No. 19-20023

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL J. HEWITT, *Plaintiff-Appellant*,
v.
HELIX ENERGY SOLUTIONS GROUP, INC.; HELIX WELL OPS, INC.,
Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas
No. 4:17-CV-2545

BRIEF OF *AMICI CURIAE* THE STATES OF MISSISSIPPI, ALABAMA, LOUISIANA, MONTANA, AND UTAH IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

LYNN FITCH
Attorney General of Mississippi

SCOTT G. STEWART
Solicitor General
KRISSY C. NOBILE
Deputy Solicitor General
JUSTIN L. MATHENY
Assistant Solicitor General
STATE OF MISSISSIPPI
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 220
Jackson, MS 39205-0220
Telephone: (601) 359-3680
E-mail: justin.matheny@ago.ms.gov
Counsel for Amici *States*

CERTIFICATE OF INTERESTED PERSONS

Under this Court's Rule 28.2.1, governmental parties need not furnish a certificate of interested persons.

s/ Justin L. Matheny
Justin L. Matheny
Counsel for Amici *States*

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

TABLE OF AUTHORITIES iv

INTRODUCTION AND INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

Legal Background 3

Factual Background 5

Procedural Background 6

SUMMARY OF ARGUMENT 8

ARGUMENT 9

This Court Should Conclude That The Plaintiff Was An "Employee Employed In A Bona Fide Executive ... Capacity" And So Was Exempt From The Overtime-Pay Requirement Under The Fair Labor Standards Act And Its Regulations.

A. When possible, a court should interpret agency regulations to be consistent with the statute that authorizes the regulations 9

B. The Fair Labor Standards Act does not permit a regulation that deems someone who is "employed in a bona fide executive ... capacity" not to be an executive exempt from the Act's overtime-pay requirement because of how that employee's compensation is computed 12

C. This Court can and should interpret the regulations here to treat the plaintiff—who was "employed in a bona fide executive ... capacity"—to be exempt from the Fair Labor Standards Act's overtime-pay requirement 19

CONCLUSION 28

CERTIFICATE OF SERVICE 29

CERTIFICATE OF COMPLIANCE 29

TABLE OF AUTHORITIES

Cases

Auer v. Robbins,
519 U.S. 452 (1997) 27

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 9, 26

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 11, 13, 15

Emery Mining Corp. v. Sec'y of Labor,
744 F.2d 1411 (10th Cir. 1984) 10, 26

Encino Motorcars, LLC v. Navarro,
138 S. Ct. 1134 (2018) 3, 17, 18

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 10, 11, 26

Federal Express Corp. v. Holowecki,
552 U.S. 389 (2008) 11

Ins. Co. of N. Am. v. Gee,
702 F.2d 411 (2d Cir. 1983) 10

Jochum v. Pico Credit Corp. of Westbank,
730 F.2d 1041 (5th Cir. 1984) 10, 26

LaVallee Northside Civic Ass'n v.
Virgin Islands Coastal Zone Mgmt. Comm'n,
866 F.2d 616 (3d Cir. 1989) 11

Long Island Care at Home, Ltd. v. Coke,
551 U.S. 158 (2007) 11, 12

Nevada v. U.S. Dep't of Labor,
218 F. Supp. 3d 520 (E.D. Tex. 2016) 14, 15, 16

Nevada v. U.S. Dep't of Labor,
275 F. Supp. 3d 795 (E.D. Tex. 2017) 13

Wirtz v. Miss. Publishers Corp.,
364 F.2d 603 (5th Cir. 1966) 26

Statutes

5 U.S.C. § 5545a 18

29 U.S.C. § 202 18

29 U.S.C. § 207 ..... 3, 18

29 U.S.C. § 213 ..... 1, 2, 3, 4, 12, 16, 17, 18, 19

Rule

Fed. R. App. P. 29 3

Regulations

29 C.F.R. § 541.100 ..... 4, 19

29 C.F.R. § 541.200 4

29 C.F.R. § 541.300 4

29 C.F.R. § 541.601 4

29 C.F.R. § 541.602 ..... 4, 5, 20, 21, 23, 24

29 C.F.R. § 541.604 ..... 2, 7, 8, 21, 22, 23, 24, 25, 26, 27

Other Authorities

Oxford English Dictionary (1933) 13, 14

Webster's New International Dictionary (2d ed. 1934) 13

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

This case is one among a series of recent cases in which an employee who clearly falls within the statutory language exempting him from the Fair Labor Standards Act's overtime-pay requirement claims that he is entitled to overtime pay because his employer did not structure his compensation just as an agency regulation provided—even though the statutory language says nothing about compensation.

This case shows the oddity of that position. The Act exempts from its overtime-pay requirement "any employee employed in a bona fide executive ... capacity." 29 U.S.C. § 213(a)(1). Plaintiff Michael Hewitt was employed in such a capacity. He managed a dozen employees and executed the defendants' (Helix's) business programs. He concedes that he performed the duties of an executive. 2018 WL 6725267, at *4. For good measure, he made over $200,000 per year when he worked for Helix.

Despite all this, a divided panel ruled that Hewitt was not "employed in a bona fide executive ... capacity" and was instead, like a manual laborer paid $8 an hour, entitled to overtime pay. 983 F.3d 789, 792-95. The panel majority did so on the ground that Hewitt was not paid "on a salary basis." Hewitt received a minimum amount for every week he worked for Helix, and that amount far exceeded the minimum amount the regulations require. Yet the majority reasoned that he was paid based on a daily rate—a minimum amount for every day that he worked—but

his payment arrangement did not satisfy a regulation governing how daily-rate workers purportedly must be paid to qualify as exempt executives. The panel saw the oddity of this conclusion—"the statutes enacted by Congress," the panel said, might "very well" call for the opposite result—but thought that the regulations required it. *Id.* at 797.

The en banc Court should hold otherwise. It should conclude that Hewitt is an exempt executive employee. Hewitt falls within the statutory exemption: he performs the duties of an executive (as he admits), and so is "employed in a bona fide executive ... capacity." 29 U.S.C. § 213(a)(1). If the regulations render him non-exempt then it would mean that the regulations defy the statute. The Court should avoid that result when it fairly can. Here it fairly can.

The better view of the regulation governing certain employees whose pay is computed on a daily basis, 29 C.F.R. § 541.604(b), is that it does not apply to employees like Hewitt. That regulation's text shows that it applies to employees who are paid at a daily rate that falls below the weekly amount that the agency has guaranteed to workers who are paid a salary. The regulation does not apply to employees, like Hewitt, whose (very high) daily rate on its own exceeds what the agency requires for a weekly salary: those employees necessarily receive the guaranteed weekly pay—the minimum weekly salary—that the agency required, and so are paid on a salary basis. If the Court has any doubts about whether

the daily-rate regulation applies to Hewitt, it should resolve those doubts in light of the statutory text by concluding that it does not apply. Any other conclusion does violence to the FLSA.

The correct resolution of this case is important to the *amici* States. The Fair Labor Standards Act strikes a balance between improving labor conditions and sustaining employment and economic growth. Rulings that conflict with the Act's text—and broaden the Act's reach—upset that balance. Such a ruling here would imperil protected business activity, upend settled expectations of employers and employees, and invade authority that the Act leaves to States. This Court can avoid all of that by resolving this case in line with the statute's text.*

STATEMENT OF THE CASE

Legal Background. The Fair Labor Standards Act "requires employers to pay overtime to covered employees who work more than 40 hours in a week." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1138 (2018); *see* 29 U.S.C. § 207(a)(1). But that requirement does not cover all employees. Relevant here, Congress exempted from the Act's overtime-pay requirement "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C.

* *Amici* are the States of Mississippi, Alabama, Louisiana, Montana, and Utah. The States may file this brief without the parties' consent or leave of the Court. Fed. R. App. P. 29(a)(2).

§ 213(a)(1). The Act permits the Secretary of Labor to issue regulations to "define[ ] and delimit[ ]" those terms. *Id.*

The agency's regulations provide three hallmarks for determining whether someone falls within that exemption (which we at times call the executive exemption). First, an employee must meet a *duties requirement*. He must perform certain executive, administrative, or professional duties. *See* 29 C.F.R. §§ 541.100(a)(2)-(4) (executive employees), 541.200(a)(2)-(3) (administrative employees), 541.300(a)(2) (professional employees). (The regulations ease the duties requirements for "highly compensated employees." *Id.* § 541.601. An employee who makes at least $107,432 annually—and who meets the two requirements described next—need perform only one exempt duty. *Id.* § 541.601(a)(1).) Second, an employee must meet a *minimum-compensation requirement*. Most employees must receive at least $684 per week. *See id.* §§ 541.100(a)(1), 541.200(a)(1), 541.300(a)(1). Third, an employee must be paid in a certain way—he must (as relevant here) be compensated *on a salary basis*. *See id.* § 541.602(a) (defining "salary basis"); *id.* §§ 541.100(a)(1), 541.200(a)(1), 541.300(a)(1).

The last regulatory requirement—the salary-basis requirement—is the focus of the panel opinions here. The core provisions describing the requirement state:

> (a) General rule. An employee will be considered to be paid on a "salary basis" within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.
>
> > (1) ... [A]n exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work.

29 C.F.R. § 541.602(a). So under this regulation, to be an exempt executive (or administrative or professional) employee, the employee must (i) be paid regularly, weekly or less often, and (ii) receive in that regular pay a previously set ("predetermined") amount for any week in which the employee does any work (the employee may receive compensation beyond that—the predetermined amount can constitute "all *or part* of the employee's compensation"). The regulation ensures that an employee receives a minimum guaranteed amount—a salary—for any week in which the employee does any work.

Factual Background. The States present what they understand to be the material facts. Defendants Helix Energy Solutions Group, Inc. and Helix Well Ops, Inc. (together, Helix) provide oil and gas services on vessels at sea. 2018 WL 6725267 (D. Ct. Op.), at *1. Each vessel has a project crew that handles the vessel's operations. *Id.* A superintendent

heads the project crew. *Id.* Just below him is the tool pusher. *Id.* The tool pusher supervises the work of other employees—the driller, drill crew, and crane crew. *Id.* "It is customary for the" tool pusher "to supervise approximately twelve to thirteen employees during a shift." *Id.* The tool pusher oversees the execution of Helix's business programs. *See id.*

From 2014 to 2017, plaintiff Michael J. Hewitt worked for Helix as a tool pusher. *Id.* Helix paid Hewitt every two weeks. *Id.* He was paid a daily rate that ranged from $963 to $1,341. *See id.* at *1 n.2. His daily rate "was not based on the quality of his work nor the number of hours that he worked in a given day" (so long as he did some work that day). *Id.* at *1. Hewitt was paid more than $200,000 per year while he worked for Helix. *Id.* At times he worked over 40 hours in a week. *See id.* at *1-2.

Procedural Background. In 2017 Hewitt sued Helix, claiming that Helix had erroneously classified him as an exempt employee in violation of the FLSA. *Id.* at *2. Hewitt conceded that he satisfied the regulation's duties requirement for executive employees. *See id.* at *4. But he contended that he was not an exempt executive employee because he was paid on a daily-rate basis rather than on a salary basis. *Id.* at *2. Thus, Hewitt maintained, he was entitled to overtime pay. *Id.*

The district court granted summary judgment to Helix, ruling that Hewitt was an exempt executive employee. *See id.* at *3-4. First, the court concluded that Helix paid Hewitt on a salary basis. Hewitt was paid

regularly and no more often than weekly (every two weeks). *Id.* at *3. And "he always received" (in addition to other compensation) a predetermined minimum amount for any week in which he did any work. *Id.* Second, as Hewitt conceded, he satisfied the duties requirement. *Id.* at *4. And third, Helix met the compensation-level requirement: he was paid "at a rate of double the weekly minimum." *Id.* (The court concluded that Hewitt was an exempt executive under the normal executive-duties test and under the relaxed duties test that the regulation applies to highly compensated employees. *Id.*)

A panel of this Court initially reversed unanimously. 956 F.3d 341. The panel later withdrew that decision and issued a divided decision again reversing. 983 F.3d 789. The panel majority ruled that Hewitt was not paid on a "salary basis." *Id.* at 792-94. The majority believed that Hewitt received a daily rate and so had to meet the two requirements of 29 C.F.R. § 541.604(b) for his pay to be on "a salary basis." *Id.* at 793. One: "the employment arrangement" needed to include "a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked." 29 C.F.R. § 541.604(b). Two: "a reasonable relationship" needed to "exist[ ] between the guaranteed amount and the amount actually earned." *Id.* The majority thought that Helix satisfied neither condition. It ruled that Helix paid Hewitt "a daily rate without offering a minimum weekly

required amount that is paid 'regardless of the number of hours, days or shifts worked.'" 983 F.3d at 794 (quoting 29 C.F.R. § 541.604(b)). And it ruled that Helix did "not comply with the reasonable relationship test": it paid "Hewitt orders of magnitude greater than the minimum weekly guaranteed amount" (Hewitt's daily rate). *Id.* So the panel held that Hewitt was not exempt and is entitled to overtime pay. Judge Wiener dissented, maintaining that Hewitt met the regulatory requirements for the executive exemption and that 29 C.F.R. § 541.604(b) does not apply to Hewitt. *Id.* at 802-09.

This Court granted rehearing en banc.

SUMMARY OF ARGUMENT

When a court construes an agency regulation, it should do so in light of the authorizing statute and should, when it fairly can, interpret the regulation in a way that is consistent with the statute. The statute here provides that someone who is employed to perform in an executive capacity is exempt from federal overtime-pay requirements no matter how his compensation is calculated. The administering agency has nonetheless issued regulations that are in serious tension with the statute: they make the executive exemption turn on the employee's compensation and how his compensation is computed. The Court need not address or resolve all of that tension today. But it can and should

reject an interpretation of the regulations that would subject a highly paid executive employee to federal overtime-pay requirements solely because his total compensation may turn in part on how many days he works in a week. Consistent with the best reading of the statute and regulations, the Court should conclude that the executive plaintiff here was an exempt employee and should affirm the district court's judgment.

ARGUMENT

This Court Should Conclude That The Plaintiff Was An "Employee Employed In A Bona Fide Executive ... Capacity" And So Was Exempt From The Overtime-Pay Requirement Under The Fair Labor Standards Act And Its Regulations.

A. When possible, a court should interpret agency regulations to be consistent with the statute that authorizes the regulations.

This Court is often asked to decide whether an agency regulation "is based on a permissible construction of the statute" that the agency is administering. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). To meet that task the Court must, of course, interpret the statute to decide whether the regulation exceeds the agency's authority and so is invalid.

At other times, however, this Court is just asked to interpret a regulation, not invalidate it. Take a case where no party challenges the regulation's validity and the parties clash only over what the regulation

means. This Court is asked to construe the regulation and is not squarely asked to decide whether the regulation conflicts with the statute.

When that happens, should this Court look only to the regulation? Or should it also look to, and interpret, the statute?

The Court should look to and interpret the statute. And when interpreting a regulation, the Court should—when it fairly can—construe the regulation in a way that harmonizes with the statute.

This understanding—which operates as a canon of regulatory interpretation—has deep roots in the law. The Supreme Court has been "quite unwilling" to read a regulation to reach conduct when the "statute speaks so specifically in terms" that show that it does not reach that conduct. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976). Longstanding caselaw thus emphasizes that courts should "not interpret" a "regulation in a vacuum." *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984). "Rather," courts "must construe" a regulation "in light of the statute it implements." *Id.* This Court has thus recognized that "courts should not interpret an agency regulation to thwart the statutory mandate it was designed to implement." *Jochum v. Pico Credit Corp. of Westbank*, 730 F.2d 1041, 1047 (5th Cir. 1984); *see also Ins. Co. of N. Am. v. Gee*, 702 F.2d 411, 414 (2d Cir. 1983) (similar); *Emery Mining Corp.*, 744 F.2d at 1414-15 (rejecting an interpretation of a regulation that "plainly is at odds with the language and objective of

the statute, even if arguably consistent with the language of the regulation"). When fairly possible, then, a regulation should be interpreted to harmonize with the statute it implements. *See, e.g.*, *LaVallee Northside Civic Ass'n v. Virgin Islands Coastal Zone Mgmt. Comm'n*, 866 F.2d 616, 623 (3d Cir. 1989) (a court should "attempt reconciliation of seemingly discordant statutes and regulations").

The Supreme Court takes this approach when construing regulations. *See, e.g.*, *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 401 (2008) (rejecting a view of a regulation that "is in considerable tension with the structure and purposes of the" statute); *Ernst & Ernst*, 425 U.S. at 214 (refusing to apply a regulation to negligent conduct when the "statute speaks so specifically in terms of ... intentional wrongdoing ... and when its history reflects no more expansive intent"). It has done so recently when interpreting regulations that implement FLSA overtime exemptions. In *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), for example, the Court rejected the Department of Labor's view of regulations—exempting an "outside salesman" from the FLSA's overtime-pay requirement—in part because that view was "flatly inconsistent with the FLSA." *Id.* at 159. The Court then evaluated the FLSA's text and aims in concluding that a pharmaceutical sales representative is an "outside salesman" under the regulations. *See id.* at 161-67. Similarly, in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S.

158 (2007), in holding that an FLSA regulation exempting domestic-service employment controlled over a conflicting regulation, a unanimous Supreme Court relied on the FLSA's aims in resolving a conflict between a literal reading of the two regulations. *Id.* at 169-70.

This Court should use the same approach here.

B. The Fair Labor Standards Act does not permit a regulation that deems someone who is "employed in a bona fide executive ... capacity" not to be an executive exempt from the Act's overtime-pay requirement because of how that employee's compensation is computed.

The canon described above calls for a sound understanding of the statute. The Fair Labor Standards Act is clear: If someone is employed to perform and performs the duties of an executive (or administrator or professional), then he is exempt from the Act's overtime penalties—period. It does not matter how much the employee is compensated or how his compensation is computed. The statute does not permit an agency to deem someone who is employed in an executive capacity to be subject to the overtime-pay requirement based on features of his compensation.

The statute's text compels this conclusion. Congress exempted from the Act's overtime-pay requirement "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). At every turn, the exemption rests on an employee's functions

and duties—requiring simply that they be one of the three sorts listed. The exemption does not turn on compensation.

To start, *capacity* means "[o]utward condition or circumstances; relation; character; position." Webster's New International Dictionary 396 (2d ed. 1934); *see* 2 Oxford English Dictionary 89 (1933) ("Position, condition, character, relation"). As the Supreme Court observed, after invoking these definitions to construe the word *capacity* in another FLSA exemption, "[t]he statute's emphasis on the 'capacity' of the employee counsels in favor of a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 161 (2012) (construing FLSA's outside-salesman exemption). So too for the executive exemption: The word *capacity* conveys that the exemption turns on the functions that an employee performs. And the word does not convey that the exemption turns on the employee's compensation—whether it be his level of compensation or how his compensation is computed.

That statute's use of the words *executive*, *administrative*, and *professional* drives home that function-based understanding. Each of those words focuses on "a person's performance, conduct, or function." *Nevada v. U.S. Dep't of Labor*, 275 F. Supp. 3d 795, 804 (E.D. Tex. 2017). *Executive* means someone "[c]apable of performance," "operative,"

"[a]ctive in execution," "energetic," "[a]pt or skilful in execution," "[p]ertaining to execution," or "having the function of executing or carrying into practical effect." 3 Oxford English Dictionary 395. *Administrative* means "[p]ertaining to, or dealing with, the conduct or management of affairs," "executive," "[o]f the nature of stewardship, or delegated authority," or "a company of men entrusted with management." 1 Oxford English Dictionary 118. And *professional* means "[p]ertaining to, proper to, or connected with a or one's profession or calling" or refers to someone "[e]ngaged in one of the learned or skilled professions, or in a calling considered socially superior to a trade or handicraft." 8 Oxford English Dictionary 1428. Each word affirms what *capacity* denotes: The executive exemption turns on an employee's functions, responsibilities, duties, or conduct—in particular, whether those features place an employee in a category for which overtime compensation would not be expected or appropriate. None of the terms—capacity, executive, administrative, professional—"suggest[s]" that "salary" or compensation is relevant to the exemption. *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 529 (E.D. Tex. 2016).

The modifying term *bona fide* reinforces this function-based understanding of the statute's text. *Bona fide* means "[i]n good faith, with sincerity; genuinely." 1 Oxford English Dictionary 980. The phrase modifies "executive, administrative, or professional capacity." "The plain

meaning of 'bona fide' and its placement in the statute indicate" that the exemption applies "based upon the tasks an employee actually performs," *Nevada*, 218 F. Supp. 3d at 529—not, say, the job title that an employee is given. A business cannot apply the executive exemption to a janitor by calling him an Executive Vice President. But someone who performs executive duties falls within the exemption.

Last, Congress made clear that the executive exemption applies to "any" employee who is employed in an executive (or other listed) capacity. Here, *any* "is best read to mean 'one or some indiscriminately of whatever kind.'" *Christopher*, 567 U.S. at 162 (some internal quotation marks omitted). "Any" bespeaks breadth and affirms that the exemption covers all employees who perform the duties and functions denoted.

Taking the words of the executive exemption together leads to an unmistakable conclusion: If someone is employed to perform and does perform the duties of an executive, an administrator, or a professional, then he falls outside of the FLSA's overtime-pay requirement. And he is "employed" in an enumerated "capacity"—be it "executive, administrative, or professional"—based on his functions and duties alone. If his duties are executive (or administrative or professional), he is exempt. The statute requires no more. And it allows no more requirements—including compensation-based requirements. The statutory exemption says nothing of compensation and nothing in it

denotes or connotes compensation. So it leaves no room for the agency to "fill a gap" by adding a compensation requirement.

The statute does permit the agency to "define[ ] and delimit[ ]" the executive exemption's terms. 29 U.S.C. § 213(a)(1). That authorization may allow the agency some latitude in defining what duties or functions are executive, administrative, or professional. *Nevada*, 218 F. Supp. 3d at 530. Perhaps they allow the agency to require that an employee devote a certain share of his time to those duties to meet the exemption. But the authority to define and delimit "is limited by the plain meaning of the statute" and does not allow the agency to rewrite the statute by adding a compensation requirement that has no basis in the statutory text. *Id.* As a district court emphasized when enjoining an agency regulation imposing a heightened salary-level requirement on the executive exemption: "Congress gave the" agency "the authority to define what type of duties qualify—it did not give" it "the authority to supplant the duties test and establish a salary test that causes bona fide" executives, administrators, or professionals "to suddenly lose their exemption irrespective of their job duties and responsibilities." *Id.* at 531 n.6 (internal quotation marks omitted).

The statute's text is clear and is grounds enough to conclude that an agency regulation may not, based on features of an employee's compensation, subject him to the Act's overtime-pay requirement when

his duties qualify him for the executive exemption. Just a few Terms ago the U.S. Supreme Court construed another FLSA overtime exemption based only on the exemption's text—in an analysis that consumed barely a page in the Supreme Court Reporter. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1140-41 (2018) ("Under the best reading of the text" of the statute, service advisors are "salesm[e]n ... primarily engaged in ... servicing automobiles."). The text here is similarly decisive.

But here there is more: The statutory structure puts beyond doubt that an employee cannot be excluded from the exemption here based on his compensation. That structure shows that Congress knows how to make an overtime exemption turn on compensation. Congress has set forth many exemptions from its general overtime-pay requirement. Title 29 U.S.C. § 213(a) and (b) contain about three dozen of them. In about 1 in 5 of those exemptions Congress specified that the exemption turns on a feature of compensation. Certain agriculture employees may be exempt if they are "paid on a piece rate basis." 29 U.S.C. § 213(a)(6). Certain computer workers who are paid on an hourly basis may be exempt—but only if they are paid at least $27.63 per hour. *Id.* § 213(a)(17). A local-delivery driver may be exempt if he is "compensated ... on the basis of trip rates." *Id.* § 213(b)(11). A baseball player is exempt only if he is provided a minimum weekly salary. *Id.* § 213(a)(19). Certain persons employed "by a nonprofit educational institution" must, to be exempt, be

paid "on a cash basis, at an annual rate of not less than $10,000." *Id.* § 213(b)(24). A criminal investigator is exempt if he is paid "availability pay" under 5 U.S.C. § 5545a. *Id.* § 213(a)(16).

This all shows that when Congress wants to make an exemption turn on a feature of compensation, it says so. It did not make the executive exemption turn on compensation. So an agency regulation cannot subject an employee to the Act's overtime-pay requirement based on how he is compensated when he is in fact "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).

This textual and structural understanding respects the balance that Congress struck in the Fair Labor Standards Act. In the FLSA, Congress did seek "to correct and ... eliminate" "labor conditions detrimental" to workers' well-being. 29 U.S.C. § 202(a), (b). But in the same breath Congress made clear that it wanted to address those conditions "without substantially curtailing employment or earning power." *Id.* § 202(b). That tempered approach is apparent in the Act's overtime-pay regime. The Act provides a general overtime-pay requirement, *id.* § 207(a)(1), but it modulates that rule with an extensive set of exemptions, *id.* § 213(a), (b). The Act's "exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement." *Encino Motorcars*, 138 S. Ct. at 1142. Applying the executive exemption in

keeping with its text and the Act's structure thus promotes the FLSA's aims and respects the balance that Congress struck.

C. This Court can and should interpret the regulations here to treat the plaintiff—who was "employed in a bona fide executive ... capacity"—to be exempt from the Fair Labor Standards Act's overtime-pay requirement.

This brings us to the ultimate issue: Under the regulation, is Hewitt exempt from the FLSA's overtime-pay requirement? The answer is yes. And if the Court has any doubt, it should resolve it in light of the FLSA itself—under which Hewitt is clearly exempt.

To start, Hewitt is exempt under the statute. Congress exempted "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Hewitt was "employed in a bona fide executive ... capacity." As a tool pusher he would have customarily supervised a dozen employees and was charged with executing Helix's oil-and-gas-service programs. D. Ct. Op. *1. Indeed, Hewitt concedes that he performed executive duties. *See id.* at *4.

Under the best reading of the regulations, Hewitt was also exempt. He satisfied the three regulatory requirements for the exemption.

First, as explained, he satisfies the duties requirement that applies to executives. Again, Hewitt concedes this. D. Ct. Op. *4.

Second, Hewitt met the minimum-compensation requirement. He needed to make only $684 per week. 29 C.F.R. § 541.100(a)(1). He never

made less than $963 in a week when working for Helix. *See* D. Ct. Op. *1 n.2. (As Part B shows, the FLSA provides no textual basis for a compensation-level requirement. But the Court need not address that requirement's validity because Hewitt met it anyway.)

Third, Hewitt met the salary-basis requirement. The regulations provide as a "[g]eneral rule" that an employee is paid on a salary basis if he "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602(a). And (as relevant here) "an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked," but "[e]xempt employees need not be paid for any workweek in which they perform no work." *Id.* § 541.602(a)(1). Hewitt met these criteria. He was paid on "a weekly, or less frequent basis"—to wit, every two weeks. D. Ct. Op. *1. When he was paid, he "regularly receive[d] ... a predetermined amount constituting all *or part* of" his compensation—he received at least $963 for each week in which he worked at all. *See id.* at *1 n.2. That predetermined amount was not subject to reduction based on "the quality or quantity of the work performed": he received at least that amount if he did any work in a week. *Id.* at *1. And he would receive his "full salary"

(the predetermined minimum amount) "for any week in which" he "perform[ed] any work." *See id.* So Hewitt was paid on a salary basis: consistent with the regulation, his employment arrangement ensured that he received a minimum guaranteed amount—a salary—for any week in which he worked at all. *See* 29 C.F.R. § 541.602.

The panel majority viewed matters differently. Because Hewitt received a daily rate for each day he worked, the panel reasoned that Hewitt was paid *with* (not, as 29 C.F.R. § 541.602(a)(1) requires, "without") "regard to the number of days or hours worked" and so needed to satisfy another regulation that addresses workers whose compensation is computed on a daily basis (983 F.3d at 793):

> (b) An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the [executive] exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek. ...

29 C.F.R. § 541.604(b). According to the panel majority, Hewitt did not satisfy the two conditions that this regulation imposes. First, "the employment arrangement" between Hewitt and Helix lacked "a

guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked." *See* 983 F.3d at 794. Rather, Helix paid Hewitt "a daily rate without offering a minimum weekly required amount that is paid 'regardless of the number of hours, days or shifts worked.'" *Id.* (quoting 29 C.F.R. § 541.604(b)). Second, "a reasonable relationship" did not "exist[ ] between the guaranteed amount and the amount actually earned": Helix paid "Hewitt orders of magnitude greater than" the minimum weekly guaranteed amount (Hewitt's daily rate). *Id.*

The en banc Court should hold otherwise. If the panel majority were right to apply 29 C.F.R. § 541.604(b), then that regulation would defy the statute. The statute provides that an employee is exempt if he is "employed in a bona fide executive ... capacity." Hewitt concededly performed the duties of an executive, so he falls within the statute. *See supra* Part B. The panel majority's view of the regulations would cause Hewitt to fall outside the exemption based on how his compensation is computed. That manifest conflict with the statute is not one that the Court should accept unless it has no better option.

The Court has a better option. There is a better view of 29 C.F.R. § 541.604(b): That regulation simply does not apply to Hewitt and employees compensated as he is.

The panel erred in thinking that 29 C.F.R. § 541.604(b) is triggered at all. The panel thought that that Hewitt was paid *with* (not, as 29 C.F.R. § 541.602(a)(1) requires, "without") "regard to the number of days ... worked"—and so the panel believed that it had to assess whether Hewitt satisfied the daily-rate requirements in 29 C.F.R. § 541.604(b). *See* 983 F.3d at 792-93. But that is not the best reading of section 541.602(a)(1)'s "without regard" requirement. Under section 541.602(a)(1) it is the employee's *salary* that cannot be paid with "regard to the number of days ... worked." Section 541.602(a)(1) says that "an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." The employee's "full salary" is different from an employee's full compensation. The term "full salary" (29 C.F.R. § 541.602(a)(1)) refers to the regularly paid, "predetermined amount constituting all *or part* of the employee's compensation" that is "not subject to reduction because of variations in the quality or quantity of the work performed" (*id.* § 541.602(a)). So long as the employee gets a salary that meets the required level, he can also get other compensation (even on a daily rate) and still satisfy the salary-basis requirement. Take Hewitt. His *full salary* was the minimum amount that he would receive in any week in which he did any work—$963. That salary was paid without regard to the number of days he worked (so long as he worked at

some point in the week). He received *further compensation*, based on a daily rate—but that compensation was not his *salary*, so it does not matter that it was paid with "regard to the number of days ... worked." Section 541.604(b) was thus never triggered because Helix guaranteed Hewitt a $963 salary per week for any week in which he did any work—a salary that far exceeds the regulatory minimum.

Section 541.604(b) applies to a different set of workers—those whose daily (or hourly or shift) rate does not on its own exceed the minimum weekly guarantee that the regulations require. Section 541.604(b) speaks to hourly, daily, and shift-basis workers and says that an employee will not "los[e]" the executive exemption if his employment arrangement "guarantee[s]" that the employee will receive "at least the minimum weekly required amount." As explained above, Hewitt's heightened pay meant that Helix never "los[t]" the exemption and never needed the safety valve that section 541.604(b) supplies: Helix satisfied section 541.602, and section 541.604(b) never came into play. Section 541.604(b)'s directive makes sense only for—and applies only to—someone whose daily (or hourly or shift) rate does not on its own catapult him above the weekly salary level that the regulations require. There is no reason to add section 541.604(b)'s extra guarantee for someone who is already compensated so handsomely that if he does *any* work in a week then he exceeds the agency's minimum weekly salary guarantee.

Similarly, section 541.604(b)'s reasonable-relationship test makes sense only for—and applies only to—employees compensated at a level at which they are not guaranteed the minimum weekly salary whenever they work at all in a week. As the panel majority itself explained, "the reasonable relationship test ensures that the minimum weekly guarantee it not a charade—it sets a ceiling on how much the employee can expect to work in exchange for his normal paycheck, by preventing the employer from purporting to pay a stable weekly amount without regard to hours worked, while in reality routinely overworking the employee far in excess of the time the weekly guarantee contemplates." 983 F.3d at 793 (emphasis omitted). That logic has no force for employees in Hewitt's shoes. He enjoyed not just a high weekly guarantee but also the further pay he got for each other day he did any work—which led him to be paid more than $200,000 per year. The reasonable-relationship test makes sense (if at all) only for someone who receives a daily (or hourly or shift) rate that does not on its own meet the weekly salary level that the regulations require.

If this Court has any doubt whether 29 C.F.R. § 541.604(b) applies to employees like Hewitt—those whose daily rate exceeds the regulation's weekly salary-level requirement—it should resolve that doubt in a way that respects the FLSA's text. As explained in Part A, this Court should "not interpret" the regulations here "in a vacuum" but

should instead "construe" them "in light of the statute" they "implement[ ]." *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984). And this Court "should not interpret an agency regulation to thwart the statutory mandate." *Jochum v. Pico Credit Corp. of Westbank*, 730 F.2d 1041, 1047 (5th Cir. 1984). Here, that means the Court should hold that 29 C.F.R. § 541.604(b) does not apply to employees like Hewitt—those whose daily rate exceeds the regulation's weekly salary requirement. Any other approach causes the regulations to do needless violence to the statute's text. This Court should be "quite unwilling" to reach that result because, as Part B explains, the "statute speaks so specifically in terms" that do not allow an employee to be stripped of the executive exemption based on how his compensation is computed. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976).

It is true that in *Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603 (5th Cir. 1966), a panel rejected the argument that the agency's then-$100-per-week minimum-salary requirement "is not a justifiable regulation" under the statute's executive exemption. *Id.* at 608. *Wirtz* is a pre-*Chevron* decision that failed to examine the statutory text and instead applied a lenient standard of review that conflicts with *Chevron*. *See id.* Even if *Wirtz* were good law, it would not bind the en banc Court. And even if it did bind this Court, it would not dictate the outcome here. *Wirtz* addresses the validity of a minimum-compensation requirement. It

does not address the salary-basis requirement. The Court should not extend or embrace a (superseded) precedent that defies the statute.

One last point: In *Auer v. Robbins*, 519 U.S. 452 (1997), the Supreme Court rejected an argument that an element of the salary-basis test—the prohibition on reducing an employee's salary for disciplinary reasons—"is invalid for public-sector employees because as applied to them it reflects an unreasonable interpretation of the" statute's executive exemption. *Id.* at 457. Three points bear emphasis. First, *Auer* did not evaluate whether the salary-basis test itself defies the statute: the respondents there did "not raise any general challenge to the Secretary's reliance on the salary-basis test." *Id.* Second, *Auer* did not concern the daily-rate issue presented here. Third, *Auer* applied the text-based approach that the States advocate: nothing in the executive exemption distinguishes between private-sector and public-sector employees, so the statute did not "compel[ ]" the agency to treat public employees differently. *Id.* at 458. This Court should take the statutory text as its guide here too.

Reading 29 C.F.R. § 541.604(b) in light of the statutory text will not solve all the problems that the regulations present. But it will narrow the problems. Other problems can await another day. For today the Court should adopt the interpretation of the regulations that is fair and that

respects the statute. That means concluding that Hewitt was an exempt employee. The district court's decision so ruling should be affirmed.

CONCLUSION

The district court's judgment is consistent with the FLSA's plain text. It should be affirmed.

Respectfully submitted,

LYNN FITCH
Attorney General of Mississippi

s/ Justin L. Matheny
SCOTT G. STEWART
Solicitor General
KRISSY C. NOBILE
Deputy Solicitor General
JUSTIN L. MATHENY
Assistant Solicitor General
STATE OF MISSISSIPPI
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 220
Jackson, MS 39205-0220
Telephone: (601) 359-3680
E-mail: justin.matheny@ago.ms.gov
Counsel for Amici *States*

CERTIFICATE OF SERVICE

I, Justin L. Matheny, hereby certify that the foregoing brief has been filed with the Clerk of Court using the Court's electronic filing system, which sent notification of such filing to all counsel of record.

Dated: April 22, 2021

s/ Justin L. Matheny
Justin L. Matheny
Counsel for Amici *States*

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the word limitations of Fed. R. App. P. 29(a)(5) because, excluding the parts of the brief exempted by Fed. R. App. P. 32, it contains 6,496 words—less than half the maximum length authorized for a party's principal brief (Fed. R. App. P. 32(a)(7)(B)(i)). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface, including serifs, using Microsoft Word 2016, in Century Schoolbook 14-point font, except for footnotes, which have been prepared the same way except in 12-point font.

Dated: April 22, 2021

s/ Justin L. Matheny
Justin L. Matheny
Counsel for Amici *States*