -- first of all, I think you're right to  
2 say that the highly compensated workers'  
3 exemption is one way to qualify for the  
4 statutory exemption for executive,  
5 administrative, and professional employees, and  
6 you know that from the structure of the statute.

7 I mean, you know, ultimately, there's  
8 a statutory exemption, but there is pretty  
9 clearly from the regulations two different ways  
10 to qualify for the statutory EAP exemption. One  
11 way is to do it through the executive exemption,  
12 the administrative exemption, and the  
13 professional exemption, which is 551.100,  
14 551.200, 551.300.

15 But there is an alternative way to  
16 qualify for the EAP exemption under the statute,  
17 and that is Section 601, and it is the thing  
18 that is streamlined and different.

19 Now we know that from the text of the  
20 regulation itself, which talks about being  
21 exempt under this -- under this section.

22 JUSTICE JACKSON: Yeah.

23 MR. CLEMENT: And we know it from that  
24 very -- if you go back to the very beginning,  
25 551.0, when it explains how this whole thing

1 works, it goes through the various subparts, and  
2 then it describes subpart G, which is about  
3 salary, and it says that generally tells you  
4 what the salary requirements are, but then it  
5 also provides an exemption for highly  
6 compensated workers.

7 JUSTICE JACKSON: Okay. But let me --

8 JUSTICE BARRETT: Mr. Clement --

9 JUSTICE ALITO: I have --

10 JUSTICE JACKSON: Go ahead.

11 JUSTICE ALITO: -- I have two  
12 questions. Would you answer the argument on the  
13 other side that the interpretation that you are  
14 offering us would have very deleterious effects  
15 on lower-compensated workers?

16 MR. CLEMENT: So I don't think this  
17 would have any deleterious effects on  
18 lower-compensated workers at all.

19 JUSTICE ALITO: Your -- your  
20 interpretation of 602?

21 MR. CLEMENT: Yeah. It would not have  
22 any negative effects on lower-compensated  
23 workers because, if you're a lower-compensated  
24 worker, you would still have to satisfy 604.  
25 And our -- our principal argument, really the

1 question presented here, is that if you're a  
2 highly compensated employee, all you have to  
3 satisfy is 602 and you don't have to go to 604.

4 So there's no effect here, really, on  
5 lower-compensated workers at all. They still  
6 have to comply with Section 604. And -- and I  
7 think, to the contrary, the problem with the  
8 government's position here is, in their own reg,  
9 in 601(c), it says that high compensation is a  
10 strong indicator of exempt status. But the  
11 government seems to forget about that.

12 But the point is, I mean, if you look  
13 at 604(b), it's -- it's a somewhat puzzling  
14 provision because it's a provision that says  
15 that we don't want you to make too much money in  
16 addition to your minimum guarantee. So, if  
17 you're guaranteed by salary \$24,000 a year, if  
18 you make up to 12,000 in extra, that's okay.  
19 But, if you can make \$24,000 in extra, that's  
20 not okay.

21 And that's puzzling enough on its face  
22 to me because I personally prefer to make the  
23 extra 24 instead of the extra 12, but -- but I  
24 guess what they're concerned about there is  
25 there may be some misclassification with

1 lower-compensated workers and so they need to  
2 police that.

3 But the reason you don't need to  
4 police that for highly compensated workers is  
5 what the government itself tells you on the face  
6 of the reg, which is high compensation is a  
7 strong indicator of an exempt status. Okay.

8 JUSTICE ALITO: So second --

9 JUSTICE BARRETT: But --

10 JUSTICE ALITO: -- second question.

11 At the end of its brief, the government says,  
12 look, you can -- you know, they -- they say we  
13 understand that the -- the situation of  
14 employees who work out on these oil rigs is --  
15 is different, but you could -- you could just  
16 alter the pay structure, it's pretty easy to  
17 alter the pay structure, to avoid the results  
18 that you want to avoid here.

19 Are they right about that?

20 MR. CLEMENT: I mean, they -- they are  
21 right that it is possible to change the pay  
22 structure, but I think it's revealing. I mean,  
23 one of the options they give us to change the  
24 pay structure is we have to up the minimum  
25 guarantee to something like \$4,000 an hour so

1 that the minimum guarantee has a certain  
2 reasonable relationship to the additional  
3 compensation.

4 But if there's one thing I thought  
5 that the regs were pretty clear about is that  
6 all the total annual compensation had to include  
7 was \$455 per week paid on a salary basis, not  
8 \$4,000 paid on a salary basis.

9 So I think their alternative way of  
10 doing this just shows that they are really  
11 deviating from what the regulation applies.  
12 And, of course, nothing we can do prospectively  
13 to change things is going to avoid massive,  
14 massive windfalls. And I --

15 JUSTICE SOTOMAYOR: Mr. Clement, how  
16 does your view of this deal with nurses? We got  
17 a brief from them to say that your view would  
18 basically destroy the healthcare industry  
19 because nurses are already kept on for more than  
20 12 hours, often 12 hours a shift, days on end,  
21 because there's a shortage of them.

22 But your view is, well, they're given  
23 a daily rate of X and hourly after that. That  
24 would equal 973 and that's okay. They're making  
25 the minimum. Correct?

1 MR. CLEMENT: Well, I -- I think they  
2 would also have to satisfy the other parts of  
3 the -- the sort of short form test, but if  
4 there's somebody who satisfies every part of the  
5 exemption, then I don't think that --

6 JUSTICE SOTOMAYOR: So how does this  
7 promote --

8 MR. CLEMENT: I mean, there's no --

9 JUSTICE SOTOMAYOR: -- how does this  
10 promote the second part of the FLSA, which  
11 was -- our case law has said a major goal of the  
12 FLSA was preventing overwork and the dangers of  
13 overwork. This was crucial to the definition of  
14 what a salary was, an employee was, but it also  
15 promotes worker safety and well-being.

16 Hard to imagine how forcing someone to  
17 work 84 hours a week 28 days straight promotes  
18 that part of the FLSA when you're not giving  
19 them a guaranteed minimum.

20 MR. CLEMENT: Well --

21 JUSTICE SOTOMAYOR: Or you're not  
22 giving them a minimum wage in the way 604 is  
23 looking at it.

24 MR. CLEMENT: So, obviously, we think  
25 that -- you're right, we're not giving them --



1 we're not satisfying 604. We are giving them a  
2 minimum weekly guarantee, but I think the  
3 critical thing is to go back to the statute. I  
4 mean, yes, the statute is concerned about sort  
5 of overwork or sort of not dividing jobs up for  
6 certain workers.

7           And then the statute tells us who's  
8 exempt, and what the statute says is bona fide  
9 executive, administrative, and professional  
10 employees. And what's so puzzling to me about  
11 this case is my friends on the other side  
12 concede that the Respondent is an executive.  
13 And so, under the statute, this is the easiest  
14 case ever.

15           CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17           Justice Thomas?

18           JUSTICE THOMAS: Just a minor  
19 question, Mr. Clement. Why is this case simply  
20 under the regs? There's no reference for the  
21 most part in the arguments to the underlying  
22 statute.

23           MR. CLEMENT: So, Justice Thomas, I  
24 mean, there's a circuit split on the  
25 interpretation of the regs.

1 JUSTICE THOMAS: Yeah.

2 MR. CLEMENT: We got circuit -- we got  
3 -- we got cert granted on the circuit split. We  
4 wanted to be faithful to that. So we addressed  
5 the regs. We think we're right on the regs.

6 But we also think that interpreting  
7 the regs, one of the first things you do is look  
8 at whether or not one interpretation of the regs  
9 is more consonant with the other underlying  
10 statute than the other interpretation of the  
11 regs. But, at bottom, this case is a statutory  
12 case and our very first answer -- this is Joint  
13 Appendix page 33 -- we said he's exempt under  
14 the statute.

15 And so there -- there isn't sort of a  
16 regulatory exemption that's separate from the  
17 statutory exemption. So, at the end of the day,  
18 I think you always want to look back and see, is  
19 our -- is our interpretation better and more  
20 consonant with the statute than theirs?

21 And the answer is absolutely because  
22 we're using sort of salary as a way to screen  
23 people in to the exemption who are otherwise  
24 concededly executives, which is all the statute  
25 requires.

1           They're using the regs to say that  
2           somebody who is concededly an executive and  
3           concededly therefore satisfies the statutory  
4           term is nonetheless not exempt because of the  
5           details not even of how he was paid or how he  
6           received his pay but how his pay was calculated.  
7           Where is that in the statute?

8           JUSTICE THOMAS: Thank you.

9           CHIEF JUSTICE ROBERTS: Justice Alito?  
10          Justice Sotomayor?  
11          Justice Kagan?

12          JUSTICE KAGAN: You know, just to pick  
13          up on that, it -- it -- it seems to me that if  
14          there is a statutory argument here, your test  
15          flunks it just as well as the government's does  
16          because the statutory argument would go  
17          something like this. The statute doesn't really  
18          care about how people are paid.

19          So the government says: Well, the  
20          regs do care about how people are paid and the  
21          government tries to justify how that fits with  
22          the statute. But you care just as much about  
23          how people are paid under 602. You're just  
24          saying a different -- you know, you're making  
25          different arguments about how people are paid.

1           But your argument about how people are  
2     paid fits with the statute just as poorly, if it  
3     is poorly, as the government's does.

4           MR. CLEMENT:  So, Justice Kagan, I'm  
5     happy to have this case decided just on the  
6     statute because my friends on the other side  
7     have conceded that we perform executive  
8     functions, and they did that for both, purposes  
9     of both exemptions, not just for the short form  
10    one.  So, if this is about the statute, we win.

11           As to whether our position is more  
12    consonant with the statute, I say it is because  
13    we still ultimately focus on the statutory  
14    phrase.  We just have sort of a screening that  
15    basically says, look, if you make more than  
16    this, we're going to give you, like, a quick  
17    look.

18           But -- but we never say, if we don't  
19    like the way you're paid, you are forbidden from  
20    getting the statutory exemption no matter how  
21    highly you are paid and no matter how much you  
22    are an executive, administrative, or  
23    professional.  And that's -- that's the burden  
24    of the other side's argument.  And I think, if  
25    you care about the statute, it lacks --

1 JUSTICE KAGAN: Did you -- did you  
2 forfeit the statutory argument?

3 MR. CLEMENT: Absolutely not, Your  
4 Honor. And I don't see how -- I'm -- I'm trying  
5 -- you know, I'm using the argument to try to  
6 say we have the better interpretation of the  
7 regs.

8 JUSTICE KAGAN: Because I don't think  
9 the briefs at all mentioned the statutory  
10 argument below. You know, there's like half a  
11 sentence in a supplemental en banc brief, but,  
12 other than that, I think that this whole  
13 argument about whether the focus on pay is  
14 consistent with the statute was not raised.

15 MR. CLEMENT: I -- I -- I think it was  
16 raised. We show you where it was raised in our  
17 reply brief. I mean, but you already said,  
18 well, it's a sentence, so we cited the  
19 sentences.

20 I mean, so we're not really that far  
21 apart. But I think we did enough. But, in all  
22 events, again, what we're asking you ultimately  
23 to do -- I mean, I'm happy to win this case on  
24 the statute, and that is ultimately what the  
25 case is about, but we have argued to a

1 fare-thee-well that we have the better  
2 interpretation of the regulations, and one  
3 metric of that is our interpretation of the  
4 regulations does not divorce the regulations  
5 from the statute.

6 JUSTICE KAGAN: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Gorsuch?

9 JUSTICE GORSUCH: You're not going to  
10 like these questions any better than those. I  
11 do want to follow up on that.

12 I actually think you probably have a  
13 pretty good argument on the statute, which  
14 focuses on job function and whether it's  
15 executive or administrative, and I kind of took  
16 the dissent in the Fifth Circuit to focus on the  
17 fact that tool-pushers are administrators and  
18 that's just the nature of their job.

19 And -- and I think that's probably all  
20 right. But the regulations are all about pay,  
21 how you're paid, the mechanics of pay. And  
22 we've been down to the minutiae of that for the  
23 last 40 minutes, and I just don't see that  
24 argument presented, and I just want to give you  
25 one last shot on why it isn't forfeited in this

1 case.

2 MR. CLEMENT: So it's not forfeited in  
3 this case, Justice Gorsuch, because the case has  
4 always been about whether ultimately my -- you  
5 know, the -- the Respondent is exempt under the  
6 statute.

7 JUSTICE GORSUCH: No, no. The --  
8 the -- the question we granted cert on was  
9 whether you had to satisfy, what is it, 601 and  
10 604 or both?

11 MR. CLEMENT: Right.

12 JUSTICE GORSUCH: That's what we  
13 granted cert on.

14 MR. CLEMENT: Absolutely. And I'm not  
15 trying to pull a bait and switch. I'm just  
16 telling you, at bottom, the case is always about  
17 the statutory exemption. Where the circuits  
18 split and what, you know, we haven't run away  
19 from is the circuits are split as to whether 604  
20 essentially conditions and modifies 601.

21 JUSTICE GORSUCH: Right.

22 MR. CLEMENT: We don't think it does  
23 for all the reasons we put forth elaborately in  
24 our brief.

25 JUSTICE GORSUCH: Put that aside,

1     though.  It seems to me quite an independent  
2     question whether 601 and 604, either of them  
3     have anything to do with the statute or defy the  
4     statute, which is I think what your -- your  
5     argument might -- might otherwise have been.

6             MR. CLEMENT:  Well, here's what I  
7     think we have argued, and I think this is  
8     fairly -- our -- our argument is, if 604 is not  
9     incorporated, then 601 is more consonant with  
10    the statute than if 604 is incorporated.

11            JUSTICE GORSUCH:  Okay.  I understand  
12    that argument.  I -- I -- I -- I take -- I  
13    understand that's before us.  Okay.

14            And with respect to that, I told you  
15    you're not going to like any of these questions.  
16    You're not going to like this one either, okay?

17            The circuit split we took up was  
18    whether you needed to satisfy just 601 or both  
19    601 and 604.  Okay.  You've heard a lot of  
20    questions today about whether you even meet 601.  
21    And let's say you don't, okay?  Let's say you  
22    don't and you -- you lose right out of the  
23    starting gate, and so the circuit split isn't  
24    even implicated.

25            Your choices at that stage are either



1 to answer the 601 question adversely and send it  
2 back or to DIG. Which do you like better? I  
3 told you you weren't going to like the question.

4 MR. CLEMENT: I -- I mean, I -- I  
5 would prefer that you just answer the question  
6 because I don't think there's a basis for DIG.  
7 And I think, if you look at the cases on the  
8 other side of the circuit split, you will  
9 realize that -- that there is no difference  
10 about whether we satisfy 601 versus those cases  
11 because all that's different in those cases --

12 JUSTICE GORSUCH: No, I understand you  
13 think you're going to win on 601. I got it.

14 MR. CLEMENT: No, no.

15 JUSTICE GORSUCH: Let's say you lose  
16 on 601. Would you rather that -- would you  
17 rather to hear that answer, or would you rather  
18 a DIG?

19 MR. CLEMENT: I'd -- I'd rather hear  
20 we lose on 601, but the statutory question is  
21 still open on remand. I mean --

22 JUSTICE GORSUCH: Well, I don't know  
23 if it is or not. I mean, I -- I -- I just --  
24 you didn't raise it here. That much I'm pretty  
25 sure about.

1 MR. CLEMENT: Because there wasn't a  
2 circuit split on the statute.

3 JUSTICE GORSUCH: Yeah. No, I know.  
4 You wouldn't have gotten here. Right. I got  
5 it.

6 MR. CLEMENT: But -- but -- but, in  
7 fairness, I mean, I just -- if there's an  
8 embedded premise that somehow this is different  
9 from the First Circuit or the Second Circuit  
10 case, I do want to address that because those  
11 cases involve the -- the same basic issue, which  
12 is somebody whose pay is calculated on an hourly  
13 basis, which is a concern of 604, but have a  
14 weekly guarantee. So they're going to get at  
15 least a thousand dollars.

16 JUSTICE GORSUCH: I got -- I got that  
17 argument.

18 MR. CLEMENT: Okay. So, if -- if --  
19 if Judge Wiener is wrong too and we're wrong and  
20 -- you know, then you should tell us we're wrong  
21 --

22 JUSTICE GORSUCH: Okay.

23 MR. CLEMENT: -- and you shouldn't DIG  
24 it because there's still a circuit split.

25 JUSTICE GORSUCH: Got it. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Kavanaugh?

3 JUSTICE KAVANAUGH: On -- on the  
4 statutory point, you obviously have a strong  
5 argument that the regs are inconsistent with the  
6 statute but say it's not -- that precise  
7 question is not before us.

8 Is that being litigated somewhere?

9 MR. CLEMENT: I -- I -- I -- I think  
10 there may be a case that litigates that. I  
11 don't know all the details of it, and I don't  
12 know whether it's focused on -- it -- it may be  
13 on --

14 JUSTICE KAVANAUGH: Why is -- why is  
15 that not being litigated somewhere, I guess?  
16 Because my understanding is that there's a lot  
17 of litigation going on about this topic. And it  
18 seems a pretty easy argument to say, oh, by the  
19 way, or maybe, oh, let's start with the fact  
20 that the regs are inconsistent with the statute  
21 and the regs are, therefore, just invalid across  
22 the board to the extent they refer to salary.

23 MR. CLEMENT: Yeah, I think there --  
24 again, I don't know the details of it. I think  
25 there's a case that maybe attacks 604(b) just on

1 that basis, but it's not quite the same issue  
2 here.

3 But, you know -- and I do -- I mean, I  
4 want to be emphatic about this. I do think  
5 there's a difference for the statutory  
6 inconsistency argument with 601 as we interpret  
7 it and either 604(b) --

8 JUSTICE KAVANAUGH: Yeah, I'm not  
9 challenging that.

10 MR. CLEMENT: Yeah.

11 JUSTICE KAVANAUGH: I'm just saying,  
12 if it's not here, if the statutory argument is  
13 not here, I'm sure someone's going to raise it  
14 because it's strong.

15 MR. CLEMENT: Well, you just asked  
16 about it, so somebody definitely will raise it  
17 now --

18 (Laughter.)

19 MR. CLEMENT: -- if they weren't -- if  
20 they weren't already.

21 JUSTICE KAVANAUGH: Yeah. Well -- the  
22 second point, to follow up, you got a sentence  
23 in to Justice Alito, but if this were just  
24 change -- about how the salary is paid by these  
25 employers, if the -- going forward, you could

1 change it to weekly, and that might have some  
2 cost, but I -- I thought this whole thing was a  
3 lot of class action lawsuits with massive  
4 retroactive liability going back a lot of years.  
5 Is that --

6 MR. CLEMENT: That -- that's  
7 absolutely right. And -- and so --

8 JUSTICE KAVANAUGH: So the question of  
9 notice comes in on that, I suppose.

10 MR. CLEMENT: Exactly. And that's  
11 been a recurring consideration in this Court's  
12 cases, I mean, Christopher, Integrity Staffing,  
13 the whole line of this Court's cases. And it's  
14 one thing -- I mean, if the -- if the government  
15 had clearly articulated this position, you know,  
16 A, it probably would have been challenged on  
17 statutory grounds immediately, but, B, the  
18 industry could say okay.

19 I mean, some of this is kind of  
20 perverse because one of the things you can do is  
21 convert them all to hourly, which isn't going to  
22 make them feel like they're really executive,  
23 administrative, you know, professionals. I  
24 mean, they're probably happier the way it was.

25 But, in all events, the notice point

1 is hugely important, and it's particularly  
2 important with respect to the highly compensated  
3 employees because, if you're talking about a  
4 universe of people that are getting paid over  
5 \$100,000, if there was a foot fault on the  
6 overtime calculations, the amount of liability  
7 is going to be huge, whereas, if you're talking  
8 about the people that the statute really cares  
9 about, the people who are only making 35- or  
10 \$40,000, if you blow the overtime calculation  
11 for them, the amount of damages is going to be  
12 much smaller. So it would really be perverse  
13 here.

14           And I think, you know, obviously, this  
15 was a -- a factor in this Court's Christopher  
16 decision, when the people were making, the sales  
17 reps were making \$70,000 a year. The  
18 Respondent's making three times that much.

19           JUSTICE KAVANAUGH: Thank you.

20           CHIEF JUSTICE ROBERTS: Justice  
21 Barrett?

22           JUSTICE BARRETT: Mr. Clement, I just  
23 want to clarify the nature of the concession.  
24 You said you win on the statute because the  
25 other side has conceded that your client was

1 executive, administrative, professional.

2 Was that the concession? Because, you  
3 know, then it's clear you win under the statute.  
4 Or was the concession that he performed some  
5 administrative duties?

6 MR. CLEMENT: So, I mean, to be  
7 clear -- and -- and my friends will, I'm sure,  
8 be even clearer -- but the concession was that  
9 he satisfied all of the duties under 541.100.  
10 So -- so he satisfied the long form of the  
11 duties test for an executive. That's what the  
12 concession is.

13 Now they are going to tell you that,  
14 no, salary is a sense part of the duties test,  
15 and so you're not -- you don't really qualify  
16 for the statutory exemption, not because of your  
17 duties, but because of the way your pay was --  
18 was -- was calculated. So they're not going to  
19 say that they set -- they're not going to say  
20 they conceded to everything that they think the  
21 statutory -- the statute requires.

22 JUSTICE BARRETT: Right.

23 MR. CLEMENT: I think they've conceded  
24 to everything that I think the statutory  
25 requires because I read that statute and I don't

1 see anything about salary --

2 JUSTICE BARRETT: Okay.

3 MR. CLEMENT: -- certainly as -- not  
4 as a disqualifying factor.

5 JUSTICE BARRETT: Well, it was my  
6 understanding that the point of the regs -- and,  
7 you know, the statutory question is not before  
8 us, but that the Secretary of Labor was  
9 permitted by the terms of the statute to define  
10 what it means to be an EAP in a bona fide way so  
11 that employees -- employers don't manipulate job  
12 descriptions to evade the requirements of the  
13 Act, right?

14 MR. CLEMENT: Well, and that does  
15 bring us back to the regulatory question  
16 because, boy, is that not a concern for people  
17 that are getting paid \$100,000 and more. And  
18 why do we know that? Don't take my word for it.  
19 Look right at the regulation. It says high  
20 compensation is a strong indicator of exempt  
21 status.

22 So, I mean, you know, if you think  
23 about it, like one way to think about the  
24 question here is what's better -- for workers  
25 that are being paid \$100,000 or more, what's a



1 better indicator that they're a bona fide  
2 executive? The fact that they're being paid  
3 \$100,000 or more or the fact that their minimum  
4 guarantee is no more than two-thirds of their  
5 total compensation?

6 JUSTICE BARRETT: Well, I agree with  
7 you the result was counterintuitive here, but  
8 the -- Labor didn't exempt altogether highly  
9 compensated employees.

10 And I guess, at the regulatory point,  
11 the -- the thing that the -- that I have trouble  
12 getting past is, in 604(b), you know, putting  
13 aside 602, 604(b) refers specifically to  
14 employees' earnings being computed on an hourly,  
15 daily, or shift basis, saying no, no, no, they  
16 can still be paid; that doesn't defeat their,  
17 you know, payment on a salary basis. So it's  
18 kind of like a specific controlling the general  
19 here. This -- this specifically refers to how  
20 your client's pay was computed.

21 MR. CLEMENT: But -- but a couple of  
22 points on that. I mean, another way to look at  
23 this, the specific controls the general, is  
24 whether you're paid more than \$100,000. So I  
25 don't think you can decide this case on the

1 specific controls the general.

2 And then, if you're trying to break  
3 the tie, which specific is sort of more specific  
4 or more persuasive here, then you look to the  
5 other factors, which is the statute expressly  
6 incorporates 602 but not -- not 604.

7 602 is labeled Salary Basis. 604 is  
8 labeled Minimum Guarantee Plus Extra. That's  
9 really important because Section 601 itself  
10 doesn't address salary basis independently. It  
11 does it by cross-reference. But it does address  
12 the issue of minimum guarantee plus extra. And  
13 it duplicates 604(a) because it says minimum  
14 guarantee plus extra, hunky-dory, and then it's  
15 contradictory to 604(b) because 601 says your  
16 total compensation can totally dwarf your  
17 guaranteed compensation. You can get \$175,000  
18 in other compensation as long as you're -- you  
19 get just 455 a week.

20 So they don't care at all about the  
21 reasonable relationship. They bless an  
22 unreasonable relationship. So that's why it  
23 seems to me such a strong inference that Section  
24 601 incorporates 602 but not 604 --

25 JUSTICE BARRETT: Thank you.

1 MR. CLEMENT: -- which is the question  
2 presented.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Jackson?

5 JUSTICE JACKSON: Yes. So, Mr.  
6 Clement, I've heard you say several times in  
7 various ways that you think the regulatory  
8 scheme is about ensuring a minimum amount and  
9 not the weekly guarantee, sort of hand waving  
10 the idea of weekly guarantee. And I want to  
11 posit something quickly and then ask you about a  
12 hypo.

13 I want to posit that 602 and the  
14 salary basis is actually parallel to 604 in that  
15 they're both ensuring the minimum weekly amount.  
16 Under 602, you get it in the form of a salary,  
17 predetermined, coming to you no matter how much  
18 you work.

19 Under 604, if your setup is not that,  
20 if you're not set up predetermined amount coming  
21 in weekly, the regulation guarantees that you  
22 still have this minimum weekly amount through  
23 604, all right? That's how I see it.

24 And let me tell you why you why I  
25 think it matters, because the regularity of a

1 predetermined amount is how people pay  
2 mortgages. So I don't know or it doesn't really  
3 matter that he might get \$100,000 over the  
4 course of the year. What he has to know is how  
5 much is coming in at a regular clip so that he  
6 can get a babysitter, so that he can hire a  
7 nanny, so that he can pay his mortgage. It's  
8 about, I think, the predictability and the  
9 regularity of payment.

10           So let me ask you this hypothetical.  
11 We have a nurse who has -- does the covered  
12 functions and makes \$455 for a 12-hour shift.  
13 That's about \$38 an hour. Some weeks, this  
14 nurse is called in for one shift and makes the  
15 \$455. Some weeks, he's called in for four  
16 shifts and makes \$1820. He doesn't know --  
17 because of the way his situation is set up, he  
18 doesn't know from week to week how much he's  
19 going to make. It just depends on how many  
20 shifts his supervisor asks him to work, and all  
21 that's guaranteed is at least one shift, right,  
22 for the predetermined amount of \$455. So some  
23 weeks, he makes that. Some weeks, he makes  
24 more. But, if he doesn't work any shift, he  
25 doesn't get anything.

1                   I think that under your theory as  
2     you've articulated it, he would be a salary  
3     basis worker and would not be entitled to  
4     overtime for the weeks that he makes the -- does  
5     the four or five shifts. Am I right about that  
6     in terms of how you have set this up?

7                   MR. CLEMENT: So I -- I -- I think  
8     you're basically right, but could I just add a  
9     couple of thoughts to that? One is the statute  
10    doesn't talk about whether you're a salary basis  
11    worker, at least not 601. Six --

12                  JUSTICE JACKSON: I know. I'm talking  
13    about the regulation. We've -- we're setting  
14    aside --

15                  MR. CLEMENT: No, no. No, no. No,  
16    but --

17                  JUSTICE JACKSON: -- for the moment  
18    the statute.

19                  MR. CLEMENT: If I said the statute --

20                  JUSTICE JACKSON: Yes.

21                  MR. CLEMENT: -- I'm -- I misspoke.

22                  JUSTICE JACKSON: Oh.

23                  MR. CLEMENT: The regs, the regs.

24                  JUSTICE JACKSON: Oh, I see.

25                  MR. CLEMENT: The regs don't care that

1 you're a salary basis worker. They care -- 601  
2 in particular cares that your total compensation  
3 includes \$455 per week paid on a salary basis.

4 So I actually agree with you that the  
5 thrust of 604 is to ensure that there is a  
6 certain regularity of the minimum amount that  
7 you are guaranteed to make every week.

8 JUSTICE JACKSON: But wait, I'm sorry,  
9 how could you say that 601 doesn't care if  
10 you're a salary worker? What is the meaning of  
11 paid on a salary basis? If it -- if it didn't  
12 care, it would just say your total amount of  
13 compensation must include at least \$455 a week.

14 MR. CLEMENT: See --

15 JUSTICE JACKSON: But it then includes  
16 the words "paid on a salary basis," and 602  
17 tells us that being "paid on a salary basis"  
18 means a predetermined regular amount.

19 MR. CLEMENT: I -- I -- I think the  
20 only -- the only disconnect is when -- when you  
21 -- I don't think it cares whether you're a  
22 salaried worker because, when I hear salaried  
23 worker, I think, well, that must mean that's  
24 where you get most of your pay.

25 All it cares about is whether you are

1 paid at least \$455 a week paid on a salary  
2 basis. And -- and -- and those are different  
3 things because the -- the --

4 JUSTICE JACKSON: So you're -- I'm  
5 sorry. So -- if I'm -- a light bulb. So you're  
6 saying the -- the minimum amount has to be the  
7 regular thing coming in.

8 MR. CLEMENT: Exactly.

9 JUSTICE JACKSON: All right.

10 MR. CLEMENT: Exactly.

11 JUSTICE JACKSON: Not -- not the --  
12 but -- but how does that solve for my problem in  
13 terms of understanding that the agency and to  
14 some extent Congress can -- could care about the  
15 variability that keeps people from being able to  
16 do other things in their lives, pay a mortgage  
17 or whatever?

18 Like it matters whether you are -- are  
19 -- are in a situation in which you're only paid  
20 for the amount that you actually work, versus  
21 you know that you have a predetermined weekly  
22 amount coming in.

23 MR. CLEMENT: I -- I -- I think what  
24 matters for paying your mortgage and most other  
25 things is what's the minimum you're going to

1 have guaranteed coming in. It's not whether you  
2 make a -- you know, if you got an \$800 mortgage  
3 payment --

4 JUSTICE JACKSON: It depends on the  
5 size of your mortgage, right?

6 MR. CLEMENT: Yeah, yeah. Right,  
7 right. But -- but -- but here's the thing. I  
8 mean, I do think Congress cares and the regs  
9 care about the minimum. So you can make your  
10 \$800 mortgage payment with your \$963 guarantee.  
11 But the -- but it's very clear that 601 for the  
12 highly compensated workers doesn't care about  
13 the variability of your total annual  
14 compensation.

15 And one of the reasons is the catch-up  
16 payment. It says you can have a catch-up  
17 payment, it can be a huge catch-up payment at  
18 the end of the year. And it creates sort of a  
19 safe harbor.

20 So somebody that, you know, they  
21 thought was going to make \$100,000, but they had  
22 a bad year, they're only making \$50,000, they  
23 can have a big payment at the end of the year.  
24 That's not consistent with a concern about  
25 stability on the top line. It is still



1 consistent that you get at least \$455 every week  
2 paid on a salary basis.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Mr. Sullivan.

6 ORAL ARGUMENT OF EDWIN SULLIVAN

7 ON BEHALF OF THE RESPONDENT

8 MR. SULLIVAN: Mr. Chief Justice, and  
9 may it please the Court:

10 For over 80 years, the FLSA has made  
11 two things clear: One, a bona fide executive  
12 must be paid on a salary basis, and, two, a pure  
13 daily rate employee is not paid on a salary  
14 basis.

15 The highly compensated employee  
16 regulation requires payment on a salary basis.  
17 There's only two ways to get there under the  
18 regulatory scheme. The first is Rule 602, the  
19 general rule, and the second is a special rule  
20 for workers who are paid on a hourly, daily, or  
21 shift basis. There are a number of textual  
22 historical reasons why the -- why Helix is  
23 unable to meet the FLSA's general rule.

24 You can look to the first two  
25 sentences as fantastic. There has to be an

1 amount earned. That amount earned has to be a  
2 predetermined amount. That predetermined amount  
3 has to be fixed on a basis in time and it is,  
4 under the regulation, a weekly or less frequent  
5 basis.

6 Mr. Hewitt was paid on a daily basis.  
7 Mr. Clement, my friend, just said that he was  
8 paid on a daily basis. It's conceded at the  
9 Joint Appendix 113. Daily basis is more  
10 frequent than weekly basis.

11 The next sentence of 602(a) says that  
12 the full salary has to be paid without regard to  
13 the days worked. Mr. Hewitt was paid with  
14 regard to the days worked. And there are  
15 several other reasons throughout the text.

16 Now, even though Helix cannot meet the  
17 general rule under 602, the Department of Labor  
18 provided a special rule under 604(b) for hourly,  
19 daily, or shift employees. Maybe they can meet  
20 the salary basis.

21 But Helix concedes they can't satisfy  
22 that section. They disclaim that they should  
23 even be of use to this section, which was made  
24 to help employers. That concession is telling  
25 because it's meant to avoid sham salaries.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Do you think this is  
3 a -- that your client's salary is a sham salary?

4 MR. SULLIVAN: Well, I don't believe  
5 my client received a salary at all. He was paid  
6 on a day rate. If they call that a salary, then  
7 it is a sham because --

8 JUSTICE THOMAS: Do you think his  
9 compensation was a sham?

10 MR. SULLIVAN: I think it would be  
11 only a sham if they called it a salary, which it  
12 is not a salary. And I want --

13 JUSTICE THOMAS: The difficulty is  
14 just, for the average person looking at it, when  
15 someone makes over \$200,000 a year, they  
16 normally think of that as an indication that  
17 it's a salary.

18 And not -- then you certainly don't  
19 normally think of someone making \$200,000 a year  
20 as a day laborer. And so that's -- you --  
21 you've got this ill fit. If you were talking  
22 about \$20,000 a year, you would be -- people  
23 would say that makes sense.

24 And I think that's the difficulty that  
25 you're having, that -- and a point that Mr.

1 Clement made, I mean, the regs say that's --  
2 their own Department of Labor's regs say that's  
3 an indication that you are a highly compensated  
4 executive, so I -- I don't know.

5 I think your difficulty is just the  
6 visual. And to say -- for you to say that  
7 that's not a salary to the average person is a  
8 difficult --

9 MR. SULLIVAN: Your Honor --

10 JUSTICE THOMAS: -- challenge.

11 MR. SULLIVAN: -- Your Honor, I take  
12 your question, obviously, in great faith.

13 601(c), which they're referencing, does say  
14 that, look, high -- high pay is a strong  
15 indication even of exempt status. And I don't  
16 disagree that that's the regulation.

17 But, to be in the capacity of a bona  
18 fide executive, which is what the statute  
19 requires, the salary --

20 JUSTICE THOMAS: But it doesn't define  
21 -- the statute doesn't really define it. That's  
22 the difficulty.

23 MR. SULLIVAN: Sure. But it allowed  
24 obviously --

25 JUSTICE THOMAS: Yeah.

1           MR. SULLIVAN: -- the Department to do  
2 so. And the Department looked and they talked  
3 to industry and, in fact, back in 1940, if you  
4 look at the Stein report, who was the hearing  
5 officer, page 19, he said it was almost  
6 universally recognized by industry, including  
7 three oil companies on Note 6 of that report,  
8 that salary was universally recognized as the  
9 hallmark of exempt status.

10           There's a reason that it's not just a  
11 concession on duties. Yes, I conceded that Mr.  
12 Hewitt otherwise -- or that Helix could  
13 otherwise satisfy the duties test. But there  
14 are three tests that the Secretary implements,  
15 all to be for their statutory directive of who  
16 is a bona fide executive.

17           And the most important of those tests  
18 is the salary basis test. They did not pay him  
19 that. And I'd like to make --

20           JUSTICE KAVANAUGH: Can I -- can I  
21 stop you there on the salary basis test, 602?

22           MR. SULLIVAN: Yes.

23           JUSTICE KAVANAUGH: Because the key  
24 word is "receives." That's the first key word.  
25 And then the second two key words are "or part."

1 So, on "receives," it doesn't say "computes" or  
2 "calculates," as it does in 604. It says,  
3 "receives each pay period on a weekly or less  
4 frequent basis a predetermined amount  
5 constituting all or part of the employee's  
6 compensation."

7 My understanding is he received every  
8 other week at least \$963. Is that accurate?

9 MR. SULLIVAN: Yes.

10 JUSTICE KAVANAUGH: Okay. Why doesn't  
11 that answer the 6 -- the 602 argument?

12 MR. SULLIVAN: Okay. Under 602, the  
13 "receives" means the employee has to actually  
14 get it. What does he have to receive? He has  
15 to receive the predetermined amount. What is  
16 the basis of the predetermined amount? It has  
17 to be on a weekly or less frequent basis.

18 JUSTICE KAVANAUGH: Where do you get  
19 that?

20 MR. SULLIVAN: A predetermined amount  
21 constituting all or part of the employee's --

22 JUSTICE KAVANAUGH: And 963 is part of  
23 his compensation and it's more than 455 and he  
24 receives it every other week.

25 MR. SULLIVAN: Sure. Your Honor, what

1 I do is I take what the Department of Labor says  
2 "all or part" means, and that is to look at Rule  
3 604(a) because all or part of an employee's  
4 compensation, a salary, or a wage, isn't the  
5 only thing that an employee gets.

6 For example, a salaried employee might  
7 get a bonus at the end of the year. A salaried  
8 employee might get a commission. And so what  
9 the Department of Labor said is there are  
10 instances over and above the minimum guarantee  
11 that an employee may earn that's all or part of  
12 the compensation.

13 That doesn't destroy the salary basis.  
14 But, if we're talking about time worked within  
15 the work week, within the normal work week, that  
16 is not -- sorry, that's based on time.

17 The Department in 604(a) gives an  
18 example that says time-based extras beyond the  
19 normal work week --

20 JUSTICE KAVANAUGH: I guess I'm  
21 missing -- just focus on 602.

22 MR. SULLIVAN: Oh, I'll go back to  
23 602.

24 JUSTICE KAVANAUGH: I'm just -- you  
25 have a separate 604 argument, and deal with

1 that. On 602, it says "receives," not  
2 "calculates," and it says "part," and he  
3 receives every other week -- I'm repeating  
4 myself now -- 963.

5 MR. SULLIVAN: Sure.

6 JUSTICE KAVANAUGH: It seems like 602  
7 is just straightforward, unless -- and I think  
8 this was the import of some of -- some of  
9 Justice Kagan's questions -- you -- "receives"  
10 in context doesn't really mean the actual  
11 physical receipt, but, you know, assuming it  
12 does, then I don't understand your 602 argument.

13 MR. SULLIVAN: It's best explained  
14 that when this regulation was implemented and  
15 today, the Secretary of Labor was not concerned  
16 about the device of bi-weekly paychecks. It is  
17 not meant to regulate the frequency of pay. It  
18 is meant to regulate the method of pay. And the  
19 method is on a weekly --

20 JUSTICE KAVANAUGH: Okay. But --

21 MR. SULLIVAN: -- or less basis.

22 JUSTICE KAVANAUGH: -- it doesn't say  
23 that. But I -- I take your point. That's a  
24 decent argument. But I just -- it does not say  
25 that. It says "receives."



1 MR. SULLIVAN: Right, it does say,  
2 because that -- that means whether the employee  
3 got it. You can't just tell an employee you're  
4 going to get paid a certain amount and not pay  
5 it. You've got to -- you've got to make good on  
6 what you're telling the person.

7 But what is the thing, Justice  
8 Kavanaugh, that has to be received? The  
9 predetermined amount. What is the predetermined  
10 amount? It's the guarantee. What is the  
11 guarantee based on? A weekly or less frequent  
12 basis. All, at best, at best --

13 JUSTICE KAVANAUGH: Can I just ask a  
14 factual question? Was he guaranteed at least  
15 963 a week?

16 MR. SULLIVAN: I don't believe he was  
17 guaranteed it, but I'm just going to assume it  
18 for this because there's no point in arguing it.  
19 But, you know, his day rates changed --

20 JUSTICE JACKSON: But that wasn't his  
21 --

22 MR. SULLIVAN: -- throughout his  
23 employment.

24 JUSTICE JACKSON: -- but that wasn't  
25 his predetermined weekly amount, right? Some

1 weeks, he could make more than the -- than the  
2 950. Some weeks, he could -- there was not a  
3 predetermined weekly amount in this case,  
4 correct?

5 MR. SULLIVAN: Correct. Fantastic.  
6 Because it's not a predetermined --

7 JUSTICE KAVANAUGH: Well, hold on.  
8 Hold on. There was a predetermined weekly  
9 amount --

10 JUSTICE JACKSON: No --

11 JUSTICE KAVANAUGH: -- because it was  
12 -- 963 was part of the total compensation.  
13 Wasn't that predetermined that he would get at  
14 least 963?

15 MR. SULLIVAN: This is my first  
16 argument. Now I got two --

17 (Laughter.)

18 MR. SULLIVAN: I don't know how to go.  
19 I'm just going to --

20 JUSTICE JACKSON: Can I just say --

21 JUSTICE KAVANAUGH: Answer them both.

22 JUSTICE JACKSON: -- that the reg --  
23 the regulation -- the regulation doesn't say  
24 predetermined part, right? It is the  
25 predetermined weekly amount, a part of which can

1 be given to you, blah, blah, blah.

2 MR. SULLIVAN: The predetermined  
3 amount.

4 JUSTICE JACKSON: So the predetermined  
5 weekly amount is what we care about. And, here,  
6 in this situation, we have a predetermined daily  
7 amount.

8 MR. SULLIVAN: A hundred percent.  
9 There is a --

10 JUSTICE JACKSON: At the end of each  
11 week, we don't know how much he's going to make  
12 for the week. That's the point.

13 MR. SULLIVAN: It has to be a  
14 predetermined amount on a weekly or less  
15 frequent basis. That is not this. At best, if  
16 it's 963, that is a predetermined daily amount.  
17 That's at best.

18 And then Mr. -- my friend's argument  
19 was, oh, well, you know, we'll just go tell the  
20 mortgage company he only earns \$963 a week. My  
21 friend -- my friend realizes, of course, that  
22 the compensation is greater for him. But what  
23 is the salary? He doesn't know because it's a  
24 post-determined amount based on the days that  
25 are actually worked by my client.

1                   JUSTICE JACKSON:  So -- so Helix could  
2 not set up, like, a direct deposit for him,  
3 right, because they don't know -- you know,  
4 usually a direct deposit is, like, two weeks,  
5 you get a predetermined amount for the two  
6 weeks, and you set it up with your bank, so your  
7 employer's not even paying attention to it.  
8 That's the sort of standard salary, at least as  
9 I think the common understanding is.

10                   But, here, Helix can't do that because  
11 they don't know what his payment is for the  
12 week.  They have to pull the time sheets and  
13 figure out how many hours he worked.  So doesn't  
14 that make him more of the daily labor, hourly  
15 labor kind of workers for whom the overtime rule  
16 is supposed to apply, rather than the regular  
17 salaried person?

18                   MR. SULLIVAN:  Yes, it does.  And the  
19 Department of Labor has discussed this time and  
20 time again.  In 1959, in the Kantor report, on  
21 page 2, it talks about people who are working  
22 squad leaders compared to who are executives.

23                   During oral argument, one of the  
24 justices said this -- judges said this sounds  
25 like a sergeant major.  Yeah.  And, you know, at

1 some level, a sergeant major is an enlisted  
2 person, and that person may make more money than  
3 an officer. But it is different. The roles are  
4 fundamentally different.

5 JUSTICE KAVANAUGH: Would you agree --

6 JUSTICE ALITO: Could you tell us --

7 JUSTICE KAVANAUGH: -- would you --

8 JUSTICE ALITO: Sorry. Go ahead.

9 JUSTICE KAVANAUGH: Go ahead.

10 JUSTICE ALITO: No, I -- I don't think  
11 a sergeant major makes over \$200,000 a year.

12 (Laughter.)

13 MR. SULLIVAN: Not yet, Your Honor.

14 JUSTICE ALITO: Maybe. Could I ask  
15 you about the statute?

16 MR. SULLIVAN: Yes.

17 JUSTICE ALITO: If we interpret that  
18 in accordance with the way the terms would have  
19 been understood by ordinary people when the FSL  
20 -- FLSA was enacted, it says that the overtime  
21 rule shall not apply to any employee employed in  
22 a bona fide executive, administrative, or  
23 professional capacity.

24 MR. SULLIVAN: Yes.

25 JUSTICE ALITO: And you said -- you

1 told somebody, okay, here's an employee who's  
2 going to make over \$200,000 a year or whatever  
3 the equivalent was back then, and the person is  
4 going to supervise other employees. Is that  
5 person employed in an executive, administrative,  
6 or professional capacity or not? What would the  
7 answer be?

8 MR. SULLIVAN: The -- the answer  
9 should be and I would assume would be going back  
10 in time, no, because that person is not paid on  
11 a salary basis, which was almost universally  
12 recognized back then to be, as you said in  
13 Christopher, Justice Alito, in the functional --  
14 what's the character? Capacity, as the  
15 dictionary definition, was the character. Okay?

16 And it goes beyond the --

17 JUSTICE ALITO: Okay, I get the -- I  
18 get your argument. So these are -- you're  
19 saying it's not the ordinary meaning of these  
20 terms. It's a specialized meaning. They're  
21 terms of art. "Executive, administrative, or  
22 professional capacity" in this context had a  
23 special meaning. That's your -- that's your  
24 argument. It may be a good argument.

25 MR. SULLIVAN: Well, I certainly hope

1 so. But plus -- plus, if you went back in time  
2 to 1949, a little before my time, but I would  
3 actually think that people would say that's the  
4 big boss. The big boss gets paid a salary,  
5 right? They know what that guy gets paid --

6 JUSTICE ALITO: You mean it's only the  
7 CEO? It's not -- it's not the -- the head of a  
8 division?

9 MR. SULLIVAN: Well, I've had a lot of  
10 jobs. The person who's telling me what to do is  
11 usually who I think of as the boss.

12 JUSTICE ALITO: So this -- this -- the  
13 only executive is the top person?

14 MR. SULLIVAN: No, no, no, Your Honor,  
15 certainly not.

16 JUSTICE ALITO: All right.

17 MR. SULLIVAN: He's not the top person  
18 here either, and yet I said he had the duties of  
19 an executive.

20 JUSTICE JACKSON: Mr. Sullivan, isn't  
21 your point that the reason the form of the  
22 payment relates to the character of an executive  
23 because, as Justice Sotomayor said at the  
24 beginning, the executive who's a salaried person  
25 can take the afternoon off on Friday and still

1 pay his mortgage because he's still going to get  
2 the full amount?

3 The difference is that when someone is  
4 not a salaried worker, they have to work each  
5 hour or each day to get the payment. And I know  
6 it's a minimum amount, says Mr. Clement, that he  
7 gets for each day that he works, but he still  
8 has to actually work it. He can't take the  
9 afternoon off.

10 That's the difference between the  
11 executive-characterized person and the person  
12 who would otherwise be a daily worker, even if  
13 that daily worker makes a very high amount.

14 MR. SULLIVAN: That is correct. An  
15 executive is given latitude to their time that  
16 the daily wage worker is not given.

17 JUSTICE ALITO: I mean, does somebody  
18 who's out working on an oil rig have the option,  
19 as a practical matter, to take the day off? I'd  
20 like to take the day off and play golf.

21 (Laughter.)

22 JUSTICE ALITO: Bring the helicopter  
23 out here to take me back to the mainland so I  
24 can play golf.

25 MR. SULLIVAN: Maybe not that, but you



1 know what they have the right to do? Maybe  
2 their kid's playing a soccer game onshore and  
3 they can watch it over the Internet. But  
4 they're not going to be able to do that if it  
5 means that you can't work that day.

6 JUSTICE ALITO: Okay. No, I -- I  
7 understand that. I mean, as fascinating as this  
8 microscopic examination of the particular terms  
9 of these particular regulations are, I am also  
10 concerned about two other things, and they --  
11 they may cut in different directions.

12 One is the -- one is the effect of  
13 this on lower-income workers, not people who are  
14 making \$200,000 a year, and the second is how  
15 you think the -- the energy industry should  
16 structure the pay of these people who work out  
17 on oil rigs in order to comply with your  
18 understanding of the regulations.

19 MR. SULLIVAN: The first question was  
20 how does this impact lower workers and the right  
21 frame. It certainly is not Helix's argument,  
22 because if a paycheck that's over some minimum  
23 equals a salary, that means every hourly, daily,  
24 piecework employee is lost under Rule 602, and  
25 they now might be a salaried employee, which --

1 which means that the company will argue if they  
2 have the duties and the rest, but it ruins the  
3 salary protection -- salary basis test for  
4 lower-income workers.

5           But another reason, if you at a  
6 company make a minimum guarantee and pay them  
7 the rest and you call that a salary, well,  
8 you're only giving salary protections against  
9 the deductions to the minimum but not to the  
10 rest. Like, if there's jury duty, if Mr. -- if  
11 Mr. Hewitt had a five-day work week and the  
12 first day is only guaranteed and the rest of the  
13 week he had to go to jury duty, it means the  
14 company can't -- the company is just perfectly  
15 allowed to deduct because they're going to say  
16 it's the minimum that's protected, not the rest.  
17 Mr. Clement answered that -- my friend answered  
18 that question maybe so.

19           With respect to Your Honor's second  
20 question about the oil industry, first, yes,  
21 there are methods of complying. I'm primarily a  
22 management lawyer. There is multiple ways that  
23 they could have been within the regulations.  
24 They chose not to do so.

25           JUSTICE ALITO: What are those ways?

1       Something like what the government outlined at  
2       the end of its brief?

3               MR. SULLIVAN:  Certainly.  I mean,  
4       yes.  They -- they could pay him an hourly wage  
5       if they wanted to with overtime.  They could, as  
6       the government said in the last page of their  
7       brief, issue a guarantee.  The Fifth Circuit  
8       said 4,000.  The government said 4,600.

9               But the point of that is to  
10       approximate that the compensation received by  
11       Mr. Hewitt would have approximated, would have  
12       been something close to a salary, as opposed to  
13       what it actually was, what we all actually know  
14       what it was, a day rate, paid by the day, which  
15       is not a salary.  Under the statute, under the  
16       regulations, under any compensation scheme,  
17       that's not what we have here.

18              JUSTICE KAVANAUGH:  Okay.  On 602,  
19       just -- sorry to go back to it, belabor it.

20              MR. SULLIVAN:  Judge -- Justice.

21              JUSTICE KAVANAUGH:  Can a worker with  
22       a salary basis, on a salary basis, make extra in  
23       his or her paycheck for commissions or bonuses  
24       or what have you?

25              MR. SULLIVAN:  They can make extra for

1 commissions. They can make extra for any  
2 non-time-based-related activities under Rule 4  
3 -- 604(a).

4 JUSTICE KAVANAUGH: Right. So then my  
5 question is the reference to predetermined  
6 amount must be a predetermined minimum because  
7 you're not going to know going paycheck to  
8 paycheck how much you're going to have in extra  
9 commissions, correct?

10 MR. SULLIVAN: Yes, but the regulation  
11 answers what that is, and that is it has to be  
12 -- that predetermined amount is answered -- it's  
13 on a basis of time, just like --

14 JUSTICE KAVANAUGH: I understand that  
15 argument. I just thought predetermined minimum  
16 must be what they're getting at because you're  
17 not going to know the exact total amount until  
18 you figure out how much commission or bonus or  
19 time and a half you get.

20 MR. SULLIVAN: No. And I'm -- I'm  
21 cognizant of time. But, if you look at  
22 602(b)(6), if you look at 604(a), if you look at  
23 604(b), where they talk about the full salary  
24 and the concerns, you know, of splitting up time  
25 and all the rest, it is -- the minimum amount

1 they're talking about is the weekly salary.

2 That is --

3 JUSTICE KAVANAUGH: Okay. On -- on --  
4 sorry to --

5 MR. SULLIVAN: No.

6 JUSTICE KAVANAUGH: You've made that  
7 -- you've answered that well. Okay. So, on  
8 604, which is the question we granted on, Mr.  
9 Clement says the specific should control the  
10 general and that 601 is a specific reference to  
11 how highly compensated employees should be  
12 considered, and this blends into Justice  
13 Thomas's question as well.

14 Why isn't that correct, that you look  
15 at 601 as a self-contained piece for highly  
16 compensated employees, cross-reference to 602,  
17 but in context, it does not pick up the 604 and,  
18 in fact, might not make sense with 604 given the  
19 catch-up payments could be \$70,000 or what have  
20 you.

21 So that's his -- I think that's the  
22 argument, kind of the lead argument on the other  
23 side. What's -- what's wrong with that?

24 MR. SULLIVAN: Okay. 601 is not a  
25 stand-alone exemption. The only exemptions that

1 exist under the law are the executive,  
2 administrative, and professional. Therefore, we  
3 look at 601(c), which actually says what is the  
4 reason for this provision, and the reason is to  
5 streamline the duties test because compensation  
6 -- Your Honor, I see --

7 CHIEF JUSTICE ROBERTS: You can finish  
8 your thought.

9 MR. SULLIVAN: I'm sorry. Because  
10 compensation is a strong level of exempt status  
11 but not everything. And -- and there is -- and  
12 it is simply a streamlined way to satisfy one of  
13 the other exemptions. That's all that it does.  
14 And it still incorporates expressly the beating  
15 heart of the white collar exemptions, which is  
16 the salary basis test.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Justice Thomas?

20 Justice Alito?

21 Justice Sotomayor?

22 Justice Gorsuch, anything further?

23 JUSTICE KAVANAUGH: Yeah. On the  
24 reasonable relationship in 604, this is the part  
25 that I think is most inconsistent, that if you

1 can have a catch-up payment at the end of the  
2 year, which is explicitly authorized by 601,  
3 that's never going to be a -- a reasonable  
4 relationship, a large catch-up payment.

5 So then what is -- that makes 601 seem  
6 incoherent. And the answer to that is that 601  
7 should not be read together with 604. I think  
8 that's the argument on the catch-up payment to  
9 show that reasonable relationship can't possibly  
10 apply to highly compensated employees.

11 MR. SULLIVAN: May I respectfully  
12 respond?

13 JUSTICE KAVANAUGH: Yes, please.

14 MR. SULLIVAN: Okay. I'd like you to  
15 think about it in a different way, the -- the  
16 way that it was intended. Under Rule 601, total  
17 annual compensation discusses what are the types  
18 of compensation an employee who earns a lot of  
19 money can be counted towards this salary level  
20 test of \$100,000 or \$107,000. But the person  
21 still has to be paid on a salary basis.

22 Rule 604 -- you know, Rule 604 is not  
23 addressing that. Rule 604 is addressing the  
24 principle who is paid on a salary basis.

25 601 assumes they're paid on a salary

1 basis, requires it. The total compensation is  
2 what is -- what are the types of compensation  
3 that go to the new salary level.

4 I hope I answered that question.

5 JUSTICE KAVANAUGH: Thank you very  
6 much.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Barrett?

9 Justice Jackson?

10 Thank you, counsel.

11 Mr. Yang.

12 ORAL ARGUMENT OF ANTHONY A. YANG

13 FOR THE UNITED STATES, AS AMICUS CURIAE,

14 SUPPORTING THE RESPONDENT

15 MR. YANG: Mr. Chief Justice, and may  
16 it please the Court:

17 The HCE regulation that Petitioner  
18 invokes applies only if the employee is paid on  
19 a salary basis. It doesn't answer what a salary  
20 basis is.

21 It provides for additional  
22 compensation beyond the salary to meet the  
23 100,000 threshold, but it doesn't excuse you  
24 from meeting the basic threshold which all the  
25 exemptions require of \$455 on a salary basis.



1 Under 602's general rule, that means  
2 the employee must receive payment on a weekly or  
3 less frequent basis, that is, next sentence, the  
4 full salary for a week has to be provided  
5 without regard to the number of days or hours  
6 worked.

7 And by its very nature, a daily rate  
8 pay is paid with, not without, regard to the  
9 number of days worked in a week. It, therefore,  
10 doesn't meet the general test. That's why the  
11 court of appeals said, when it comes to a daily  
12 rate employee, the employer must comply with the  
13 alternative salary basis provisions of 604(b).

14 604(b) provides an alternative. It  
15 benefits employers. It's not required. The  
16 point is they didn't meet 604(a) and they don't  
17 claim to meet 604(b).

18 I welcome the Court's questions.

19 JUSTICE THOMAS: Mr. Yang, just one  
20 quick question. Can someone be functionally an  
21 executive but not meet these -- but paid in a  
22 way that undoes that?

23 MR. YANG: If the question is can you  
24 meet the duties requirements of an executive but  
25 not meet the exemption, the answer is yes, but

1 it's because you're not fully functioning as an  
2 executive.

3 The rulemakings, there have been  
4 multiple rulemaking hearings with evidence going  
5 back to the '40s. They've all determined --

6 JUSTICE THOMAS: No, just -- I'm only  
7 interested in the compensation features. Let's  
8 say the first year a person is salaried at  
9 \$50,000 a year or basically \$200,000, as we have  
10 in this case.

11 MR. YANG: Okay.

12 JUSTICE THOMAS: But then the second  
13 year the pay structure is like the pay structure  
14 here.

15 MR. YANG: Right.

16 JUSTICE THOMAS: Does that person who  
17 was an executive in year one --

18 MR. YANG: Yeah.

19 JUSTICE THOMAS: -- with a \$200,000  
20 salary --

21 MR. YANG: Right.

22 JUSTICE THOMAS: -- cease to be an  
23 executive in the second year because of the pay  
24 structure?

25 MR. YANG: The answer is yes because

1 they're not a bona fide executive. And let me  
2 explain why.

3 JUSTICE THOMAS: What were they the  
4 first year?

5 MR. YANG: Oh, no, in the first year,  
6 if you get a \$200,000 true salary, like you're  
7 get -- they split 200,000 into 52 and you get  
8 that every week regardless of how much you work  
9 that week, that's a salary.

10 But the -- the reason why that we look  
11 at this not -- right here, we're looking back on  
12 a case, right, but the employee has to look  
13 forward. The employee at the beginning of the  
14 week doesn't know if you're paid on a daily  
15 basis how much you're going to be paid.

16 But, if you're a salaried employee,  
17 where your compensation is on a weekly or less  
18 frequent basis, you know you're going to get X  
19 amount for a week.

20 That's why they talk about -- the  
21 regulation, 602(a), talks about a predetermined  
22 amount. You -- you have to know in advance what  
23 is the predetermined amount for the week.

24 And the next sentence is critical. It  
25 talks about, therefore, the salary -- the full

1 salary has to be provided without regard to the  
2 number of days or hours worked. That means for  
3 the week you get this chunk.

4 Now my friend says you can just get a  
5 guarantee, right, that exceeds \$455 and that's  
6 your salary. So that's analogous to saying,  
7 look, on day one, I'm going to pay you \$100. On  
8 day two -- I'm going to call that your salary,  
9 your weekly salary. On day two, I give you  
10 another \$100, and it goes through the week.

11 No one would say that that's a salary.  
12 You're paid a daily wage because your weekly  
13 salary is what you get for your work during the  
14 week.

15 602(b)(6), this is on page 3a or,  
16 excuse me, 6a of the government's brief. It  
17 provides a special rule for the first and last  
18 week that an employee works, and it says there  
19 you can pay the proportionate amount of the full  
20 salary for the first and last week.

21 But then the second sentence is  
22 important. It says: However, you're not paid  
23 on a salary basis within the meaning of the  
24 regulations if you're employed occasionally for  
25 a few days and you only get a proportionate

1 amount of the weekly salary. That just  
2 reinforces you get a few days salary. It's not  
3 a weekly salary.

4 Then you look at 604(b), this is on  
5 the following -- 604(a), on the following page.  
6 The reason, Justice Kavanaugh, that it says your  
7 comp -- your salary is all or part of your  
8 compensation is because compensation can include  
9 more than salary. Compensation can include  
10 bonuses, that type of thing.

11 But, importantly, this is the last,  
12 the third category here, this is on page 7a, the  
13 additional compensation that is beyond the  
14 salary can include compensation based on hours  
15 worked for work beyond the normal work week.

16 So, for instance, if you get -- you  
17 can get paid if you normally work 40 hours a  
18 week, you know, for hours 40 to 50. But the  
19 first 40, that is your week -- that has to be a  
20 weekly salary.

21 CHIEF JUSTICE ROBERTS: Mr. Yang, I'm  
22 -- I'm sorry, but -- and I'm sorry to refer back  
23 to the statute.

24 MR. YANG: Right.

25 CHIEF JUSTICE ROBERTS: But I -- I

1 think it is significant. I gather that the  
2 statement, their concession or not, concerning  
3 executive duties was not that the individual was  
4 an executive but that he performed executive  
5 duties.

6 MR. YANG: That's my understanding.

7 CHIEF JUSTICE ROBERTS: Do you know,  
8 is the nature of the work he did divisible in  
9 some way that he could say these are executive  
10 duties, but these other ones are not, or is  
11 performing executive duties what he does?

12 MR. YANG: Well, there are certain  
13 things that he does that -- and, again, because  
14 it wasn't disputed, this wasn't fully fleshed  
15 out in the record, but there are certain things  
16 that meet the duties requirements. However --

17 CHIEF JUSTICE ROBERTS: Well, do you  
18 have any idea if that's like 90 percent of his  
19 work --

20 MR. YANG: It's not --

21 CHIEF JUSTICE ROBERTS: -- or  
22 80 percent?

23 MR. YANG: That is not in the record.  
24 And I don't have any independent knowledge of  
25 that. But -- but -- but, Your Honor, I think

1 what's important is that Congress said that you  
2 -- a bona fide executive is subject to  
3 exemption. And then it gave the power to the  
4 Department of Labor not only to define that term  
5 but to delimit the term. That's broad authority  
6 that the Court's already recognized as broad  
7 authority.

8           And when they did look at what  
9 constitutes an executive, one of the critical  
10 things -- this -- this is almost unanimously --  
11 almost universally agreed in all contexts --  
12 that they're paid on a salary basis. Why? Why  
13 is an executive paid on a salary basis? Because  
14 it reflects the autonomy and discretion that the  
15 executive has to manage his or her own time.  
16 That executive -- the employer vests that  
17 discretion -- it's not like you have to show up  
18 on Monday and I'll give you a thousand dollars.  
19 You're paid for the general value of the time.

20           That has a real-world impact. You  
21 know --

22           CHIEF JUSTICE ROBERTS: Well, but on  
23 the other --

24           MR. YANG: -- pay predictability is  
25 important. If I get \$500 a day, it matters to

1 me whether I'm going to get \$2500 a week or  
2 maybe just sometimes \$500 a day because my life  
3 I have to organize to know am I going to just  
4 only \$500 a -- a week?

5 CHIEF JUSTICE ROBERTS: Well, but we  
6 heard earlier that the most significant  
7 characteristic of an executive is the amount of  
8 pay.

9 MR. YANG: That's actually not quite  
10 correct. I'd like to point the Court to the --

11 CHIEF JUSTICE ROBERTS: What's not  
12 correct? That's not what it says or that that's  
13 not what we heard earlier?

14 MR. YANG: That -- that -- that's not  
15 what it says. The -- at 2a of the government's  
16 brief, this is the highly compensated exemption.  
17 And if you just pair it on page 1a, that's the  
18 executive exemption.

19 The executive exemption requires three  
20 things. You have to be paid \$455 a week on a  
21 salary basis, the first two requirements. And  
22 then there are three duties tests you have to  
23 meet. Three -- you have to meet all of them.

24 Look at 601. 601(b)(1) says, with  
25 respect to the total compensation, it must



1 include at least \$455 a week on a salary or fee  
2 basis. That parallels exactly the general  
3 requirement for the executive. All it says is  
4 you have to meet that part of the executive.

5 The difference for the highly  
6 compensated employee is that you can get a  
7 relaxed duties test. Instead of meeting all  
8 three of the requirements, you can meet just one  
9 duties requirement. But that comes only if your  
10 total compensation, which has to include your  
11 salary, but it can include these other things,  
12 right, exceeds \$100,000.

13 And that's why the ratio that you were  
14 concerned about is completely -- it's a  
15 different ratio.

16 JUSTICE KAVANAUGH: About that, let me  
17 ask about that.

18 MR. YANG: Sure.

19 JUSTICE KAVANAUGH: And interrupt you.  
20 I'm sorry. You can be a highly compensated  
21 employee by getting \$30,000 in guaranteed and a  
22 \$70,000 catch-up, correct? The 455 a week --

23 MR. YANG: You have -- it has -- the  
24 30,000 has to be paid on a salary basis.

25 JUSTICE KAVANAUGH: Paid on a salary

1 basis.

2 MR. YANG: Which means --

3 JUSTICE KAVANAUGH: So you receive it

4 --

5 MR. YANG: Each week, you're getting,

6 let's say --

7 JUSTICE KAVANAUGH: Say 500 a week.

8 MR. YANG: Okay.

9 JUSTICE KAVANAUGH: Say 500 a week.

10 MR. YANG: Yeah.

11 JUSTICE KAVANAUGH: Okay? And then

12 you --

13 MR. YANG: Regardless of how much you

14 work.

15 JUSTICE KAVANAUGH: Yep.

16 MR. YANG: Yep.

17 JUSTICE KAVANAUGH: And then you get a

18 \$70,000 catch-up.

19 MR. YANG: Yep.

20 JUSTICE KAVANAUGH: That qualifies you

21 as a highly compensated employee, correct?

22 MR. YANG: It would. It would. Now

23 the catch-up is not salary.

24 JUSTICE KAVANAUGH: And here's the

25 inconsistency that I think the other side

1 raises, and you may have an answer to this, but  
2 that is explicitly authorized by 601, the  
3 \$30,000 plus the \$70,000 catch-up. That's  
4 explicitly authorized as I understand it.

5 MR. YANG: Yeah.

6 JUSTICE KAVANAUGH: You can correct me  
7 if that's wrong, but I think you've agreed with  
8 it.

9 MR. YANG: But that's -- that's for  
10 compensation.

11 JUSTICE KAVANAUGH: Let me -- let me  
12 finish. Yeah. Let me finish. And that would  
13 not satisfy, however, the 604 reasonable  
14 relationship test.

15 MR. YANG: But that deals with  
16 different things. Let me -- let me explain.  
17 Your compensation includes but is not limited to  
18 salary. 604(b) is the alternative  
19 determination -- way to say whether you get a  
20 salary, right?

21 And the reason there's a proportion  
22 there is because the premise of 602 is you get a  
23 full weekly salary without regard to the number  
24 of days or hours worked, right? So, if you get  
25 payment based on each day that you work, it's

1 not 602(a). So 604(a) says, hey, but you can  
2 calculate -- and I'd like to discuss "calculate"  
3 versus "receive" because it --

4 JUSTICE KAVANAUGH: Well, let's --

5 MR. YANG: -- it --

6 JUSTICE KAVANAUGH: -- put that aside.

7 MR. YANG: But I'll put that aside.

8 JUSTICE KAVANAUGH: What I -- I just  
9 want to know 30/70 --

10 MR. YANG: Right.

11 JUSTICE KAVANAUGH: -- is authorized  
12 by 601. And they say -- and I just want your  
13 answer to this -- that that can't be consistent  
14 with 604 because that requires a reasonable  
15 relationship between the guaranteed amount,  
16 which we agreed was 30, and the amount actually  
17 earned, which we agreed was more than 100.

18 MR. YANG: No, no, no, no, no.

19 JUSTICE KAVANAUGH: Okay.

20 MR. YANG: That -- that's not correct.  
21 That's not reading the whole provision. It's  
22 the amount normal -- earned for the days -- the  
23 time worked during a normal work week. And  
24 then, if you go further on, it says, no, no,  
25 this does not apply to things like bonuses, that

1 really reasonable relationship.

2           And the reason why that exists is  
3 because, if you're paid on a daily basis, you're  
4 not really receiving anything that is like a  
5 salary unless that guarantee is basically what  
6 you would get as a weekly salary.

7           And so the reasonable relationship  
8 test is, look, what would you get normally for  
9 the full week? And if you have a guarantee that  
10 has a reasonable relationship test -- to that,  
11 that's going to function as a salary. But  
12 that's a different question.

13           The second question for 601 is a  
14 second and different question, which is, once  
15 you've established you're on a salary basis, you  
16 also have to show total compensation exceeding  
17 \$100,000. These are like different ratios for  
18 different functions --

19           JUSTICE JACKSON: Mr. Yang, can I --

20           MR. YANG: -- but they're just  
21 unrelated.

22           JUSTICE JACKSON: -- can I ask you  
23 something that hasn't come up yet, and I just  
24 want to make sure that you get a chance to  
25 address it, and that is what do we take from the

1 fact that both the statute and the regulation  
2 seem to have separate provisions for certain  
3 categories of people that are outside --  
4 exemptions that are not in EAP that cover hourly  
5 work for that category?

6 So what am I talking about? If you  
7 look at the statute, I understood that the  
8 statute had a carveout from the FLSA rule for  
9 computer analysts, and those people -- are you  
10 familiar with that one? Or, if not --

11 MR. YANG: There's a lot of exemptions  
12 --

13 JUSTICE JACKSON: Okay.

14 MR. YANG: -- in the FLSA. I'm not as  
15 familiar --

16 JUSTICE JACKSON: Okay. I guess my --  
17 the thrust of my question is I -- I noticed that  
18 there are exemptions in the statute for  
19 computers and an exemption elsewhere in the  
20 regulation for movie industry people. Those  
21 people make very high hourly rates compared to  
22 people who would otherwise be in EAP. If  
23 Petitioner was right in this case, why would we  
24 have needed those carveouts?

25 MR. YANG: Oh --

1 JUSTICE JACKSON: In other words --

2 MR. YANG: -- you don't. You  
3 wouldn't.

4 JUSTICE JACKSON: Right. You  
5 wouldn't.

6 MR. YANG: The reason that there's a  
7 -- I think the movie exception is just  
8 regulatory, is useful because they petitioned  
9 for rulemaking, saying in our industry, there's  
10 no good way to actually pay a salary. And so  
11 they petitioned for rulemaking. They got an  
12 exemption for salary basis allowing daily rate  
13 pay.

14 JUSTICE JACKSON: Exactly.

15 MR. YANG: You would never need that  
16 -- you would never need that if they were right  
17 about 602(a).

18 JUSTICE JACKSON: And if -- and if --  
19 and the oil and gas industry could do the same  
20 thing, could they not?

21 MR. YANG: Well, they could. Whether  
22 they would get it is a -- you know --

23 JUSTICE JACKSON: Is another --

24 MR. YANG: -- it would depend on --

25 JUSTICE JACKSON: -- issue, but they

1 say --

2 MR. YANG: -- the merits of their  
3 position.

4 JUSTICE JACKSON: But, if they're  
5 saying the -- the nature of our payments and the  
6 way we're paid in this industry is not amenable  
7 to salaries in the way that you've listed it  
8 here, we need an exemption.

9 MR. YANG: Yep.

10 JUSTICE JACKSON: Then they could  
11 potentially petition the way the movie industry  
12 did --

13 MR. YANG: They could.

14 JUSTICE JACKSON: -- and get a  
15 separate --

16 MR. YANG: And the danger of my  
17 friend's argument is it applies not just to  
18 those paid \$200,000; it applies to people who  
19 make down to \$24,000 a year. And if those  
20 hourly wage people are converted into salary  
21 basis employees, then, you know, there's going  
22 to be a whole swath of people who have vested  
23 interests -- I mean, these are real people in  
24 the world that are going to lose their overtime,  
25 they're not going to be able to -- I mean, this



1 is -- and nurses are just one of the many  
2 examples of these people.

3 And the reason that the whole high --  
4 highly compensated exemption is a -- is a red  
5 herring is because it just builds on the normal  
6 exemption, which builds on the normal salary  
7 basis test, and has a relaxed duties  
8 requirement, only a relaxed duties requirement,  
9 because it has the same salary basis requirement  
10 as the normal exemption.

11 JUSTICE ALITO: What does -- what do  
12 these exemptions do to Mr. Sullivan's argument  
13 that being employed in an executive,  
14 administrative, or professional capacity was  
15 understood at the time of the FLSA to require  
16 that a person be paid on a salary basis? If the  
17 -- if the Secretary has the authority to say no,  
18 we're going to exempt people who are not paid on  
19 a salary basis --

20 MR. YANG: Well --

21 JUSTICE ALITO: -- that seems  
22 inconsistent.

23 MR. YANG: No, I -- I don't think so.  
24 So give -- let me give you an example. I'd like  
25 to talk about the "compute" versus "received"

1 and also about paycheck frequency, but let me  
2 give you the example here in the regulations.

3 For the executive exemption, there --  
4 you -- that's the normal rule we've been talking  
5 about. But Section 101 deals with people with a  
6 20 percent equity stake in the company that --  
7 generally engage in management of the company.  
8 Those people are exempt regardless of salary.

9 So the ultimate question is, what  
10 constitutes an executive? And you can do that  
11 through these duties, right? Three duties test  
12 normally. You can go to one if you're highly  
13 compensated. But you also -- always,  
14 regardless, for all of the exemptions, you have  
15 to be paid on a salary basis, and that's been a  
16 hallmark of executive discretion since the '40s.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Justice Thomas?

20 Justice Alito?

21 JUSTICE SOTOMAYOR: I don't think  
22 you've answered why you use "receives" in 602 --

23 MR. YANG: Yes.

24 JUSTICE SOTOMAYOR: -- and "compute"

25 --

1 MR. YANG: Yeah.

2 JUSTICE SOTOMAYOR: -- in 604.

3 MR. YANG: The reason why you receive  
4 sick -- receives on a -- on a weekly or less  
5 frequent basis in 602 is you actually have to  
6 receive it, right?

7 The whole point of 604 is you do not  
8 have to receive the pay on a daily basis. The  
9 whole point of 604 is you get a weekly guarantee  
10 that functions like a salary.

11 So, if you only work one day, you  
12 don't receive daily pay. You receive the  
13 guarantee. That's why it says it has to be --  
14 the pay is calculated on the daily basis, but  
15 what you actually receive may be that weekly  
16 guarantee, and the weekly guarantee has to  
17 function like a full weekly salary because it  
18 has a reasonable relationship to what you would  
19 earn for the entire week.

20 That's why there's a textual  
21 difference there. And that's also -- I think  
22 this concerns paycheck frequency too. I mean,  
23 this is all interrelated, but the whole idea of  
24 paycheck frequency, there's no sensible reason  
25 to distinguish an executive from a salaried

1 worker or a -- a wage worker based on when you  
2 receive a paycheck. That's regulated --

3 CHIEF JUSTICE ROBERTS: Justice Kagan,  
4 any --

5 MR. YANG: -- by state law.

6 CHIEF JUSTICE ROBERTS: Justice Kagan,  
7 anything further?

8 Justice Gorsuch?

9 Justice Kavanaugh?

10 Justice Barrett?

11 Justice Jackson? Thank you.

12 Thank you, counsel.

13 Rebuttal, Mr. Clement?

14 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

15 ON BEHALF OF THE PETITIONERS

16 MR. CLEMENT: Thank you, Mr. Chief

17 Justice. Just a few points in rebuttal.

18 The -- it is conceded here that the  
19 Respondent makes over \$200,000 a year and is  
20 guaranteed to receive at least \$963 in each week  
21 in which he works. Yet their position is that  
22 he receives zero in salary, not a penny.

23 Now we would say the far more logical  
24 reading of what 602 actually says is to say he  
25 receives at least \$963 in salary every week in

1 which he works. And then you compare that to  
2 the statutory -- or rather the regulatory test,  
3 total compensation has to include \$455 per week,  
4 paid on a salary basis. He satisfies it.

5 The contrary view requires you to say  
6 that this person gets no salary at all, which  
7 defies reality and common sense. And it doesn't  
8 make any difference that this is a day rate  
9 because what matters is the day rate's above the  
10 weekly minimum.

11 We can easily say, okay, you make 90  
12 -- \$963 if you work a day, even a minute, and we  
13 give you a weekly guarantee of \$963. It would  
14 be redundant. Anytime somebody is paid a day  
15 rate that's above the weekly minimum, they  
16 satisfy the terms of 602.

17 The second point I want to make is I  
18 thought it was very revealing that my friends on  
19 the other side really couldn't answer the  
20 question about what 602 means, particularly with  
21 respect to "receives" and "all or part" without  
22 directing you to 604. But the problem with that  
23 is twofold. One is, if you get to 602, it uses  
24 "calculates," rather "computes, rather than  
25 "receives." So the regulators knew how to use

1 those differently.

2           The second problem, though, and I  
3 think this is very telling, is if you start to  
4 hear what their theory is, they say, well, for  
5 602, you can get commissions and things like  
6 that, but if it's pay for time worked, then you  
7 have to figure out what the normal work week is,  
8 or if you get to 604(b), you have to figure out  
9 what the person's scheduled normal work week is.

10           And this is all in the context of 601  
11 that's supposed to be a streamlined,  
12 easy-to-administer exemption that captures the  
13 common-sense instinct that somebody's getting  
14 six figures is very, very likely to be exempt.

15           Now there's no threat to lower-income  
16 workers here. And I want to be clear about  
17 this. Just because 602 allows you to figure out  
18 that somebody's made a certain -- paid a certain  
19 amount on a salary basis, if they don't qualify  
20 for the HCE 601 exemption, then you still have  
21 to go to 604(b) and you still have to satisfy  
22 that, and that -- that protects the lower-income  
23 workers.

24           This is all about 601 and its  
25 interaction with 604, and, with respect to those

1 two provisions, 604 is duplicative and  
2 contradictory. And this I want to reinforce as  
3 well, that 601 is absolutely a stand-alone  
4 exemption. You get that from the text of the  
5 statute -- of the regulation, which says you can  
6 be exempt under this section, but you also get  
7 it from the fact that it's got that subsection  
8 (d) that's entirely duplicative of 541.3, and  
9 you also get it from the fact that in the  
10 regulatory history, excuse me, they had to add  
11 the 455 per week paid on a salary basis after  
12 the proposed regulation.

13           They wouldn't have needed to do that  
14 if 601 automatically picked up 600, which has  
15 the 455 for every executive employee, so further  
16 evidence that 601 operates independently as a  
17 stand-alone exemption and it's supposed to be  
18 streamlined.

19           On the carveouts -- with respect, the  
20 carveouts for special workers aren't carveouts  
21 just for the special workers over \$100,000. So  
22 we're not asking for a carveout for the whole  
23 industry. We're just asking for a sensible rule  
24 that says that when somebody concededly does  
25 executive functions and is paid six figures that

1 that person is, as the regulatory language says,  
2 strongly likely to be an exempt person, the  
3 detailed inquiry into both salary details and  
4 into duties is not worth the candle.

5 And the last thing I'll leave you with  
6 is just the thought that if you listen to the  
7 other side, everything they're talking about is  
8 like does he get a true salary, but the question  
9 under the statute at the end of the day is, is  
10 he truly a bona fide executive. And that's all  
11 but conceded in this case. And our view of the  
12 regulation allows it to coexist with the  
13 statute. Their view of the regulation  
14 completely divorces it from the statutory text.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
17 Clement, Mr. Sullivan. The case is submitted.

18 (Whereupon, at 1:20 p.m., the case was  
19 submitted.)

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