No. 21-984

In the Supreme Court of the United States

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

v.

MICHAEL J. HEWITT

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

SEEMA NANDA
Solicitor of Labor
JENNIFER S. BRAND
Associate Solicitor
RACHEL GOLDBERG
Counsel for Appellate Litigation
STEVEN W. GARDINER
ERIN M. MOHAN
Senior Attorneys
Department of Labor
Washington, D.C. 20210

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether an employee whose pay was calculated on a daily-rate basis, rather than on a weekly or less frequent basis, but whose wages totaled over $200,000 annually, was paid on a "salary basis" and was exempt from overtime-pay requirements as a highly compensated executive employee under 29 C.F.R. 541.601, which incorporates the salary-basis test in 29 C.F.R. 541.602.

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INTEREST OF THE UNITED STATES

This case concerns the circumstances under which an employee paid on a daily-rate basis can be exempt under 29 U.S.C. 213(a)(1) from the overtime-pay requirements of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* The United States has a significant interest in that question because it concerns the proper interpretation of implementing regulations promulgated by the Department of Labor (DOL), which administers and enforces the FLSA. 29 U.S.C. 204, 211(a), 216(c), 217.

STATEMENT

1. Congress enacted the FLSA to protect covered employees from both "substandard wages" and "oppressive working hours." *Barrentine* v. *Arkansas-Best*

Freight Sys., Inc., 450 U.S. 728, 739 (1981); see 29 U.S.C. 206 (minimum wage), 207 (overtime pay). Congress addressed the latter by requiring time-and-a-half overtime pay, even for those whose "regular pay" exceeds "the statutory minimum," to "compensate [workers] for the burden" of working long hours and to increase overall employment by incentivizing employers to expand their "distribution of available work." *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 577-578 (1942); see 29 U.S.C. 207(a)(1). Employees therefore are not "deprived of the benefits of [overtime compensation] simply because they are well paid." *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 167 (1945).

The FLSA, however, exempts some workers from its protections, 29 U.S.C. 213(a) and (b), including "any employee employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor)]." 29 U.S.C. 213(a)(1).

a. "Since 1940, the regulations implementing th[at] exemption" have included three distinct criteria, each of which must normally be satisfied to qualify for exemption: "(1) The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the 'salary basis test'); (2) the amount of salary paid must meet a minimum specified amount (the 'salary level test'); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties" "(the 'duties test')." 84 Fed. Reg. 51,230 (2019).

Consistent with that history, Section 541.100, which defines the "executive" exemption relevant to this case,

applies only if: (1) the employee is "[c]ompensated on a salary basis" (2) "at a rate of not less than $455 [now $684] per week," and (3) all three of the following duties requirements are satisfied: (a) the employee's "primary duty is management of the enterprise in which [he] is employed" or "a customarily recognized department or subdivision thereof"; (b) he "customarily and regularly directs the work of two or more other employees"; and (c) he either has "authority to hire or fire other employees" or his "suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees" are given "particular weight." 29 C.F.R. 541.100(a) (2015).[1]

b. This case concerns the "salary basis" test—principally, whether that test is satisfied when an employee is paid on a "daily rate" basis for each day that he works.

The "salary basis" requirement for executive employees was adopted in 1940, see 29 C.F.R. 541.1(e) (Supp. 1940), after public notice and rulemaking hearings. Wage & Hour Div., DOL, *"Executive, Administrative, Professional . . . Outside Salesman" Redefined:*

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[1] Unless otherwise indicated, all citations to Part 541 in this brief are to 29 C.F.R. Part 541 (2015). Those regulations were revised in 2016, but the 2015 regulations remained in force because a district court enjoined enforcement of the amendments pending further litigation and appeal. See 84 Fed. Reg. at 51,230, 51,232 & n.16. In 2019, after the years relevant to this case, DOL rescinded the 2016 amendments and further revised Part 541 effective January 2020. *Id.* at 51,231-51,233, 51,245-246. The 2019 amendments increased the salary-level threshold from $455 to $684/week, see 29 C.F.R. 541.100(a)(1), 541.600(a) (2020), but did not materially alter the salary-basis regulations relevant to this case. For convenience, this brief generally refers to the applicable 2015 regulations and $455/week salary-level threshold in the present tense.

Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition 1 & n.3 (Oct. 1940) (*1940 Stein Report*); see *id.* at III (adopting report's construction of regulations as agency's position). The agency determined that "[t]he term 'executive' implies a certain prestige, status, and importance"; that compensation on a "salary" basis was a hallmark of "'bona fide' executive" positions; and that "there was general agreement" among rulemaking participants, including representatives from the oil-and-gas industry, "on the appropriateness of a salary test" for "'executive'" employees. *Id.* at 5 & n.16, 19 & n.66. The agency explained that "executive status in and of itself connotes" a degree of "tenure" and that "[t]he shortest pay period which can properly be understood to be appropriate for a person employed in an executive capacity is obviously a weekly pay period." *Id.* at 23. The agency therefore concluded that "hourly paid employees" should not be exempt. *Ibid.*

The agency interpreted "salary basis" to require that an exempt employee "regularly receive[] each pay period, on a weekly, biweekly, semi-monthly, monthly or annual basis, a predetermined amount" that is "not subject to reduction because of variations in the number of hours worked or in the quantity or quality of the work performed during the pay period." Wage & Hour Div., DOL, *Release No. A-9* (Aug. 24, 1944), available at *Wage & Hour Manual (BNA)* 719 (1944-1945 Cum. ed.). That salary-basis requirement reflected that executives were "normally allowed some latitude with respect to the time spent at work," including reasonable flexibility to "go[] home early" or take a "day off," without reduction in the amount paid as their salary. *Ibid.*

In 1949, again after notice and rulemaking hearings, 12 Fed. Reg. 6896 (1947), DOL promulgated regulations "based upon [the presiding officer's] report," known as the Weiss Report, which "explain[ed] and illustrat[ed]" the terms used in the regulations. 14 Fed. Reg. 5573 (1949); see Wage & Hour & Public Contracts Divisions, DOL, *Report and Recommendations on Proposed Revisions of Regulations, Part 541*, at 1-2 (June 1949) (*1949 Weiss Report*). The agency also promulgated regulations defining relevant terms, including "salary basis." 14 Fed. Reg. 7723, 7735 (1949) (promulgating 29 C.F.R. 541.118 (Cum. Supp. 1949)). The rulemaking report had determined that the evidence and the agency's own experience demonstrated the "propriety of a salary test for exemption" and showed that "[c]ompensation on a salary basis" was "almost universally recognized as the only method of payment consistent with the status implied by the term 'bona fide' executive." *1949 Weiss Report* 8, 24. The report confirmed that "the shortest period of payment which will meet the requirement of payment 'on a salary basis' is a week," *id.* at 15; explained that payment on a "salary basis" requires that an employee "receive his full salary for any week in which he performs any work without regard to the number of days or hours worked"; and clarified that such a salary may "'constitut[e] all or part of [an employee's] compensation'" because "additional compensation besides the salary"—such as a sales "commission" or percentage share of "sales or profits"—"is not inconsistent with the salary basis of payment," *id.* at 26.

The hearing officer's report stated, however, that the "salary basis" test would not be satisfied if a weekly "salary is divided into two parts"—for example, a "guaranteed minimum" plus an "additional [sum]" subject to

deductions—because the resulting compensation would not satisfy "the requirement that the full salary must be paid in any week in which any work is performed." *1949 Weiss Report* 26. The report similarly stated that an employee who occasionally works only "a few days" in a week will not be paid "on a salary basis" if he is paid only "a proportionate part of the weekly salary." *Id.* at 26-27.

Most of the relevant salary-basis regulations codifying the agency's interpretations and explanations have not materially changed since 1949. See, *e.g.*, 29 C.F.R. 541.602, 541.604(a); 29 C.F.R. 541.118(a)-(c) (2003); 29 C.F.R. 541.118(a)-(c) (Cum. Supp. 1949). Thus, Section 541.602(a) currently provides that an employee is "paid on a 'salary basis'" 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." 29 C.F.R. 541.602(a). Subject to certain exceptions, an exempt employee must therefore receive "the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." *Ibid.* And so long as the employee is guaranteed "at least the minimum weekly-required amount paid on a salary basis," an employer may pay the employee "additional compensation" —such as a "commission on sales," "a percentage of the sales or profits," or pay for "hours worked for work beyond the normal workweek"—without "losing the exemption or violating the salary basis requirement." 29 C.F.R. 541.604(a).

c. The regulations separately address employees whose earnings are computed on an hourly, daily, or

shift basis rather than on a weekly or less frequent basis. Section 541.604(b), which was promulgated in 2004, provides that an employer "may * * * compute[]" an employee's earnings "on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement," if: (1) its employment arrangement "also includes a guarantee of at least the [$455] minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked," and (2) "a reasonable relationship exists between the guaranteed amount and the amount actually earned." 29 C.F.R. 541.604(b); see 29 C.F.R. 541.600(a). "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). The purpose of the reasonable-relationship requirement is to ensure that the guarantee functions sufficiently like a true salary—a stable amount the employee can depend on that is reasonably close to the employee's total weekly pay. 69 Fed. Reg. 22,122, 22,184 (2004).

d. From 1949 to 2004, Part 541 contained an alternative method of establishing an executive, administrative, or professional (EAP) exemption. DOL determined that "a short-cut determination for exemption" was warranted in contexts involving "employees who receive [sufficiently high] salaries" because the rulemaking evidence and the agency's enforcement experience showed that "the higher the salaries paid the more likely the employees are to meet all the requirements for exemption, and the less productive are the hours of inspection time spent in analysis of the duties performed." *1949 Weiss Report* 22-23. That alternative

method "combin[ed]" both "high salary requirements" and "certain qualitative requirements relating to the work performed." *Id.* at 23. It provided, for instance, that "an employee who is compensated on a salary basis at a [specified high weekly] rate" and who satisfies two of the executive exemption's "duty" tests "shall be deemed to meet all the requirements of [the executive exemption]." 29 C.F.R. 541.1(f) (2003); accord 29 C.F.R. 541.1 (Cum. Supp. 1949); see 29 C.F.R. 541.119(a) (2003); see also, *e.g.*, 29 C.F.R. 541.2(e)(2), 541.3(e) (2003).

In 2004, DOL adopted Section 541.601 to apply an even "more flexible duties standard" for certain highly compensated employees (HCEs). 69 Fed. Reg. at 22,174. Section 541.601, like Section 541.100's standard executive exemption, requires that an exempt executive receive "at least $455 per week paid on a salary * * * basis." 29 C.F.R. 541.601(b)(1). But if the employee's "[t]otal annual compensation"—which includes that "salary" plus any "commissions, nondiscretionary bonuses and other nondiscretionary compensation" (*ibid.*)—is "at least $100,000," the employee "is deemed exempt * * * if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities" required for an executive exemption. 29 C.F.R. 541.601(a); cf. 29 C.F.R. 541.601(a)(1) (2020) ($107,432 total now required).

2. From December 2014 to August 2017, respondent worked for petitioners as a "Toolpusher" on a vessel involved in oil production. Pet. App. 79. Respondent typically worked about 84 hours per week (12 hours daily, seven days a week) during a 28-day "hitch," after which he would have 28 days off before his next hitch. *Ibid.*; J.A. 62-63, 83. The "top" position on such vessels is the

Captain, who supervises the marine crew. J.A. 72-73. As one of two Toolpushers, respondent reported to the vessel's Superintendent, who supervises the "projects crew." J.A. 73-74; Pet. App. 78. Respondent worked "outside on [the vessel's] deck" and in its "drill shack," supervising approximately 12-14 members of the drill, crane, and subsea-department crews. J.A. 54-56; Pet. App. 78-79.

Petitioners paid respondent on a "daily rate" basis and did not provide overtime compensation. J.A. 53-54, 96. Respondent was paid the daily rate, which ranged from $963 to $1341 per day, Pet. App. 7, 79 & n.2, for any day in which he worked any amount; but if he worked only one day in a week, he would be paid only for that single day of work, J.A. 65-66, 96-97. Under that compensation scheme, petitioners paid respondent over $200,000 annually. Pet. App. 79; J.A. 104, 114.

3. Respondent filed this FLSA action, alleging that petitioners' failure to pay him overtime compensation was unlawful because he was not exempt from the FLSA's overtime requirements. J.A. 24-31.

The district court granted summary judgment to petitioners (Pet. App. 77-87), holding that respondent was paid on a "salary basis" and that the remaining requirements for exemption were satisfied. *Id.* at 84-86.

4. A panel of the court of appeals unanimously reversed and remanded. Br. in Opp. (Opp.) App. 1a-8a. On rehearing, the panel again reversed in a substitute opinion, this time with one judge dissenting. *Id.* at 9a-51a.

5. The court of appeals granted rehearing en banc, and the en banc court likewise reversed and remanded. Pet. App. 1-76.

a. The 12-judge majority concluded that respondent was not an exempt employee because he was not paid on a salary basis. Pet. App. 1-20. The court of appeals explained that the regulations governing both the executive exemption and its HCE variant impose a "salary basis" test. *Id.* at 2-4. The court analyzed Section 541.602(a)'s "general" salary-basis rule and Section 541.604(b)'s "special rule" for employees like respondent who are paid an "hourly or daily rate" and concluded that petitioners failed to satisfy either. *Id.* at 4-5, 8-9; see *id.* at 9-15.

The court of appeals noted that Section 541.602(a)'s general rule both defines "salary" as "compensation paid 'on a weekly, or less frequent basis'" and requires that an exempt employee "'receive the full salary for any week in which the employee performs any work *without regard to the number of days or hours worked*.'" Pet. App. 4, 8-9 (quoting 29 C.F.R. 541.602(a) (2020)). The court observed that "a daily rate, by definition, is paid with regard to—and not 'regardless of'—the number of . . . days . . . worked." *Id.* at 11 (citation omitted). The court therefore "h[e]ld that, when it comes to daily-rate employees like [respondent], [petitioners] must comply with [Section] 541.604(b)" to satisfy the salary-basis test. *Id.* at 5.

Turning to Section 541.604(b), the court of appeals characterized the provision as an "exception[] or proviso[]" to Section 541.602(a)'s "general rule" that provides that "an employee's earnings can 'be computed on . . . a daily . . . basis, without losing the exemption or violating the salary basis requirement'—but only 'if' certain other conditions are met." Pet. App. 8-9

(quoting 29 C.F.R. 541.604(b)) (emphasis omitted). Those conditions, the court explained, are that "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 that "a reasonable relationship exists between the guaranteed amount and the amount actually earned." *Id.* at 9-10 (quoting 29 C.F.R. 541.604(b)). "Tellingly," the court stated, "[petitioners] do[] not contend" that they satisfied Section 541.604(b)'s requirements. *Id.* at 11; see *id.* at 5. But the court observed that petitioners "could have easily complied with [Section] 541.604(b)" by "offering a minimum weekly guarantee." *Id.* at 6.

The majority further determined that Section 541.601's HCE provision does not displace those salary-basis requirements. Pet. App. 15-17. The court explained that HCEs—just like their "more modestly paid" "counterparts"—are "exempt only if they are '[c]ompensated on a salary basis,'" *id.* at 16-17 (citation omitted; brackets in original); see *id.* at 15-16 (quoting 29 C.F.R. 541.601(b)(1) (2020)), and that "the only way for an employee to have his pay 'computed on a daily basis' 'without violating the salary basis requirement' is to comply with [Section] 541.604(b)." *Id.* at 16 (citation omitted). The court added that its decision was "hardly novel" and could "hardly come as a surprise to the oil and gas industry." *Id.* at 15.

b. Judge Jones (Pet. App. 35-62) and Judge Weiner (*id.* at 63-76) authored dissents for a total of six judges.

SUMMARY OF ARGUMENT

To be eligible for exemption under Section 541.601's provisions for highly compensated employees, an employee must, *inter alia*, be paid on a "salary basis." Respondent's daily wage does not qualify.

A. To satisfy the salary-basis requirement, Section 541.602(a) requires payment of a "predetermined amount" constituting the employee's "full salary" for a week, which must be calculated on a "weekly, or less frequent basis" and be determined "without regard to the number of days or hours worked." 29 C.F.R. 541.602(a). Daily-rate pay, however, is by definition determined *with*, not "without[,] regard to the number of days" worked. *Ibid.* Daily-rate pay also is not a "predetermined amount" constituting the "full salary" for the week, because the amount to be paid cannot be determined until after the extent of an employee's actual work in that week is known. And because the "basis" on which the salary is computed must either be "weekly" or "less frequent," a daily-rate basis does not qualify. These provisions governing a full weekly "salary" embody the traditional meaning of the word "salary."

The "predetermined amount" of pay for a week can "constitut[e] all or part of an employee's compensation," but that does not suggest that a single day's payment can be a "full salary" for the week. 29 C.F.R. 541.602(a). The quoted language reflects that an employee's total compensation may include "additional compensation"—such as a "commission" or a percentage of "sales or profits"—supplementing his full-week salary. 29 C.F.R. 541.604(a). And the only permissible "additional" compensation that can be based on the amount of time worked is that for work "beyond the normal workweek." *Ibid.*

The regulatory context and history confirm that daily-rate pay does not satisfy Section 541.602(a)'s requirements. That is the best reading of the regulations. In any event, DOL's interpretation is reasonable, reflects the agency's considered judgment based on its longstanding interpretation of its regulations, and is entitled to deference.

B. 1. Payment on a daily-rate basis can nevertheless satisfy the salary-basis test if an employer provides a weekly pay guarantee under Section 541.604(b) that functions sufficiently like a full weekly salary. Petitioners, however, do not claim to satisfy Section 541.604(b).

2. Section 541.601's provisions for highly compensated employees do not alter that conclusion. Section 541.601 requires payment on a salary basis, 29 C.F.R. 541.601(b)(1), just like the standard exemption for executives, and its provisions are fully consistent with Section 541.604(b). Petitioners' contrary reading would perversely deny other employers exemptions to which they currently are entitled under Section 541.601.

C. The foregoing application of the "salary basis" requirement, which reflects bona fide executives' status and flexibility to manage their time, is consistent with the FLSA and the agency's broad authority both to "define" and "delimit" the EAP exemption. Indeed, Congress in 1949 ratified the salary-basis requirement for exemption.

D. No sound reason exists to excuse petitioners from complying with the salary-basis requirement to obtain an exemption. Petitioners have multiple practical options for complying with their FLSA payment obligations. And given the regulations' text and long history, it should have been no surprise that daily-rate pay does not qualify as payment on a "salary basis."

ARGUMENT

RESPONDENT IS NOT AN EXECUTIVE EMPLOYEE EXEMPT FROM OVERTIME REQUIREMENTS

The court of appeals correctly held that when an employee is paid based on a daily rate, rather than a weekly (or longer) rate, the employer must comply with Section 541.604(b) to satisfy the salary-basis test incorporated in Section 541.601's provisions for HCEs. Pet. App. 4-5. The general salary-basis test found in Section 541.602(a) is never satisfied when an employee like respondent is paid on a daily-rate basis. As a result, an employer who pays an employee earnings computed on a "daily" basis can only avoid "losing the exemption or violating the salary basis requirement" by complying with Section 541.604(b), which requires a weekly pay guarantee that bears a reasonable relationship to the amount actually earned. 29 C.F.R. 541.604(b). Because petitioners do not contend that they satisfy Section 541.604(b), respondent is not an exempt executive employee.

A. An Employee Paid On A Daily-Rate Basis Does Not Satisfy Section 541.602(a)'s General Salary-Basis Test

Section 541.602(a)'s text, its broader regulatory context, and the provision's history all demonstrate that an employee paid on a daily-rate basis is not paid on a "salary basis" within the meaning of Section 541.602(a).

1. Section 541.602(a)'s text and context

Section 541.602(a) provides that an employee is considered "paid on a 'salary basis'" 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." 29 C.F.R. 541.602(a). Subject only to limited exceptions, an exempt employee therefore "must receive *the full salary* for any week in which the employee performs any work *without regard to the number of days or hours worked*." *Ibid.* (emphases added).

a. Compensation on a daily-rate basis like that paid to respondent does not satisfy those requirements. Such pay based on the number of days actually worked in a week does not comply with the condition that an employee "receive [his] *full salary* for any week in which [he] performs any work *without regard to the number of days or hours worked*." 29 C.F.R. 541.602(a) (emphases added). As the court of appeals recognized, compensation paid on a daily-rate basis, "by definition, is paid with regard to—and not 'regardless of'—the number of . . . days . . . worked." Pet. App. 11 (citation omitted). And if an employee's compensation depends on the number of days he works, the employee's "full salary for [the] week" cannot be determined until the week is over and thus is not the "predetermined amount" that has long been the hallmark of salary-basis pay under Section 541.602(a).

Section 541.602(a)'s requirement that an employee receive his "full salary" for the week regardless of the number of days actually worked, 29 C.F.R. 541.602(a), embodies the standard meaning of "salary." In 1949, when DOL promulgated Section 541.602(a)'s predecessor with materially similar text, see 49 C.F.R. 541.118(a) (Cum. Supp. 1949), a "salary" was typically understood to be "fixed compensation regularly paid, as by the year, quarter, month, or week," especially as compensation to "holders of official, executive, or clerical positions." *Webster's New International Dictionary of the English*

Language 2203 (2d ed. 1949) (*1949 Webster's Second*). "Salary" was thus "often distinguished from *wages*," *ibid.*, which was the term more commonly used to refer to "[p]ay given for labor, usually manual or mechanical, at short stated intervals." *Id.* at 2863. As the court of appeals recognized, that continues to be the case. In "common parlance," English speakers still "typically associate the concept of 'salary' with the stability and security of a regular weekly, monthly, or annual pay structure" and "do not ordinarily think of daily or hourly wage earners—whose pay is subject to the vicissitudes of business needs and market conditions—as 'salaried' employees." Pet. App. 4.

b. Section 541.602(a)'s requirement that an employee's salary be paid on a weekly or less frequent "basis," 29 C.F.R. 541.602(a), similarly reflects that the employee must be paid a predetermined amount based on a unit of pay no shorter than one week. The word "basis" has long carried a meaning synonymous with "base," denotes the "foundation for" something, and often refers to "a price used as a unit from which to calculate other prices." *1949 Webster's Second* 225, 227. The regulations surrounding Section 541.602 repeatedly use "basis" that way to refer to the unit of pay in calculating compensation. See, *e.g.*, 29 C.F.R. 541.604(a) (providing that "additional compensation may be paid on any basis (*e.g.*, flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis)"); 29 C.F.R. 541.604(b) (distinguishing compensation computed "on an hourly, a daily or a shift basis" from "amount[s] paid on a salary basis regardless of the number of hours, days or shifts worked").[2]

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[2] See also, *e.g.*, 29 C.F.R. 541.600(d) (discussing a "compensation requirement" satisfied by "compensation on an hourly basis at a

Section 541.602(a)'s requirement of a predetermined salary paid on a "weekly, or less frequent basis" thus likewise refers to compensation that is calculated using a unit of pay based on a week or less frequent measure of time. Wage & Hour Div., DOL, Opinion Letter FLSA2020-13, 2020 WL 5367070, at *3 (Aug. 31, 2020). Compensation based on a daily rate of pay does not satisfy that requirement. *Hughes* v. *Gulf Interstate Field Servs., Inc.*, 878 F.3d 183, 189 (6th Cir. 2017) (daily-rate pay does not satisfy Section 541.602(a) because it is "calculated *more* frequently than weekly"); cf. *Reich* v. *Waldbaum, Inc.*, 52 F.3d 35, 40-41 (2d Cir. 1995) (concluding that "the law [is] clear" that "employees compensated on an hourly basis" do not satisfy the "salary basis" test); *Brock* v. *Claridge Hotel & Casino*, 846 F.2d 180, 183-184 (3d Cir. 1988), cert. denied, 488 U.S. 925 (1988); *Craig* v. *Far W. Eng'g Co.*, 265 F.2d 251, 258-260 & n.11 (9th Cir.), cert. denied, 361 U.S. 816 (1959).

Petitioners incorrectly contend that the requirement that an employee regularly "'receive[] pay 'on a weekly, or less frequent basis'" simply addresses the timing of paychecks and is satisfied here because "[r]espondent received paychecks bi-weekly." Br. 26 (quoting 29 C.F.R. 541.602(a)) (first set of brackets in original). Petitioners fail to account for the textual focus on the "basis" of payment, which refers to the method of calculating the pay, not the frequency of its payment.

Moreover, petitioners identify no sensible reason why Section 541.602's salary-basis test would have been designed to turn on whether an employee's paycheck is

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rate of not less than $27.63 an hour"); 29 C.F.R. 541.605(a) (stating that compensation "paid on a 'fee basis'" is an "agreed sum for a single job" analogous to "piecework payments * * * for which payment on an identical basis is made over and over again").

issued no more frequently than once per week. Indeed, petitioners do not contend that any relevant class of employees actually receives paychecks more frequently than once a week. And although the FLSA provides a remedy for delayed compensation, the timing of employees' paychecks is ultimately governed by state, not federal, law. See Wage & Hour Div., DOL, *State Payday Requirements* (Jan. 1, 2022), https://go.usa.gov/xhjZB (summarizing state-law requirements). Connecticut, for instance, requires weekly or biweekly paydays. See Conn. Gen. Stat. § 31-71b(a)(1) (Supp. 2022). Under petitioners' theory, that state-law rule would mean that every employee in the State would be paid on a weekly or less frequent basis. No plausible reason exists for evaluating whether an employee is employed as a bona fide executive based on the happenstance of each State's distinct payday requirements.

Petitioners also conflate the salary-basis test (in Section 541.602(a)) with the salary-level test (in Section 541.600), asserting, for instance, that "[t]he definition of 'salary basis' in [Section] 541.602 treats any guaranteed predetermined amount *above the* [*$455*] *threshold* as payment on a salary basis." Br. 27 (emphasis added). But it is Section 541.600's separate salary-*level* test—not Section 541.602(a)'s salary-*basis* test—that requires that salary-basis compensation be at a "rate of not less than $455 per week." 29 C.F.R. 541.600(a). The fact that an employee receives compensation "above the [$455] threshold" (Pet. Br. 27) does not mean that the compensation has been paid on a salary basis. Indeed, if a $455 weekly guarantee accompanying hourly-, daily-, or shift-based pay itself sufficed to satisfy Section 541.602(a)'s salary-basis test, Section 541.604(b)'s detailed provisions governing the type of guarantee

needed—and, specifically, the reasonable-relationship requirement—would be rendered superfluous.

c. Petitioners also rely on Section 541.602(a)'s reference to salary as a "predetermined amount constituting all or part of an employee's compensation," 29 C.F.R. 541.602(a). They argue (Br. 26) that because respondent was paid at a daily rate, his compensation at that rate for the first day that he worked in a week was the required "predetermined amount" and permissibly constituted only "'part' of his compensation" for the week. But that argument cannot be squared with Section 541.602(a)'s text, which demonstrates that the "predetermined amount" must be the employee's "full salary for [the] week," "without regard to the number of days or hours worked." 29 C.F.R. 541.602(a); see *1949 Weiss Report* 26 (explaining that the "predetermined amount" passage was adopted to implement the "full salary" requirement); see also 29 C.F.R. 541.602(b)(6) (providing that "employees are not paid on a salary basis" if they are occasionally employed "for a few days" and are paid only "a proportionate part of the weekly salary when so employed"); pp. 5-6, *supra*.

Petitioners also fundamentally misunderstand the language in Section 541.602(a) on which they rely. "[T]he language 'a predetermined amount constituting all or part of [the employee's] compensation'" was drafted for the express purpose of "mak[ing] it clear that additional compensation *besides the salary* is not inconsistent with the salary basis of payment," *1949 Weiss Report* 26, not to allow the requirement of a weekly salary to be satisfied by adding up daily units of pay. For more than 80 years, Section 541.604(a) and its predecessor have specified the forms of permissible "additional compensation" that may be paid in addition to compensation "paid

on a salary basis" without violating the salary-basis test. 29 C.F.R. 541.604(a). In 1949, Section 541.118(b) made clear that an exempt employee's "salary" could constitute only "part of the employee's compensation" because "additional compensation *besides the salary*"—for instance, "commissions" or a "percentage of the [company's] sales or profits"—is consistent with "the salary basis of payment" when it supplements payment on a salary basis. 29 C.F.R. 541.118(b) (Cum. Supp. 1949) (emphasis added); accord 29 C.F.R. 541.118(b) (2003) see p. 5, *supra*. When DOL promulgated Section 541.604(a) in 2004 with "editorial changes" to "streamline" the provision, "[S]ection 541.604[(a)] continue[d] the guidance from [former Section] 541.118(b) on allowing payments of additional compensation besides the salary." 68 Fed. Reg. 15,560, 15,564, 15,572 (2003) (discussing proposed rule). Notably, the only "additional compensation" that may be paid based on the time that an employee actually works is pay for "work [performed] *beyond* the normal workweek," 29 C.F.R. 541.604(a) (emphasis added), not for days of work *within* the normal workweek. In short, the view that respondent's "minimum [daily guarantee] was a salary" and that "all wages above that level were 'additional compensation' * * * is fundamentally incoherent." *Brock*, 846 F.2d at 184 (rejecting similar argument based on pay guarantee and hourly wages).

2. Regulatory history

Section 541.602(a)'s regulatory history confirms that employees compensated on a daily-rate basis were excluded from the category of exempt executives under the salary-basis test.

When DOL first adopted the "salary basis" requirement, it adopted a rulemaking report that determined

that "hourly paid employees should not be entitled to the exemption" because "[t]he shortest pay period which can properly be understood to be appropriate for a person employed in an executive capacity is obviously a weekly pay period." *1940 Stein Report* III, 23. Then, in 1949, when the agency promulgated its more extensive salary-basis regulations, it based its regulations on a rulemaking report that reaffirmed that "the shortest period of payment which will meet the requirement of payment 'on a salary basis' is a week" and explained that a salary-basis employee must "receive his full salary for any week in which he performs any work without regard to the number of days or hours worked." *1949 Weiss Report* 15, 26. In 2004, when the agency moved those regulations to Section 541.602(a), the agency "retained virtually unchanged" the "general rules for determining whether an employee is paid on a salary basis," 69 Fed. Reg. 22,122, 22,176 (2004), which reflect the agency's consistent understanding that executive employees "have discretion to manage their time" and thus "are not paid by the hour or task, but for the general value of services performed," *id.* at 22,177.

The payment of a fixed salary is one of the significant "compensatory privileges" that signals an executive's "exempt status." 69 Fed. Reg. at 22,177; see *1940 Stein Report* 19 (bona fide "executive" status reflects "a certain prestige, status, and importance" and includes the "compensatory privilege[]" of being "paid a salary"). Compensation on a salary basis provides substantial real-world benefits because a salary—unlike a daily wage—does not depend on the amount of work performed in any given week. As a result, executives enjoy meaningfully greater financial security than others who have the potential to earn a level of compensation that

is analogous but not similarly guaranteed. A predetermined weekly income provides stability to an employee navigating a personal and family budget and planning for monthly bills, which better positions the employee to undertake more substantial financial commitments like mortgages and tuition payments. By contrast, if an employee's weekly pay consists of a guaranteed component that reflects only a small fraction of his anticipated weekly earnings with the balance dependent on the amount of work ultimately performed in any given week, that greater degree of uncertainty will warrant more caution in the employee's conduct of his financial affairs. Such concerns are not typically associated with executive employees because, as DOL has long determined based on multiple rulemaking proceedings, "[c]ompensation on a salary basis" has been "almost universally recognized as the only method of payment consistent with the status implied by the term 'bona fide' executive." *1949 Weiss Report* 24; see 69 Fed. Reg. at 22,117.

3 DOL's interpretation reflects the best interpretation of its salary-basis regulation and is entitled to deference

The conclusion that daily-rate pay does not satisfy Section 541.602(a)'s salary-basis test reflects the best interpretation of the regulation based on its text, context, and history. And in any event, DOL's interpretation of its own regulation is entitled to *Auer* deference because it is at the very least a reasonable reading and reflects the agency's fair and considered expert judgment. See *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2408, 2414-2418 (2019); *Auer* v. *Robbins*, 519 U.S. 452, 461-462 (1997) (deferring to DOL's interpretation of its regulatory "salary basis test" articulated in an amicus brief in

this Court). DOL's longstanding interpretation has been that the salary-basis test now codified in Section 541.602(a) is satisfied only if an employee's predetermined "amount" of salary compensation is "calculated on a weekly or less frequent basis," Opinion Letter FLSA2020-13, 2020 WL 5367070, at *3-*4. See pp. 4-6, 15-22, *supra*. And under that reasonable reading, daily-rate pay, like hourly-rate pay, is not salary compensation under Section 541.602(a).

4. The court of appeals correctly interpreted Section 541.602(a)

Petitioners ultimately seek to avoid this Court's consideration of Section 541.602(a)'s requirements by arguing (Br. 27) that the court of appeals' decision "has nothing to do with the salary-basis test" because, they assert, "the *en banc* decision assumed [that Section 541.602(a)'s salary-basis test] was satisfied," Br. 25 (citing Pet. App. 16). Petitioners misread the court of appeals' decision. The court held that payment on a daily-rate basis could not satisfy Section 541.602(a)'s general salary-basis test, Pet. App. 4-5, 8-10, and therefore that, "when it comes to daily-rate employees like [respondent], [petitioners] must comply with [Section] 541.604(b)'s" alternative salary-basis provisions. *Id.* at 5.

Petitioners rely (Br. 25) on a single paragraph later in the court of appeals' opinion (Pet. App. 16). Immediately before that paragraph, the court concluded that Section 541.601's HCE provisions incorporate the "salary-basis test" and reiterated that "the only way for an employee to have his pay 'computed on a daily basis' 'without violating the salary basis requirement' is to comply with [Section] 541.604(b)." *Id.* at 15-16 (citation omitted). The court then turned to petitioners' "[a]lter-

native[]" theory that they did "not have to comply with [Section] 541.604(b)" because they "complie[d] with [Section] 541.602." *Id.* at 16. The court rejected that alternative argument "even accepting [petitioners'] premise about [Section 541.602]." *Ibid.* But that paragraph addressing an alternative argument based on a counter-factual assumption does not eliminate the court's earlier determination that daily-rate pay does not satisfy Section 541.602(a)'s salary-basis test.

B. Employees Paid On A Daily-Rate Basis Must Satisfy Section 541.604(b) To Be Exempt Under Section 541.601's Provisions Applicable To Highly Compensated Employees

1. Section 541.604(b) requires a salary-like guarantee

Because pay calculated on a daily basis does not qualify under Section 541.602(a)'s general "salary basis" test, an employee receiving such pay will qualify for exemption as an executive or HCE only if Section 541.604(b)'s alternative provisions are satisfied. Section 541.604(b) provides that "earnings may be computed on an hourly, a daily or a shift basis, *without* losing the exemption or *violating the salary basis requirement*," if two conditions are met. 29 C.F.R. 541.604(b) (emphases added). First, the employment arrangement must "include[] a guarantee of at least the [$455] minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked." *Ibid.* And second, "a reasonable relationship [must] exist[] between the guaranteed amount and the amount actually earned." *Ibid.*

Those two conditions ensure that the "weekly guarantee" that backstops payment on a daily (or hourly or shift) basis will function sufficiently like a full weekly

salary to be treated as salary-basis compensation. Like the "full salary for [a] week" normally required, which must be paid "without regard to the number of days or hours worked," 29 C.F.R. 541.602(a), the "weekly guarantee" must also be paid "regardless of the number of hours, days or shifts worked." 29 C.F.R. 541.604(b). And Section 541.604(b) ensures that the "weekly guarantee" is sufficiently analogous to a full weekly salary by requiring the "guaranteed amount" to have a "reasonable relationship" to the employee's "actual[]" weekly earnings, which occurs "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*." *Ibid.* (emphases added). The regulation recites an example of a $500 weekly guarantee for an employee paid "$150 per shift" who normally works "four or five shifts each week" and thus usually earns up to $750 weekly. *Ibid.* As that regulatory example reflects, the required "reasonable relationship" exists if the weekly guarantee ($500) is at least two thirds of the employee's usual weekly earnings ($750). Wage & Hour Div., DOL, Opinion Letter FLSA2018-25, 2018 WL 5921453, at *2 (Nov. 8, 2018). That condition ensures that the guarantee sufficiently approximates a true weekly salary and therefore is "a meaningful guarantee rather than a mere illusion." 69 Fed. Reg. at 22,184.

2. Section 541.601's HCE provisions apply the same salary-basis test as the standard EAP regulations

Petitioners do not purport to satisfy Section 541.604(b)'s conditions. Petitioners instead argue (Br. 29-38) that Section 541.604(b) is wholly inapplicable when an employer seeks exemption under Section 541.601's HCE provisions. But even if Section 541.604(b)

were inapplicable, petitioners could not prevail because they do not satisfy Section 541.602(a)'s general salary-basis test and identify no other ground for meeting Section 541.601's salary-basis requirement. In any event, petitioners are incorrect. As the court of appeals explained, "no principled basis" exists (Pet. App. 17) for treating Section 541.601's textual "salary * * * basis" requirement, 29 C.F.R. 541.601(b)(1), any differently than the textual "salary basis" requirements in other EAP regulations, 29 C.F.R. 541.100(a)(1), 541.200(a)(1), 541.300(a)(1). And if adopted, petitioners' position would perversely deprive *other employers* of the exemption under the HCE regulation that they currently enjoy.

a. Section 541.601's HCE provisions apply the same salary-basis and salary-level tests as the regulations governing the standard EAP exemptions. The standard regulations each require as a condition for exemption "[c]ompensat[ion] on a *salary basis* at a rate of not less than $455 per week" (or alternatively, for administrative and professional exemptions, $455 weekly on a "fee basis"). 29 C.F.R. 541.100(a)(1) (emphasis added); see 29 C.F.R. 541.200(a)(1), 541.300(a)(1). Those provisions each provide that "[t]he phrase 'salary basis' is defined at [Section] 541.602." 29 C.F.R. 541.100(b), 541.200(b); 541.300(b).

The HCE regulation applies the same salary-basis test. Section 541.601 was adopted to allow a "more lenient duties standard" when an employee who satisfies the normal salary-basis and salary-level tests *also* has total annual compensation exceeding $100,000. 69 Fed. Reg. at 22,173-22,174; see pp. 7-8, *supra*. Thus, at all times relevant here, Section 541.601 provided that an employee's "total annual compensation" must be at

least $100,000 to qualify for the provision's streamlined duties test, 29 C.F.R. 541.601(a), and that the employee's total compensation "*must include* at least $455 per week paid on a *salary* or fee *basis*," 29 C.F.R. 541.601(b)(1) (emphases added). As discussed above, Section 541.602(a) sets out the general salary-basis test, while Section 541.604(b) provides an alternative test, permitting an employer to use an hourly, daily, or shift basis for pay without "violating the salary-basis requirement." 29 C.F.R. 541.604(b).

b. Petitioners nonetheless argue (Br. 29-37) that Section 541.604(b) never applies when an employer invokes the HCE regulation. Petitioners misread the relevant regulations.

First, petitioners contend (Br. 29-30) that Section 541.601 is a "standalone" provision, observing that the "current" version of the regulation (effective in 2020) expressly incorporates the salary-basis test in Section 541.602(a) through an express cross-reference to Section 541.602, but does not expressly cross-reference Section 541.604(b). See 29 C.F.R. 541.601(b)(1) (2020) (requiring that total annual compensation must include the minimum weekly amount "paid on a salary * * * basis as set forth in [Section] 541.602"). The regulations in effect in the years relevant here, however, did not include that express cross-reference. If the subsequent addition of the cross-reference to Section 541.602 had altered Section 541.601's scope—and it did not—that would not affect the pre-2020 version of the regulation applicable here.

In any event, no express cross-reference to Section 541.604(b) is necessary. Section 541.604(b) applies by its own terms because it provides that an exempt employee's earnings "may be computed on an hourly, a

daily or a shift basis, *without * * * violating the salary basis requirement"* if certain conditions are satisfied. 29 C.F.R. 541.604(b) (emphasis added). Thus, if Section 541.604(b)'s conditions are satisfied, the "salary basis requirement" is not "violat[ed]," *ibid.*, whether that requirement is imposed under the standard EAP regulations (which likewise do not cross-reference Section 541.604(b)) or Section 541.601's HCE provisions.[3]

Second, petitioners incorrectly contend (Br. 32-35) that Section 541.601's HCE provisions "conflict" with Section 541.604(b). Petitioners observe (*ibid.*) that (1) Section 541.601 requires at least about one fourth ($23,660) of its $100,000 compensation threshold be paid on a salary basis, while (2) Section 541.604(b) requires that a weekly-pay guarantee must be at least two thirds of the employee's typical time-based pay for a normal scheduled workweek in order to satisfy the "reasonable relationship" requirement. The distinct ratios in those distinct requirements reflect no inconsistency.

Section 541.601 requires its $100,000 total-annual-compensation threshold to "include at least $455 per week paid on a salary or fee basis" (*i.e.*, $23,660/year) and permits employers to "also include commissions, nondiscretionary bonuses and other nondiscretionary compensation" to meet that threshold. 29 C.F.R. 51.601(b)(1). Section 541.601 sets that $100,000 compensation threshold—counting salary-based pay *plus* non-discretionary non-salary compensation—for the

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[3] For similar reasons, regulations addressing the effect of improper deductions from salary (29 C.F.R. 541.603) and the "additional compensation" provided on top of salary-basis compensation (29 C.F.R. 541.604(a)) also apply notwithstanding the lack of express cross-references in either the general EAP or HCE regulations.

purpose of justifying the application of its streamlined *duties* test for exemption. 69 Fed. Reg. at 22,173, 22,175; see pp. 7-8, 26-27, *supra*.

Section 541.604(b), by contrast, provides that the salary-basis test is not violated if pay on an hourly, daily, or shift basis is accompanied by a "weekly guarantee" that functions sufficiently like a full weekly salary, *i.e.*, the guarantee is reasonably related to the weekly amount that the employee typically earns from his time-based pay. 29 C.F.R. 542.604(b). As previously discussed, the "weekly guarantee" is considered sufficient when it is at least two thirds of the employee's "usual earnings at the assigned *hourly, daily or shift rate* for the employee's *normal scheduled workweek*." *Ibid.* (emphases added); pp. 24-25, *supra*. Because that comparison tests whether a "weekly guarantee" functions like a weekly salary, it logically compares that guarantee only to the employee's time-based pay earned during a "normal scheduled workweek." It does not consider commissions, bonuses, or time-based pay for work beyond the normal workweek because such payments are "additional compensation" distinct from salary-based compensation. See 29 C.F.R. 541.602(a).

Petitioners' two other purported conflicts (Br. 35-37) are nonexistent. An employer may make a final payment to satisfy Section 541.601's total *annual* compensation threshold, 29 C.F.R. 541.601(b)(2), but may not make a year-end supplemental payment under Section 541.604(b), because the guarantee in Section 541.604(b) is a *weekly* guarantee that must simulate a full salary for a week. And Section 541.604(b)'s requirement that the weekly guarantee be at least two-thirds of the employee's typical time-based compensation to function sufficiently like a *salary* has no connection to the

distinct types of nondiscretionary *non-salary* "extras" —*e.g.*, commissions and bonuses—that Section 541.601 includes within total annual compensation.

c. If, as petitioners suggest, Section 541.604(b)'s alternative salary-basis provisions did not apply to Section 541.601's provisions for HCEs, other employers currently able to claim an overtime exemption under Section 541.601 would be unable to do so. For example, under petitioners' theory, an employee paid $52 per hour who typically works at least a 40-hour week is not paid on a "salary basis" under Section 541.602(a). Such an employee's hourly-rate compensation would alone result in more than $108,000 in annual pay and satisfy Section 541.601's total annual compensation requirement (other than its salary-basis component) before any commissions or bonuses. But that *hourly* pay would still violate Section 541.602(a)'s salary-basis requirement. If the employer were unable to rely on Section 541.604(b)'s alternative salary-basis provisions, the employer would not be able to benefit from the HCE regulation. The same would be true for employees receiving total compensation over $100,000 from a lower hourly-rate pay plus nondiscretionary commissions and bonuses. Petitioners' position would therefore change the rules for numerous employers, newly requiring that they pay overtime to HCEs who currently are exempt only because of Section 541.604(b) and Section 541.601's streamlined duties test.

C. The Salary-Basis Test Is Consistent With The FLSA

Petitioners suggest (Br. 41-44) that applying Section 541.604(b)'s "reasonable-relationship requirement" to the HCE regulation would "divorce[]" the regulations from the FLSA's text. Br. 41. But petitioners are not aided by their observation (Br. 41-42) that the FLSA's

exemption for those employed in a "bona fide executive, administrative, or professional capacity," 29 U.S.C. 213(a)(1), requires an examination of job duties. Congress used the word "capacity," not "duties." And "capacity" in this context "means 'outward condition or circumstances; relation; character; position,'" and counsels in favor of a "functional, rather than a formal, inquiry" that addresses an employee's responsibilities in the context of the particular industry. *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 161 (2012) (brackets and citation omitted). The agency regulations permissibly implement the statute by focusing on job duties and, in addition, the salaried "character" of an executive "position," *ibid.*, which reflects, *inter alia*, that salary-basis pay is characteristic of a bona fide executive position and affects the executive's discretion to manage his own time in discharging his responsibilities.

That "salary basis" inquiry reflects an appropriate exercise of the agency's "broad [statutory] authority" not only to "'define,'" but also to "'delimit,'" the "scope of the exemption for executive, administrative, and professional employees." See *Auer*, 519 U.S. at 456 (citation and brackets omitted). And if the only relevant inquiry were an "employee's job duties" (Pet. Br. 42), then the HCE regulation that petitioners seek to apply would itself be invalid insofar as it excuses compliance with establishing eligibility for the exemption under the more robust "duties" test based solely on total-compensation level.

In any event, Congress has itself ratified the salary-basis requirement. By 1949, the EAP regulations applying both a "duties" test and "salary basis" test had been well established, see pp. 3-6, *supra*; widely disseminated, including though publication in the United

States Code, see, *e.g.*, 29 U.S.C. App. 3442 (1946); and repeatedly upheld by the courts.[4] "When Congress amended the [FLSA] in 1949 it provided that pre-1949 rulings and interpretations by the Administrator should remain in effect unless inconsistent with the [1949 statutory amendments]." *Mitchell* v. *Kentucky Fin. Co.*, 359 U.S. 290, 292 (1959); see Fair Labor Standards Amendments of 1949, ch. 736, § 16(c), 63 Stat. 920 (ratifying "[a]ny order, regulation, or interpretation" then in effect under the FLSA). Congress accordingly "underst[ood]" and ratified the regulations imposing the salary-basis requirement. *Steiner* v. *Mitchell*, 350 U.S. 247, 255 & n.8 (1956); see *Alstate Const. Co.* v. *Durkin*, 345 U.S. 13, 16-17 (1953) (declining to "repudiate an administrative interpretation of the [FLSA] which Congress refused to repudiate" in 1949).[5] And this Court has itself upheld as "a permissible reading of the statute" a component of "the salary-basis test" concerning disciplinary deductions. *Auer*, 519 U.S. at 454, 456-458.

Petitioners also assert (Br. 42-43) that the HCE regulation looks only to the level of an employee's compen-

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[4] See, *e.g.*, *Walling* v. *Morris*, 155 F.2d 832, 836 (6th Cir. 1946) (explaining that regulations' validity was "well established"), vacated on other grounds, 332 U.S. 442 (1947); *Fanelli* v. *United States Gypsum Co.*, 141 F.2d 216, 218 & n.5 (2d Cir. 1944); *Helliwell* v. *Haberman*, 140 F.2d 833, 834 (2d Cir. 1944) (per curiam) (agreeing with *Walling* v. *Yeakley*, 140 F.2d 830, 832-833 (10th Cir. 1944)). After 1949, courts consistently continued to reject challenges to the salary-basis requirement. See, *e.g.*, *Wirtz* v. *Mississippi Publishers Corp.*, 364 F.2d 603, 608 (5th Cir. 1966); *Craig*, 265 F.2d at 259-260.

[5] See, *e.g.*, 4 *Minimum Wage Standards: Hearings Before Subcomm. No. 4 of the House Comm. on Education and Labor*, 80th Cong., 1st Sess. 2594, 2626-2627 (1947) (discussing "widely divergent views" behind proposals to maintain or delete Part 541's "salary test").

sation as a "proxy" for exempt status and not to what they assert are mere "details" about how that compensation is paid. But the text and history of the HCE regulation clearly show that it applies the same salary-basis and salary-level tests as the standard EAP regulations. The difference is that the HCE regulation offers a streamlined *duties* test if the employee's overall compensation *also* exceeds $100,000. See pp. 7-8, 26-27, *supra*.

D. No Sound Reason Exists To Excuse The Application Of Longstanding Salary-Basis Rules

Petitioners identify no sound reason to prevent the application of Section 541.602(a)'s salary-basis requirements. As the court of appeals explained, it is "hardly novel" and should not "come as a surprise" that an employee paid on a daily basis, even a highly paid one, is not paid on a *salary basis*. Pet. App. 15; see *id.* at 3 n.1, 13-14 & n.3. Moreover, the Section 541.602(a) question in this case impacts workers at far lower compensation levels, since Section 541.602(a)'s salary-basis test is the same whether it is incorporated by Section 541.601's HCE provisions, 29 C.F.R. 541.601(b)(1), or applied to determine if workers who earn as little as $455/week and $23,660 annually (now $684 and $35,568) are exempt. See 29 C.F.R. 541.600(a); see also 29 C.F.R. 541.600(a) (2020).

Petitioners suggest (Br. 49-50) that operational considerations prevent their compliance with the regulatory framework. But even if petitioners keep their current work practices, they have several options. If relevant employees now typically work 12 hours per day and seven days weekly on a 28-day hitch at a daily rate of $1000 (typically $7000/week and $28,000/hitch), petitioners could offer the same daily rate with a weekly

guarantee of at least $4667 (two-thirds of $7000) and satisfy the reasonable-relationship requirement under Section 541.604(b). If petitioners are concerned that hitches with travel time could span four to six workweeks depending on the day of the week on which a hitch begins, they could uniformly provide a flat $4667/week salary for at least six weeks per hitch (totaling $28,002), ensuring constant pay per hitch by occasionally paying salaries during workweeks in which no work is performed.

If petitioners object to those options because they would require payment of a full weekly sum even when an employee does not work a full week, that suggests that petitioners ultimately seek to pay only for time worked rather than on a salary basis. Yet that too can be accommodated. Petitioners could pay an hourly rate of $66.04, which in a typical week would result in 40 hours of straight pay ($2641.60) and 44 hours of overtime ($4358.64), totaling $7000. For weeks involving one day of work, petitioners would pay only for that time; and for workweeks longer than 84 hours, they would pay additional overtime.

In any event, the circumstances petitioners describe furnish no basis to disregard well established salary-basis requirements, even based on a "custom[] * * * prevalent in the industry." *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 166-167 (1945).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SEEMA NANDA
Solicitor of Labor
JENNIFER S. BRAND
Associate Solicitor
RACHEL GOLDBERG
Counsel for Appellate Litigation
STEVEN W. GARDINER
ERIN M. MOHAN
Senior Attorneys
Department of Labor

ELIZABETH B. PRELOGAR
Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General

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APPENDIX

1. Part 541 of Title 29 of the Code of Federal Regulations (2015) provided in pertinent part:

* * * * *

§ 541.100. General rule for executive employees.

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

(1) Compensated on a salary basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

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

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

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

(b) The phrase "salary basis" is defined at § 541.602; "board, lodging or other facilities" is defined at § 541.606; "primary duty" is defined at § 541.700; and "customarily and regularly" is defined at § 541.701.

* * * * *

§ 541.600. Amount of salary required.

(a) To qualify as an exempt executive, administrative or professional employee under section 13(a)(1) of the Act, an employee must be compensated on a salary basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities. Administrative and professional employees may also be paid on a fee basis, as defined in § 541.605.

(b) The $455 a week may be translated into equivalent amounts for periods longer than one week. The requirement will be met if the employee is compensated biweekly on a salary basis of $910, semimonthly on a salary basis of $985.83, or monthly on a salary basis of $1,971.66. However, the shortest period of payment that will meet this compensation requirement is one week.

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§ 541.601. Highly compensated employees.

(a) An employee with total annual compensation of at least $100,000 is deemed exempt under section 13(a)(1) of the Act if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in subparts B, C or D of this part.

(b)(1) "Total annual compensation" must include at least $455 per week paid on a salary or fee basis. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. Total

annual compensation does not include board, lodging and other facilities as defined in § 541.606, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other fringe benefits.

(2) If an employee's total annual compensation does not total at least the minimum amount established in paragraph (a) of this section by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level. For example, an employee may earn $80,000 in base salary, and the employer may anticipate based upon past sales that the employee also will earn $20,000 in commissions. However, due to poor sales in the final quarter of the year, the employee actually only earns $10,000 in commissions. In this situation, the employer may within one month after the end of the year make a payment of at least $10,000 to the employee. Any such final payment made after the end of the 52-week period may count only toward the prior year's total annual compensation and not toward the total annual compensation in the year it was paid. If the employer fails to make such a payment, the employee does not qualify as a highly compensated employee, but may still qualify as exempt under subparts B, C or D of this part.

(3) An employee who does not work a full year for the employer, either because the employee is newly hired after the beginning of the year or ends the employment before the end of the year, may qualify for exemption under this section if the employee receives a *pro rata* portion of the minimum amount established in paragraph (a) of this section, based upon the number of

weeks that the employee will be or has been employed. An employer may make one final payment as under paragraph (b)(2) of this section within one month after the end of employment.

(4) The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply.

(c) A high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties. Thus, a highly compensated employee will qualify for exemption if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in subparts B, C or D of this part. An employee may qualify as a highly compensated executive employee, for example, if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements for the executive exemption under § 541.100.

(d) This section applies only to employees whose primary duty includes performing office or non-manual work. Thus, for example, non-management production-line workers and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt

under this section no matter how highly paid they might be.

§ 541.602. Salary basis.

(a) *General rule.* An employee will be considered to be paid on a "salary basis" within the meaning of these regulations 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. Subject to the exceptions provided in paragraph (b) of this section, 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. Exempt employees need not be paid for any workweek in which they perform no work. An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

(b) *Exceptions.* The prohibition against deductions from pay in the salary basis requirement is subject to the following exceptions:

(1) Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if deductions are made from the

salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence.

* * * * *

(6) An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement. However, employees are not paid on a salary basis within the meaning of these regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed.

* * * * *

(c) When calculating the amount of a deduction from pay allowed under paragraph (b) of this section, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for violations of major safety rules under paragraph (b)(4) of this section may be made in any amount.

* * * * *

§ 541.604. Minimum guarantee plus extras.

(a) An employer may provide an exempt employee with additional compensation without losing the 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. Thus, for example, an exempt employee guaranteed at least $455 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least $455 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (*e.g.*, flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

(b) An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the 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. Thus, for example, an exempt employee guaranteed compensation of at least $500 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $150 per shift without violating the salary

basis requirement. The reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary of $650 per week who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary.

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2. Part 541 of Title 29 of the Code of Federal Regulations (2003) provided in pertinent part:

* * * * *

§ 541.1. Executive

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

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

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

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: * * * ; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week (or $130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, That an employee who is compensated on a salary basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

* * * * *

§ 541.117. Amount of salary required.

(a) Except as otherwise noted in paragraph (b) of this section, compensation on a salary basis at a rate of not less than $155 per week, exclusive of board, lodging, or other facilities, is required for exemption as an

executive. The $155 a week may be translated into equivalent amounts for periods longer than 1 week. The requirement will be met if the employee is compensated biweekly on a salary basis of $310, semimonthly on a salary basis of $335.84 or monthly on a salary basis of $671.67. However, the shortest period of payment which will meet the requirement of payment "on a salary basis" is a week.

* * * * *

§ 541.118. Salary basis.

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more

for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

* * * * *

(b) *Minimum guarantee plus extras*. It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $155 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $200 in each week in which any work is performed, and an additional $50 which is made subject to deductions which, are not permitted under paragraph (a) of this section.

(c) *Initial and terminal weeks.* Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

§ 541.119. Special proviso for high salaried executives.

(a) Except as otherwise noted in paragraph (b) of this section, § 541.1 contains an upset or high salary proviso for managerial employees who are compensated on a salary basis at a rate of not less than $250 per week exclusive of board, lodging, or other facilities. Such a highly paid employee is deemed to meet all the requirements in paragraphs (a) through (f) of § 541.1 if the employee's primary duty consists of the management of the enterprise in which employed or of a customarily recognized department or subdivision thereof and includes the customary and regular direction of the work of two or more other employees therein. If an employee qualifies for exemption under this proviso, it is not necessary to test that employee's qualifications in detail under paragraphs (a) through (f) of § 541.1 of this part.

* * * * *

(c) Mechanics, carpenters, linotype operators, or craftsmen of other kinds are not exempt under the proviso no matter how highly paid they might be.

* * * * *

3. Part 541 of Title 29 of the Code of Federal Regulations (Cum. Supp. 1949) provided in pertinent part:

* * * * *

§ 541.1. *Executive.* The term "employee employed in a bona fide executive . . . capacity" in section 13(a)(1) of the act shall mean any employee:

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

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

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: * * * ; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $55 per week (or $30 per week if employed in Puerto Rico or the Virgin Islands) exclusive of board, lodging, or other facilities:

Provided, That an employee who is compensated on a salary basis at a rate of not less than $100 per week (exclusive of board, lodging, or other facilities) and whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all of the requirements of this section.

* * * * *

§ 541.117. *Amount of salary required.* (a) Compensation on a salary basis at a rate of not less than $55 per week is required for exemption as an executive.[5] The $55 a week may be translated into equivalent amounts for periods longer than one week. The requirement will be met if the employee is compensated biweekly on a salary basis of $110, semimonthly on a salary basis of $119.17 or monthly on a salary basis of $238.33. However, the shortest period of payment which will meet the requirement of payment "on a salary basis" is a week.

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[5] The validity of including a salary requirement in the regulations in Subpart A of this part has been sustained in a number of appellate court decisions. See, for example, *Walling* v. *Yeakley*, 140 F. (2d) 830 (CCA 10); *Helliwell* v. *Haberman*, 140 F. (2d) 833 (CCA 2); and *Walling* v. *Morris*, 155 F. (2d) 832 (CCA 6) [reversed on another point in 332 U.S. 442].

§ 541.118. *Salary basis.* (a) An employee will be considered to be paid on a salary basis within the meaning of the regulations in Subpart A of this part, if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the number of hours worked in the workweek or in the quality or quantity of the work performed. The employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.

(b) It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $55 or more per week and, in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of his branch if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations in Subpart A of this part. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that he will receive not less than the amount specified in the regulations in Subpart A of this part in any week in which he performs any work. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the

requirement that the full salary must be paid in any week in which any work is performed. For example, a salary of $100 a week may not arbitrarily be divided into a guaranteed minimum of $55 paid in each week in which any work is performed, and an additional $45 which is made subject to deductions.

(c) Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. For this purpose, an extended voluntary leave of absence may be considered to come within this rule. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations in Subpart A of this part if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations in Subpart A of this part.

§ 541.119. *Special proviso for high salaried executives.* (a) Section 541.1 contains a special proviso for managerial employees who are compensated on a salary basis at a rate of not less than $100 per week (exclusive of board, lodging, or other facilities). Such a highly paid employee is deemed to meet all the requirements in paragraphs (a) through (f) of § 541.1 if his primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized depart-

ment or subdivision thereof and includes customary and regular direction of the work of two or more other employees therein. If an employee qualifies for exemption under this proviso, it is not necessary to test his qualifications in detail under paragraphs (a) through (f) of § 541.1.

(b) Mechanics, carpenters, linotype operators, or craftsmen of other kinds are not exempt under the proviso no matter how highly paid they might be.

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