

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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HELIX ENERGY SOLUTIONS GROUP,            )  
INC., ET AL.,                                    )  
  Petitioners,                                    )  
  v.    ) No. 21-984  
MICHAEL J. HEWITT,                            )  
  Respondent.                                    )  
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Pages: 1 through 105  
Place: Washington, D.C.  
Date: October 12, 2022

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3 HELIX ENERGY SOLUTIONS GROUP, )

4 INC., ET AL., )

5 Petitioners, )

6 v. ) No. 21-984

7 MICHAEL J. HEWITT, )

8 Respondent. )

9 - - - - -

10 Washington, D.C.

11 Wednesday, October 12, 2022

12

13 The above-entitled matter came on for  
14 oral argument before the Supreme Court of the  
15 United States at 11:45 a.m.

16

17 APPEARANCES:

18 PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; on  
19 behalf of the Petitioners.

20 EDWIN SULLIVAN, ESQUIRE, Houston, Texas; on behalf of  
21 the Respondent.

22 ANTHONY A. YANG, Assistant to the Solicitor General,  
23 Department of Justice, Washington, D.C.; for the  
24 United States, as amicus curiae, supporting the  
25 Respondent.

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

2 (11:45 a.m.)

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

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONERS

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

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

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

1 relationship test.

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

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

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

25 Respondent's position would put the --

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

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

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

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

1 to simply be a wage earner but a highly paid  
2 wage earner?

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

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

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

1 compensation include at least \$455 on a fee or  
2 salary basis. So we can --

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

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

16 MR. CLEMENT: You're right about that,  
17 Justice Jackson.

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



1 at the predictability and the regularity of the  
2 payment, not the amount.

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

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

17 Whereas Mr. Hew -- whatever his name  
18 is -- not Hewitt -- what's your --

19 MR. CLEMENT: It is Hewitt.

20 JUSTICE JACKSON: Hewitt, okay.  
21 Whereas Mr. Hewitt, at the end of the week,  
22 doesn't know. One week, it could be the minimum  
23 amount because he worked a minute. Another  
24 week, it could be much more than that because he  
25 worked more than a minute. Why is that not the

1 way we should think about salary basis given  
2 this regulation?

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

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

21 JUSTICE KAVANAUGH: Your --

22 MR. CLEMENT: And 601 tells you that  
23 what you're looking for is not whether the  
24 employee gets most of his or her compensation on  
25 a salary basis or the lion's share of his or her

1 compensation on a salaried basis. It's asking  
2 you a single question, does the total annual  
3 compensation include at least \$455 on a salary  
4 basis? And the answer for Respondent is yes  
5 because every week in which he worked he knew at  
6 the beginning of the week that he was going to  
7 get at least \$963.

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

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

15 MR. CLEMENT: Absolutely, Justice  
16 Kavanaugh.

17 JUSTICE KAVANAUGH: But "or" -- "or  
18 part" is critical to your 602 argument?

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

1 less than \$24,000.

2 JUSTICE JACKSON: Well, why doesn't  
3 that "or part" reference other things that could  
4 be added? I mean, we have this other concept  
5 happening in the regulation about, you know,  
6 your sort of predetermined amount, that would be  
7 your salary, plus other bonuses and things that  
8 are coming in.

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

17 And I think that's what -- the  
18 Department of Labor cared not only about the  
19 minimum amount I would think in this EAP  
20 regulation, the way it's set up, but also about  
21 this predictability, because you -- 455 is a --  
22 is -- is not a very high number in terms of  
23 people who would be exempted. So it seemed to  
24 me from the way that this is constructed what  
25 they're trying to do is make sure that there's a

1 steady stream of income coming in no matter how  
2 much you work for this category of workers.

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

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

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

25 MR. CLEMENT: Well, I -- I -- they

1 were making a distinction about it for 601  
2 purposes. And 601 doesn't incorporate just 600.  
3 It's got its own language. It's slightly  
4 different. I'm not going to make a big deal out  
5 of the difference, but 600 says that the  
6 person's salary is -- is -- their compensation  
7 is they're compensated on a salary basis, where  
8 601 simply says it includes \$455 a week paid on  
9 a salary basis.

10 But what's so significant about 601  
11 and sets it apart is that the prototypical  
12 worker who is covered by the exemption is making  
13 \$100,000 or more. Yet all the regulators cared  
14 about is that the base be \$24,000.

15 JUSTICE SOTOMAYOR: Mr. Clement --

16 JUSTICE KAGAN: Well, Mr. Clement --

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

23 Your reading of this takes out basis  
24 completely. You're -- you're thinking that if I  
25 work an hour and get the minimum, that's my

1 salary. But I read 602 and it says, "receives  
2 each pay period on a weekly, or less frequent  
3 basis, a predetermined amount constituting all  
4 or part of the employee's compensation, which  
5 amount is not subject to reduction because of  
6 variations in the quality or quantity of the  
7 work performed."

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

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

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

20 JUSTICE SOTOMAYOR: So how do we --

21 MR. CLEMENT: That's additional  
22 compensation.

23 JUSTICE SOTOMAYOR: What do we do with  
24 the second part of -- purpose of 602, which is  
25 to ensure -- I thought the reason for 602 was to

1 ensure that an employee who wanted to take a  
2 Friday afternoon off wouldn't be penalized or  
3 wanted to do something else or didn't want to  
4 start on Monday but on whatever day they wanted  
5 to start.

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

11           MR. CLEMENT: Again --

12           JUSTICE SOTOMAYOR: Or how does that  
13 fit the definition of a salary basis?

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

20           JUSTICE SOTOMAYOR: But you tell --

21           MR. CLEMENT: It asks --

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

25           MR. CLEMENT: But -- but only for a



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

9 JUSTICE SOTOMAYOR: Exactly.

10 MR. CLEMENT: Right.

11 JUSTICE SOTOMAYOR: And so what you're  
12 asking us to do is take an hourly wage earner  
13 and take them out of 604 -- and take them out of  
14 604, which is the only provision that deals with  
15 someone who's not paid on a salary basis.

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

20 JUSTICE SOTOMAYOR: This -- this guy  
21 is an hourly worker.

22 MR. CLEMENT: Well, he's a daily  
23 worker.

24 JUSTICE SOTOMAYOR: Daily or hourly --

25 MR. CLEMENT: And -- and -- and --

1 JUSTICE SOTOMAYOR: -- but he's not --  
2 he's not a weekly worker.

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

4 JUSTICE SOTOMAYOR: Meaning only if he  
5 decides to stay that way.

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

12 There's another group of worker that's  
13 really the second half of the circuit split, and  
14 this is the Anani case from the Second Circuit  
15 and the Litz case from the First Circuit, and  
16 these are individuals whose pay is calculated on  
17 an hourly basis, but they're given a minimum  
18 guarantee on top of that, a thousand dollars,  
19 \$2,000, whatever it is.

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

1                   Again, 602 doesn't say are you  
2 generally paid in a salary basis. It has a  
3 definition of salary basis that allows you to  
4 answer the question that's relevant under 601 --

5                   JUSTICE JACKSON: Which is the --

6                   MR. CLEMENT: -- how much --

7                   JUSTICE JACKSON: -- except --

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

12                   MR. CLEMENT: Okay. But can I -- can  
13 I just stop you to say --

14                   JUSTICE KAGAN: Not really.

15                   MR. CLEMENT: -- but it's sent --  
16 okay.

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

23                   And the question is, you know, should  
24 we understand it the way I think Justice  
25 Sotomayor was understanding it is, is the

1 predetermined amount calculated on a weekly or  
2 less frequent basis? In which case he doesn't  
3 get it because -- because his pay is calculated  
4 on a daily basis.

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

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

18 JUSTICE KAGAN: Yeah, so I think --

19 MR. CLEMENT: And so what --

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

25 MR. CLEMENT: Well, can -- can --

1                   JUSTICE KAGAN:  And -- and, you know,  
2                   this is a clunker of a sentence, but I would  
3                   think, given all the different ways that this  
4                   regulation uses the idea of weekly basis, daily  
5                   basis, you know, et cetera, et cetera, hourly  
6                   basis, et cetera, et cetera, that what this  
7                   regulation is talking about is how is your pay  
8                   calculated.

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

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

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

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

10           JUSTICE KAVANAUGH: How often did he  
11 receive pay?

12           MR. CLEMENT: He received pay on a  
13 biweekly basis, so every other week. And in --

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

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

20           JUSTICE KAVANAUGH: Yeah, 1926.

21           MR. CLEMENT: And if he only worked  
22 one, he'd know he'd receive 963. And the  
23 regulation is explicit, which I think also  
24 underscores that it's not a stability  
25 regulation. The regulation is explicit, if you

1 don't work a minute in a week, it's fine for you  
2 to get nothing.

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

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

12 JUSTICE KAGAN: Right.

13 MR. CLEMENT: -- but -- but -- but if  
14 I told him --

15 JUSTICE KAGAN: So it has nothing to  
16 do with --

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

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

23 MR. CLEMENT: Not if I --

24 JUSTICE KAGAN: That's exactly what  
25 this regulation says.

1 MR. CLEMENT: If -- if -- if I'm  
2 providing legal services to somebody who I think  
3 is on the verge of bankruptcy, I might well tell  
4 them, look, I need to receive the -- the money  
5 at -- every day. So I think the key word is  
6 "receive."

7 JUSTICE KAGAN: Well, you might tell  
8 them that, but then you would say considerably  
9 more.

10 MR. CLEMENT: No, no. I would say the  
11 word --

12 JUSTICE KAGAN: You would not just say  
13 --

14 MR. CLEMENT: -- I would use the word  
15 "receive."

16 JUSTICE KAGAN: -- pay me on an hourly  
17 basis.

18 MR. CLEMENT: I would --

19 JUSTICE KAGAN: You would say, really,  
20 I mean that you have to give me a check on an  
21 hourly basis. And if you don't say that,  
22 everybody knows that an hourly basis means  
23 you're getting paid X dollars, you fill in the  
24 blank, you know, per hour.

25 MR. CLEMENT: I -- I respectfully



1 disagree. I think you're -- you're -- you're  
2 giving insufficient weight to the word  
3 "receive." If I tell the client I need to  
4 receive on an hourly basis \$600, boy, I think --  
5 I mean, I'm probably not going to get that  
6 client because that's a pretty, you know, tough  
7 demand. But I think, if I use the word  
8 "receive," I'm making clear I need to receive  
9 it.

10           And, again, this dovetails perfectly  
11 with 601 because 601 says paid on -- on -- on a  
12 weekly or fee -- rather, on a salary or fee  
13 basis. So, from the perspective of the  
14 employer, it's what you pay. From the  
15 inspective -- perspective of the employee, it's  
16 what you receive.

17           JUSTICE JACKSON: Mr. Clement, can I  
18 ask you about the relationship between 601 and  
19 the rest of the EAP exemption regulation? Your  
20 question presented suggests that it's  
21 "standalone" and you use that term.

22           And I was a little concerned about it  
23 because, when I look at the structure of the  
24 entire regulation, when you start at the  
25 beginning, at its title, it says this is

1 "defining and delimiting the exemptions for  
2 executive, administrative, professional,  
3 computer and outside sales employees." It  
4 doesn't say highly compensated employees.

5           When you look at the subparts of the  
6 regulation, they have a subpart for executive, a  
7 subpart for administrative, a subpart for  
8 professional, a subpart for computer. There's  
9 no subpart for highly compensated.

10           And the government says highly  
11 compensated is actually just a subset of these  
12 other categories. It is the fact that, you  
13 know, a person who is in each of these other  
14 categories, with the exception of computers, has  
15 to be paid on a salary basis. And some of those  
16 people are going to be making much more than the  
17 \$455 minimum. Those are the ones we'll call  
18 highly compensated for the purpose of 601 and  
19 allow them to have this shortcut through.

20           So can you talk a little bit about why  
21 it is -- first of all, does Mr. Hewitt satisfy  
22 any of the other parts of this regulation? You  
23 -- you hone right in on 601. And what is -- how  
24 are we to understand that this is really about  
25 the kind of employee who, in my view, would have

1 the regularity and predictability of a salary  
2 versus what some people have called the kind of  
3 "eat what you kill" dynamic, that you only get  
4 paid when you work and not a dollar more?

5 MR. CLEMENT: So, Justice Jackson, I  
6 think -- first of all, I think you're right to  
7 say that the highly compensated workers'  
8 exemptions is one way to qualify for the  
9 statutory exemption for executive,  
10 administrative, and professional employees, and  
11 you know that from the structure of the statute.

12 I mean, you know, ultimately, there's  
13 a statutory exemption, but there is pretty  
14 clearly from the regulations two different ways  
15 to qualify for the statutory EAP exemption. One  
16 way is to do it through the executive exemption,  
17 the administrative exemption, and the  
18 professional exemption, which is 551.100,  
19 551.200, 551.300.

20 But there is an alternative way to  
21 qualify for the EAP exemption under the statute,  
22 and that is Section 601, and it is the thing  
23 that is streamlined and different.

24 Now we know that from the text of the  
25 regulation itself, which talks about being

1 exempt under this -- under this section.

2 JUSTICE JACKSON: Yeah.

3 MR. CLEMENT: And we know it from that  
4 very -- if you go back to the very beginning,  
5 551.0, when it explains how this whole thing  
6 works, it goes through the various subparts, and  
7 then it describes subpart G, which is about  
8 salary, and it says that generally tells you  
9 what the salary requirements are, but then it  
10 also provides an exemption for highly  
11 compensated workers.

12 JUSTICE JACKSON: Okay. But let me --

13 JUSTICE BARRETT: Mr. Clement --

14 JUSTICE ALITO: I have --

15 JUSTICE JACKSON: Go ahead.

16 JUSTICE ALITO: -- I have two  
17 questions. Would you answer the argument on the  
18 other side that the interpretation that you are  
19 offering us would have very deleterious effects  
20 on lower-compensated workers?

21 MR. CLEMENT: So I don't think this  
22 would have any deleterious effects on  
23 lower-compensated workers at all.

24 JUSTICE ALITO: Your -- your  
25 interpretation of 602?

1           MR. CLEMENT: Yeah. It would not have  
2 any negative effects on lower-compensated  
3 workers because, if you're a lower-compensated  
4 worker, you would still have to satisfy 604.  
5 And our -- our principal argument, really the  
6 question presented here, is that if you're a  
7 highly compensated employee, all you have to  
8 satisfy is 602 and you don't have to go to 604.

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

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

1                   And that's puzzling enough on its face  
2                   to me because I personally prefer to make the  
3                   extra 24 instead of the extra 12, but -- but I  
4                   guess what they're concerned about there is  
5                   there may be some misclassification with  
6                   lower-compensated workers and so they need to  
7                   police that.

8                   But the reason you don't need to  
9                   police that for highly compensated workers is  
10                  what the government itself tells you on the face  
11                  of the reg, which is high compensation is a  
12                  strong indicator of an exempt status.

13                  JUSTICE ALITO:   Okay --

14                  JUSTICE BARRETT:   But --

15                  JUSTICE ALITO:   -- second question.

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

24                  Are they right about that?

25                  MR. CLEMENT:   I mean, they -- they are

1 right that it is possible to change the pay  
2 structure, but I think it's revealing. I mean,  
3 one of the options they give us to change the  
4 pay structure is we have to up the minimum  
5 guarantee to something like \$4,000 an hour so  
6 that the minimum guarantee has a certain  
7 reasonable relationship to the additional  
8 compensation.

9 But if there's one thing I thought  
10 that the regs were pretty clear about is that  
11 all the total annual compensation had to include  
12 was \$455 per week paid on a salary basis, not  
13 \$4,000 paid on a salary basis.

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

20 JUSTICE SOTOMAYOR: Mr. Clement, how  
21 does your view of this deal with nurses? We got  
22 a brief from them to say that your view would  
23 basically destroy the healthcare industry  
24 because nurses are already kept on for more than  
25 12 hours, often 12 hours a shift, days on end,

1 because there's a shortage of them.

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

6 MR. CLEMENT: Well, I -- I think they  
7 would also have to satisfy the other parts of  
8 the -- the -- the sort of short form test, but  
9 if there's somebody who satisfies every part of  
10 the exemption, then I don't think that --

11 JUSTICE SOTOMAYOR: So how does this  
12 promote --

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

14 JUSTICE SOTOMAYOR: -- how does this  
15 promote the second part of the FSLA, which  
16 was -- our case law has said a major goal of the  
17 F -- FLSA was preventing overwork and the  
18 dangers of overwork. This was crucial to the  
19 definition of what a salary was, an employee  
20 was, but it also promotes worker safety and  
21 well-being.

22 Hard to imagine how forcing someone to  
23 work 84 hours a week 28 days straight promotes  
24 that part of the FSLA when you're not giving  
25 them a guaranteed minimum.



1 MR. CLEMENT: Well --

2 JUSTICE SOTOMAYOR: Or you're not  
3 giving them a minimum wage in the way 604 is  
4 looking at it.

5 MR. CLEMENT: So, obviously, we think  
6 that -- you're right, we're not giving them --  
7 we're not satisfying 604. We are giving them a  
8 minimum weekly guarantee, but I think the  
9 critical thing is to go back to the statute. I  
10 mean, yes, the statute is concerned about sort  
11 of overwork or sort of not dividing jobs up for  
12 certain workers.

13 And then the statute tells us who's  
14 exempt, and what the statute says is bona fide  
15 executive, administrative, and professional  
16 employees. And what's so puzzling to me about  
17 this case is my friends on the other side  
18 concede that the Respondent is an executive.  
19 And so, under the statute, this is the easiest  
20 case ever.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Justice Thomas?

24 JUSTICE THOMAS: Just a minor  
25 question, Mr. Clement. Why is this case simply

1 under the regs? There's no reference for the  
2 most part in the arguments to the underlying  
3 statute.

4 MR. CLEMENT: So, Justice Thomas, I  
5 mean, there's a circuit split on the  
6 interpretation of the regs.

7 JUSTICE THOMAS: Yeah.

8 MR. CLEMENT: We got circuit -- we got  
9 -- we got cert granted on the circuit split. We  
10 wanted to be faithful to that. So we've  
11 addressed the regs. We think we're right on the  
12 regs.

13 But we also think that interpreting  
14 the regs, one of the first things you do is look  
15 at whether or not one interpretation of the regs  
16 is more consonant with the other underlying  
17 statute than the other interpretation of the  
18 regs. But, at bottom, this case is a statutory  
19 case and our very first answer -- this is Joint  
20 Appendix page 33 -- we said he's exempt under  
21 the statute.

22 And so there -- there isn't sort of a  
23 regulatory exemption that's separate from the  
24 statutory exemption. So, at the end of the day,  
25 I think you always want to look back and see, is

1 our -- is our interpretation better and more  
2 consonant with the statute than theirs?

3 And the answer is absolutely because  
4 we're using sort of salary as a way to screen  
5 people in to the exemption who are otherwise  
6 concededly executives, which is all the statute  
7 requires.

8 They're using the regs to say that  
9 somebody who is concededly an executive and  
10 concededly therefore satisfies the statutory  
11 term is nonetheless not exempt because of the  
12 details not even of how he was paid or how he  
13 received his pay but how his pay was calculated.  
14 Where is that in the statute?

15 JUSTICE THOMAS: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Alito?  
17 Justice Sotomayor?

18 Justice Kagan?

19 JUSTICE KAGAN: You know, just to pick  
20 up on that, I -- it -- it -- it -- it seems to  
21 me that if there is a statutory argument here,  
22 your test flunks it just as well as the  
23 government's does because the statutory  
24 argument would go something like this. The  
25 statute doesn't really care about how people are

1 paid.

2           So the government says: Well, the  
3 regs do care about how people are paid -- paid  
4 and the government tries to justify how that  
5 fits with the statute. But you care just as  
6 much about how people are paid under 602.  
7 You're just saying a different -- you know,  
8 you're making different arguments about how  
9 people are paid.

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

13           MR. CLEMENT: So, Justice Kagan, I'm  
14 happy to have this case decided just on the  
15 statute because my friends on the other side  
16 have conceded that we perform executive  
17 functions, and they did that for both --  
18 purposes of both exemptions, not just for the  
19 short form one. So, if -- if this is about the  
20 statute, we win.

21           As to whether our position is more  
22 consonant with the statute, I say it is because  
23 we still ultimately focus on the statutory  
24 phrase. We just have sort of a screening that  
25 basically says, look, if you make more than

1 this, we're going to give you, like, a quick  
2 look.

3 But -- but we never say, if we don't  
4 like the way you're paid, you are forbidden from  
5 getting the statutory exemption no matter how  
6 highly you are paid and no matter how much you  
7 are an executive, administrative, or  
8 professional. And that's -- that's the burden  
9 of the other side's argument. And I think, if  
10 you care about the statute, it lacks --

11 JUSTICE KAGAN: Did you -- did you  
12 forfeit the statutory argument?

13 MR. CLEMENT: Absolutely not, Your  
14 Honor. And I don't see how -- I'm -- I'm trying  
15 -- you know, I'm using the argument to try to  
16 say we have the better interpretation of the  
17 regs.

18 JUSTICE KAGAN: Because I don't think  
19 the briefs at all mentioned the statutory  
20 argument below. You know, there's like half a  
21 sentence in a supplemental en banc brief, but,  
22 other than that, I think that this whole  
23 argument about whether the focus on pay is  
24 consistent with the statute was not raised.

25 MR. CLEMENT: I -- I -- I -- I think

1 it was raised. We show you where it was raised  
2 in our reply brief. I mean, but -- but you  
3 already said, well, it's a sentence, so we cited  
4 the sentences.

5 I mean, so we're -- we're not really  
6 --

7 JUSTICE KAGAN: Half.

8 MR. CLEMENT: -- that far apart. But  
9 -- but I think we did enough. But, in all  
10 events, again, what we're asking you ultimately  
11 to do -- I mean, I'm happy to win this case on  
12 the statute, and that is ultimately what the  
13 case is about, but we have argued to a  
14 fare-thee-well that we have the better  
15 interpretation of the regulations, and one  
16 metric of that is our interpretation of the  
17 regulations does not divorce the regulations  
18 from the statute.

19 JUSTICE KAGAN: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Gorsuch?

22 JUSTICE GORSUCH: You're not going to  
23 like these questions any better than those. I  
24 -- I do want to follow up on that.

25 I actually think you probably -- I

1 have a pretty good argument on the statute,  
2 which focuses on job function, whether it's  
3 executive or administrative, and I kind of took  
4 the dissent in the Fifth Circuit to focus on the  
5 fact that tool-pushers are administrators and  
6 that's just the nature of their job.

7 And -- and I think that's probably all  
8 right. But the regulations are all about pay,  
9 how you're paid, the mechanics of pay. And  
10 we've been down to the minutiae of that for the  
11 last 40 minutes, and I -- I -- I just don't see  
12 that argument presented, and I just want to give  
13 you your one last shot on why it isn't forfeited  
14 in this case.

15 MR. CLEMENT: So it's not forfeited in  
16 this case, Justice Gorsuch, because the case has  
17 always in -- been about whether ultimately my --  
18 you know, the -- the Respondent is exempt under  
19 the statute.

20 JUSTICE GORSUCH: No, no. The --  
21 the -- the question we granted cert on was  
22 whether you had to satisfy, what is it, 601 and  
23 -- 642 -- 604 or both?

24 MR. CLEMENT: Right.

25 JUSTICE GORSUCH: That's what we

1 granted cert on.

2 MR. CLEMENT: Absolutely. And I'm not  
3 trying to pull a bait and switch. I'm just  
4 telling you, at bottom, the case is always about  
5 the statutory exemption. Where the circuits  
6 split and what, you know, we haven't run away  
7 from is the circuits are split as to whether 604  
8 essentially conditions and modifies 601.

9 JUSTICE GORSUCH: Right.

10 MR. CLEMENT: We don't think it does  
11 for all the reasons we put forth elaborately in  
12 our brief.

13 JUSTICE GORSUCH: Put that aside,  
14 though. It seems to me quite an independent  
15 question whether 601 and 604, either of them  
16 have anything to do with the statute or defy the  
17 statute, which is I think what your -- your  
18 argument might -- might otherwise have been.

19 MR. CLEMENT: Well, here -- here's  
20 what I think we have argued, and I think this is  
21 fairly -- our -- our -- our argument is, if 604  
22 is not incorporated, then 601 is more consonant  
23 with the statute than if 604 is incorporated.

24 JUSTICE GORSUCH: Okay. I understand  
25 that argument. I -- I -- I -- I take -- I -- I



1 understand that's before us. Okay.

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

5 The -- the circuit split we took up  
6 was whether you needed to satisfy just 601 or  
7 both 601 and 604. Okay. You've heard a lot of  
8 questions today about whether you even meet 601.  
9 And let's say you don't, okay? Let's say you  
10 don't and you -- you lose right out of the  
11 starting gate, and so the circuit split isn't  
12 even implicated.

13 Your choices at that stage are either  
14 to answer the 601 question adversely and send it  
15 back or to DIG. Which do you like better? I  
16 told you you weren't going to like the question.

17 MR. CLEMENT: I -- I mean, I -- I -- I  
18 would prefer that you just answer the question  
19 because I don't think there's a basis for DIG.  
20 And I think, if you look at the cases on the  
21 other side of the circuit split, you will  
22 realize that -- that there is no difference  
23 about whether we satisfy 601 versus those cases  
24 because all that's different in those cases --

25 JUSTICE GORSUCH: No, I understand you

1 think you're going to win on 601. I got it.

2 MR. CLEMENT: No, no.

3 JUSTICE GORSUCH: Let's say you lose  
4 on 601. Would you rather that -- would you  
5 rather to hear that answer, or would you rather  
6 a DIG?

7 MR. CLEMENT: I'd -- I'd rather hear  
8 we lose on 601 --

9 JUSTICE GORSUCH: Okay.

10 MR. CLEMENT: -- but the statutory  
11 question is still open on remand. I mean --

12 JUSTICE GORSUCH: Well, I don't know  
13 if it is or not. I mean, I -- I -- I just --  
14 you didn't raise it here. That much I'm pretty  
15 sure about.

16 MR. CLEMENT: Because there wasn't a  
17 circuit split on the statute.

18 JUSTICE GORSUCH: Yeah. No, I know.  
19 You wouldn't have gotten here. Right. I got --  
20 I got it.

21 MR. CLEMENT: But -- but -- but --  
22 but, in fairness, I mean, I -- I -- I just -- if  
23 there's an embedded premise that somehow this is  
24 different from the First Circuit or the Second  
25 Circuit case, I do want to address that because

1 those cases involve the -- the -- the same basic  
2 issue, which is somebody whose pay is calculated  
3 on an hourly basis, which is a concern of 604,  
4 but have a weekly guarantee. So they're going  
5 to get at least a thousand dollars.

6 JUSTICE GORSUCH: I -- I got -- I got  
7 that argument.

8 MR. CLEMENT: Okay. So, if -- if --  
9 if Judge Wiener is wrong too and we're wrong and  
10 -- you know, then you should tell us we're wrong  
11 --

12 JUSTICE GORSUCH: Okay.

13 MR. CLEMENT: -- but you shouldn't DIG  
14 it because there's still a circuit split.

15 JUSTICE GORSUCH: Got it. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Kavanaugh?

18 JUSTICE KAVANAUGH: On -- on the  
19 statutory point, you obviously have a strong  
20 argument that the regs are inconsistent with the  
21 statute but say it's not -- that precise  
22 question is not before us.

23 Is that being litigated somewhere?

24 MR. CLEMENT: I -- I -- I -- I think  
25 there may be a case that litigates that. I

1 don't know all the details of it, and I don't  
2 know whether it's focused on -- it -- it may be  
3 on --

4 JUSTICE KAVANAUGH: Why is -- why is  
5 that not being litigated somewhere, I guess?  
6 Because my understanding is that there's a lot  
7 of litigation going on about this topic. And it  
8 seems a pretty easy argument to say, oh, by the  
9 way, or maybe, oh, let's start with the fact  
10 that the regs are inconsistent with the statute  
11 and the regs are, therefore, just invalid across  
12 the board to the extent they refer to salary.

13 MR. CLEMENT: Yeah, I -- I think there  
14 -- again, I don't know the details of it. I  
15 think there's a case that maybe attacks 604(b)  
16 just on that basis, but it's not quite the same  
17 issue here.

18 But, you know, I do -- and -- and I do  
19 -- I mean, I -- I want to be emphatic about  
20 this. I do think there's a difference for the  
21 statutory inconsistency argument with 601 as we  
22 interpret it and either 604(b) --

23 JUSTICE KAVANAUGH: Yeah, I'm not  
24 challenging that.

25 MR. CLEMENT: Yeah.

1 JUSTICE KAVANAUGH: I'm just saying,  
2 if it's not here, if the statutory argument is  
3 not here, I'm sure someone's going to raise it  
4 because it's strong.

5 MR. CLEMENT: Well -- well, you just  
6 asked about it, so somebody definitely will  
7 raise it now --

8 (Laughter.)

9 MR. CLEMENT: -- if they weren't -- if  
10 they weren't already.

11 JUSTICE KAVANAUGH: Yeah. Well -- the  
12 second point, to follow up, you got a sentence  
13 in to Justice Alito, but if this were just  
14 change -- about how the salary is paid by these  
15 employers, if the -- going forward, you could  
16 change it to weekly, and that might have some  
17 cost, but I -- I thought this whole thing was a  
18 lot of class action lawsuits with massive  
19 retroactive liability going back a lot of years.  
20 Is that --

21 MR. CLEMENT: That -- that's  
22 absolutely right. And -- and so --

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

25 MR. CLEMENT: Exactly. And that's

1     been a recurring consideration in this Court's  
2     cases, I mean, Christopher, Integrity Staffing,  
3     the whole line of this Court's cases. And it's  
4     one thing -- I mean, if the -- if -- if the  
5     government had clearly articulated this  
6     position, you know, A, it probably would have  
7     been challenged on statutory grounds  
8     immediately, but, B, the industry could say  
9     okay.

10                 I mean, some of this is kind of  
11     perverse because one of the things you can do is  
12     convert them all to hourly, which isn't going to  
13     make them feel like they're really executive,  
14     administrative, you know, professionals. I  
15     mean, they're probably happier the way it was.

16                 But, in all events, the notice point  
17     is hugely important, and it's particularly  
18     important with respect to the highly compensated  
19     employees because, if you're talking about a  
20     universe of people that are getting paid over  
21     \$100,000, if there was a foot fault on the  
22     overtime calculations, the amount of liability  
23     is going to be huge, whereas, if you're talking  
24     about the people that the statute really cares  
25     about, the people who are only making 35- or

1 \$40,000, if you blow the overtime calculation  
2 for them, the amount of damages is going to be  
3 much smaller. So it would really be perverse  
4 here.

5 And I think, you know, obviously, this  
6 was a -- a factor in this Court's Christopher  
7 decision, when the people were making -- the  
8 sales reps were making \$70,000 a year. The  
9 Respondent's making three times that much.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Barrett?

13 JUSTICE BARRETT: Mr. Clement, I just  
14 want to clarify the nature of the concession.  
15 You said you win on the statute because the  
16 other side has conceded that your client was  
17 executive, administrative, professional.

18 Was that the concession? Because, you  
19 know, then it's clear you win under the statute.  
20 Or was the concession that he performed some  
21 administrative duties?

22 MR. CLEMENT: So, I mean, to be  
23 clear -- and -- and my friends will, I'm sure,  
24 be even clearer -- but the concession was that  
25 he satisfied all of the duties under 541.100.

1 So -- so he satisfied the long form of the  
2 duties test for an executive. That's what the  
3 concession is.

4 Now they are going to tell you that,  
5 no, salary is a sense part of the duties test,  
6 and so you're not -- you don't really qualify  
7 for the statutory exemption, not because of your  
8 duties, but because of the way your pay was --  
9 was -- was calculated. So they're not going to  
10 say they -- they set -- they're not going to say  
11 they conceded to everything that they think the  
12 statutory -- the statute requires.

13 JUSTICE BARRETT: Right.

14 MR. CLEMENT: I think they've conceded  
15 to everything that I think the statutory  
16 requires because I read that statute and I don't  
17 see anything about salary --

18 JUSTICE BARRETT: Okay.

19 MR. CLEMENT: -- certainly as -- not  
20 as a disqualifying factor.

21 JUSTICE BARRETT: Well, it was my  
22 understanding that the point of the regs -- and,  
23 you know, the statutory question is not before  
24 us, but that the Secretary of Labor was  
25 permitted by the terms of the statute to define



1 what it means to be an EAP in a bona fide way so  
2 that employees -- employers don't manipulate job  
3 descriptions to evade the requirements of the  
4 Act, right?

5 MR. CLEMENT: Well, and that does  
6 bring us back to the regulatory question  
7 because, boy, is that not a concern for people  
8 that are getting paid \$100,000 and more. And  
9 why do we know that? Don't take my word for it.  
10 Look right at the regulation. It says high  
11 compensation is a strong indicator of exempt  
12 status.

13 So, I -- I mean, you know, if you  
14 think about it, like one way to think about the  
15 question here is what's better -- for workers  
16 that are being paid \$100,000 or more, what's a  
17 better indicator that they're a bona fide  
18 executive? The fact that they're being paid  
19 \$100,000 or more or the fact that their minimum  
20 guarantee is no more than two-thirds of their  
21 total compensation?

22 JUSTICE BARRETT: Well, I agree with  
23 you the result was counterintuitive here, but  
24 the -- Labor didn't exempt altogether highly  
25 compensated employees.

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

12           MR. CLEMENT: But -- but a couple of  
13    points on that. I mean, another way to look at  
14    this, the specific thing controls the general,  
15    is whether you're paid more than \$100,000. So I  
16    don't think you can decide this case on the  
17    specific controls the general.

18           And then, if you're trying to break  
19    the tie, which specific is sort of more specific  
20    or more persuasive here, then you look to the  
21    other factors, which is the statute expressly  
22    incorporates 602 but not -- not 604.

23           602 is labeled Salary Basis. 604 is  
24    labeled Minimum Guarantee Plus Extra. That's  
25    really important because Section 601 itself

1 doesn't address salary basis independently. It  
2 does it by cross-reference. But it does address  
3 the issue of minimum guarantee plus extra. And  
4 it duplicates 604(a) because it says minimum  
5 guarantee plus extra, hunky-dory, and then it's  
6 contradictory to 604(b) because 60 -- 601 says  
7 your total compensation can totally dwarf your  
8 guaranteed compensation. You can get \$175,000  
9 in other compensation as long as you're -- you  
10 get just 455 a week.

11 So they don't care at all about the  
12 reasonable relationship. They bless an  
13 unreasonable relationship. So that's why it  
14 seems to me such a strong inference that Section  
15 601 incorporates 602 but not 604 --

16 JUSTICE BARRETT: Thank you.

17 MR. CLEMENT: -- which is the question  
18 presented.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Jackson?

21 JUSTICE JACKSON: Yes. So, Mr.  
22 Clement, I've heard you say several times in  
23 various ways that you think the regulatory  
24 scheme is about ensuring a minimum amount and  
25 not the weekly guarantee, sort of hand waving

1 the idea of weekly guarantee. And I want to  
2 posit something quickly and then ask you about a  
3 hypo.

4 I want to posit that 602 and the  
5 salary basis is actually parallel to 604 in that  
6 they're both ensuring the minimum weekly amount.  
7 Under 602, you get it in the form of a salary,  
8 predetermined, coming to you no matter how much  
9 you work.

10 Under 604, if your setup is not that,  
11 if you're not set up predetermined amount coming  
12 in weekly, the regulation guarantees that you  
13 still have this minimum weekly amount through  
14 604, all right? That's how I see it.

15 And let me tell you why I think it  
16 matters, because the regularity of a  
17 predetermined amount is how people pay  
18 mortgages. So I don't know or it -- it doesn't  
19 really matter that he might get \$100,000 over  
20 the course of the year. What he has to know is  
21 how much is coming in at a regular clip so that  
22 he can get a babysitter, so that he can hire a  
23 nanny, so that he can pay his mortgage. It's  
24 about, I think, the predictability and the  
25 regularity of payment.

1                   So let me ask you this hypothetical.  
2                   We have a nurse who has -- does the covered  
3                   functions and makes \$455 for a 12-hour shift.  
4                   That's about 38 -- eight dollars an hour. Some  
5                   weeks, this nurse is called in for one shift and  
6                   makes the \$455. Some weeks, he's called in for  
7                   four shifts and makes \$1820. He doesn't know --  
8                   because of the way his situation is set up, he  
9                   doesn't know from week to week how much he's  
10                  going to make. It just depends on how many  
11                  shifts his supervisor asks him to work, and all  
12                  that's guaranteed is at least one shift, right,  
13                  for the predetermined amount of 40 -- \$455. So  
14                  some weeks, he makes that. Some weeks, he makes  
15                  more. But, if he doesn't work any shift, he  
16                  doesn't get anything.

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

23                  MR. CLEMENT: So I -- I -- I think  
24                  you're basically right, but could I just add a  
25                  couple of thoughts to that? One is the statute

1 doesn't talk about whether you're a salary basis  
2 worker, at least not 601. Six --

3 JUSTICE JACKSON: I know. I'm talking  
4 about the regulation. We've -- we're setting  
5 aside --

6 MR. CLEMENT: No, no. No, no. No,  
7 but --

8 JUSTICE JACKSON: -- for the moment  
9 the statute.

10 MR. CLEMENT: I -- if I said the  
11 statute --

12 JUSTICE JACKSON: Yes.

13 MR. CLEMENT: I'm -- I'm -- I -- I  
14 misspoke.

15 JUSTICE JACKSON: Oh.

16 MR. CLEMENT: The regs, the regs.

17 JUSTICE JACKSON: Oh, I see.

18 MR. CLEMENT: The regs don't care that  
19 you're a salary basis worker. They care -- 601  
20 in particular cares that your total compensation  
21 includes \$455 per week paid on a salary basis.

22 So I actually agree with you that the  
23 thrust of 604 is to ensure that there is a  
24 certain regularity of the minimum amount that  
25 you are guaranteed to make every week.

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

8 MR. CLEMENT: See --

9 JUSTICE JACKSON: But it then includes  
10 the words "paid on a salary ... basis," and 602  
11 tells us that being "paid on a 'salary basis'"  
12 means a predetermined regular amount.

13 MR. CLEMENT: I -- I -- I think the  
14 only -- the only disconnect is when -- when you  
15 -- I don't think it cares whether you're a  
16 salaried worker because, when I hear salaried  
17 worker, I think, well, that must mean that's  
18 where you get most of your pay.

19 All it cares about is whether you are  
20 paid at least \$455 a week paid on a salary  
21 basis. And -- and -- and those are different  
22 things because the -- the --

23 JUSTICE JACKSON: So you're -- I'm  
24 sorry. So -- if I'm -- I'm -- a light bulb. So  
25 you're saying the -- the minimum amount has to

1 be the regular thing coming in.

2 MR. CLEMENT: Exactly. And --

3 JUSTICE JACKSON: All right.

4 MR. CLEMENT: Exactly.

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

12 Like it matters whether you are -- are  
13 -- are -- are in a situation in which you're  
14 only paid for the amount that you actually work,  
15 versus you know that you have a predetermined  
16 weekly amount coming in.

17 MR. CLEMENT: I -- I -- I think what  
18 matters for paying your mortgage and most other  
19 things is what's the minimum you're going to  
20 have guaranteed coming in. It's not whether you  
21 make a -- you know, if you got an \$800 mortgage  
22 payment --

23 JUSTICE JACKSON: It depends on the  
24 size of your mortgage, right?

25 MR. CLEMENT: Yeah, yeah. Right,



1 right. But -- but -- but here's the thing. I  
2 mean, I do think Congress cares and the regs  
3 care about the minimum. So you can make your  
4 \$800 mortgage payment with your \$963 guarantee.  
5 But the -- but it's very clear that 601 for the  
6 highly compensated workers doesn't care about  
7 the variability of your total annual  
8 compensation.

9           And one of the reasons is the catch-up  
10 payment. It says you can have a catch-up  
11 payment, it can be a huge catch-up payment at  
12 the end of the year. And it creates sort of a  
13 safe harbor.

14           So somebody that, you know, they  
15 thought was going to make \$100,000, but they had  
16 a bad year, they're only making \$50,000, they  
17 can have a big payment at the end of the year.  
18 That's not consistent with a concern about  
19 stability on the top line. It is still  
20 consistent that you get at least \$455 every week  
21 paid on a salary basis.

22           CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24           Mr. Sullivan.

25

1                   ORAL ARGUMENT OF EDWIN SULLIVAN  
2                   ON BEHALF OF THE RESPONDENT

3                   MR. SULLIVAN: Mr. Chief Justice, and  
4 may it please the Court:

5                   For over 80 years, the FLSA has made  
6 two things clear: One, a bona fide executive  
7 must be paid on a salary basis, and, two, a pure  
8 daily rate employee is not paid on a salary  
9 basis.

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

19                  You can look at the first two  
20 sentences as fantastic. There has to be an  
21 amount earned. That amount earned has to be a  
22 predetermined amount. That predetermined amount  
23 has to be fixed on a basis in time and it is,  
24 under the regulation, a weekly or less frequent  
25 basis.

1           Mr. Hewitt was paid on a daily basis.  
2           Mr. Clement, my friend, just said that he was  
3           paid on a daily basis. It's conceded at the  
4           Joint Appendix 113. Daily basis is more  
5           frequent than weekly basis.

6           The next sentence of 602(a) says that  
7           the full salary has to be paid without regard to  
8           the days worked. Mr. Hewitt was paid with  
9           regard to the days worked. And there are  
10          several other reasons throughout the text.

11          Now, even though Helix cannot meet the  
12          general rule under 602, the Department of Labor  
13          provided a special rule under 604(b) for hourly,  
14          daily, or shift employees. Maybe they can meet  
15          the salary basis.

16          But Helix concedes they can't satisfy  
17          that section. They disclaim that they should  
18          even be of use to this section, which was made  
19          to help employers. That concession is telling  
20          because it's meant to avoid sham salaries.

21          I welcome the Court's questions.

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

24          MR. SULLIVAN: Well, I don't believe  
25          my client received a salary at all. He was paid

1 on a day rate. If they call that a salary, then  
2 it is a sham because --

3 JUSTICE THOMAS: Do you think his  
4 compensation was a sham?

5 MR. SULLIVAN: I think it would be  
6 only a sham if they called it a salary, which it  
7 is not a salary. And I want --

8 JUSTICE THOMAS: The difficulty is  
9 just, for the average person looking at it, when  
10 someone makes over \$200,000 a year, they  
11 normally think of that as an indication that  
12 it's a salary.

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

19 And I think that's the difficulty that  
20 you're having, that -- and -- and -- and a point  
21 that Mr. Clement made, I mean, the regs say  
22 that's -- their own -- Department of Labor's  
23 regs say that's an indication that you are  
24 highly compensated executive, so I -- I don't  
25 know.

1 I think your difficulty is just the  
2 visual. And to say -- for you to say this --  
3 that's not a salary to the average person is a  
4 difficult --

5 MR. SULLIVAN: Your Honor --

6 JUSTICE THOMAS: -- challenge.

7 MR. SULLIVAN: -- Your Honor, I take  
8 your question, obviously, in great faith.  
9 601(c), which they're referencing, does say  
10 that, look, high -- high pay is a strong  
11 indication even of exempt status. And I don't  
12 disagree that's the regulation.

13 But, to be in the capacity of a bona  
14 fide executive, which is what the statute  
15 requires, the salary --

16 JUSTICE THOMAS: But it doesn't define  
17 -- the statute doesn't really define it. That's  
18 the difficulty.

19 MR. SULLIVAN: Sure. But it allowed  
20 obviously --

21 JUSTICE THOMAS: Yeah.

22 MR. SULLIVAN: -- the Department to do  
23 so. And the Department looked and they talked  
24 to industry and, in fact, back in 1940, if you  
25 look at the Stein Report, who was the hearing

1 officer, page 19, he said it was almost  
2 universally recognized by industry, including  
3 three oil companies on Note 6 of that report,  
4 that salary was universally recognized as the  
5 hallmark of exempt status.

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

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

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

18 MR. SULLIVAN: Yes.

19 JUSTICE KAVANAUGH: Because the key  
20 word is "receives." That's the first key word.  
21 And then the second two key words are "or part."  
22 So, on "receives," it doesn't say "computes" or  
23 "calculates," as it does in 604. It says,  
24 "receives each pay period on a weekly, or less  
25 frequent basis, a predetermined amount

1 constituting all or part of the employee's  
2 compensation."

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

5 MR. SULLIVAN: Yes.

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

8 MR. SULLIVAN: Oh, okay. Under 602,  
9 the "receives" means the employee has to  
10 actually get it. What does he have to receive?  
11 He has to receive the predetermined amount.  
12 What is the basis of the predetermined amount?  
13 It has to be on a weekly or less frequent basis.

14 JUSTICE KAVANAUGH: Where do you get  
15 that?

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

18 JUSTICE KAVANAUGH: And 963 is part of  
19 his compensation and it's more than 455 and he  
20 receives it every other week.

21 MR. SULLIVAN: Sure. Your Honor, what  
22 I do is I take what the Department of Labor says  
23 "all or part" means, and that is to look at Rule  
24 604(a) because all or part of an employee's  
25 compensation, a salary, or a wage, isn't the

1 only thing that an employee gets.

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

9 That doesn't destroy the salary basis.  
10 But, if we're talking about time worked within  
11 the work week, within the normal work week, that  
12 is not -- sorry, that's based on time.

13 The Department in 604(a) gives an  
14 example that says time-based extras beyond the  
15 normal work week --

16 JUSTICE KAVANAUGH: I guess I'm  
17 missing -- just focus on 602.

18 MR. SULLIVAN: Oh, I'll go back to  
19 602.

20 JUSTICE KAVANAUGH: I'm just -- you  
21 have a separate 604 argument, and deal with  
22 that. But on 602, it says "receives," not  
23 "calculates," and it says "part," and he  
24 receives every other week -- I'm repeating  
25 myself now -- 963.



1 MR. SULLIVAN: Sure.

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

9 MR. SULLIVAN: It's best explained  
10 that when this regulation was implemented and  
11 today, the Secretary of Labor was not concerned  
12 about the vice of biweekly paychecks. It is not  
13 meant to regulate the frequency of pay. It is  
14 meant to regulate the method of pay. And the  
15 method is on a weekly --

16 JUSTICE KAVANAUGH: Okay. But --

17 MR. SULLIVAN: -- or less frequent  
18 basis.

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

23 MR. SULLIVAN: Right, it does say,  
24 because that -- that means whether the employee  
25 got it. You can't just tell an employee you're

1 going to get paid a certain amount and not pay  
2 it. You've got to -- you've got to make good on  
3 what you're telling the person.

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

10 JUSTICE KAVANAUGH: Can I just ask a  
11 factual question? Was he guaranteed at least  
12 963 a week?

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

17 JUSTICE JACKSON: But that wasn't his  
18 --

19 MR. SULLIVAN: -- throughout his  
20 employment.

21 JUSTICE JACKSON: -- but that wasn't  
22 his predetermined weekly amount, right? Some  
23 weeks, he could make more than the -- than the  
24 950. Some weeks, he could -- there was not a  
25 predetermined weekly amount in this case,

1 correct?

2 MR. SULLIVAN: Correct. Fantastic.  
3 Because it's not a predetermined --

4 JUSTICE KAVANAUGH: Well, hold on.  
5 Hold on. There was a predetermined weekly  
6 amount --

7 JUSTICE JACKSON: No --

8 JUSTICE KAVANAUGH: -- because it was  
9 -- 963 was part of the total compensation.  
10 Wasn't that predetermined that he would get at  
11 least 963?

12 MR. SULLIVAN: This is my first  
13 argument. Now I got two --

14 (Laughter.)

15 MR. SULLIVAN: I don't know how to go.  
16 I'm just going to try --

17 JUSTICE JACKSON: Can I just say --

18 JUSTICE KAVANAUGH: Answer them both.

19 JUSTICE JACKSON: -- that the -- the  
20 reg -- the regulation -- the regulation doesn't  
21 say predetermined part, right? It is the  
22 predetermined weekly amount, a part of which can  
23 be given to you, blah, blah, blah.

24 MR. SULLIVAN: The predetermined  
25 amount.

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

5 MR. SULLIVAN: A hundred percent.  
6 There isn't --

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

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

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

23 JUSTICE JACKSON: So -- so Helix could  
24 not set up, like, a direct deposit for him,  
25 right, because they don't know -- you know,

1 usually a direct deposit is, like, two weeks,  
2 you get a predetermined amount for the two  
3 weeks, and you set it up with your bank, so your  
4 employer's not even paying attention to it.  
5 That's the sort of standard salary, at least as  
6 I think the common understanding is.

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

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

20 During oral argument, one of the  
21 justices said this -- judges said this sounds  
22 like a sergeant major. Well. And, you know, at  
23 some level, a sergeant major is an enlisted  
24 person, and that person may make more money than  
25 an officer. But it is different. The roles are

1 fundamentally different.

2 JUSTICE KAVANAUGH: Would you -- would  
3 you agree --

4 JUSTICE ALITO: Could you tell us --

5 JUSTICE KAVANAUGH: -- would you --

6 JUSTICE ALITO: Sorry. Go ahead.

7 JUSTICE KAVANAUGH: Go ahead. Go  
8 ahead.

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

12 (Laughter.)

13 MR. SULLIVAN: Not yet, Your Honor.

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

16 MR. SULLIVAN: Yes.

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

24 MR. SULLIVAN: Yes.

25 JUSTICE ALITO: And you said -- you

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

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

16 And that goes beyond the --

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

25 MR. SULLIVAN: Well, I certainly hope

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

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

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

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

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

17 JUSTICE ALITO: Okay. All right.

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

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



1 can take the afternoon off on Friday and still  
2 pay his mortgage because he's still going to get  
3 the full amount?

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

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

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

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

22 (Laughter.)

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

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

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

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

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

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

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

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

1 JUSTICE ALITO: What are those ways?  
2 Something like what the government outlined at  
3 the end of its brief?

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

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

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

21 MR. SULLIVAN: Judge -- Justice.

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

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

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

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

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

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

1 up time and all the rest, it is -- the minimum  
2 amount they're talking about is the weekly  
3 salary. That is --

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

6 MR. SULLIVAN: No.

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

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

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

25 MR. SULLIVAN: Okay. 601 is not a

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

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

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

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Justice Thomas?

21 Justice Alito?

22 Justice Sotomayor?

23 Justice Gorsuch, anything further?

24 JUSTICE KAVANAUGH: Yeah. On the  
25 reasonable relationship in 604, this is the part

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

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

12 MR. SULLIVAN: May I respectfully  
13 respond?

14 JUSTICE KAVANAUGH: Yes, please.

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

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



1 basis.

2           601 assumes they're paid on a salary  
3 basis, requires it. The total compensation is  
4 what is -- what are the types of compensation  
5 that go to the new salary level.

6           I hope I answered that question.

7           JUSTICE KAVANAUGH: Thank you very  
8 much.

9           CHIEF JUSTICE ROBERTS: Justice  
10 Barrett?

11           Justice Jackson?

12           Thank you, counsel.

13           Mr. Yang.

14           ORAL ARGUMENT OF ANTHONY A. YANG

15           FOR THE UNITED STATES, AS AMICUS CURIAE,

16           SUPPORTING THE RESPONDENT

17           MR. YANG: Mr. Chief Justice, and may  
18 it please the Court:

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

23           It provides for additional  
24 compensation beyond the salary to meet the  
25 100,000 threshold, but it doesn't excuse you

1 from meeting the basic threshold which all the  
2 exemptions require of \$455 on a salary basis.

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

9 And by its very nature, a daily rate  
10 pay is paid with, not without, regard to the  
11 number of days worked in a week. It, therefore,  
12 doesn't meet -- meet the general test. That's  
13 why the court of appeals said, when it comes to  
14 a daily rate employee, the employer must comply  
15 with the alternative salary basis provisions of  
16 604(b).

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

21 I welcome the Court's questions.

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

1           MR. YANG:  If the question is can you  
2 meet the duties requirements of an executive but  
3 not meet the exemption, the answer is yes, but  
4 it's because you're not fully functioning as an  
5 executive.

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

9           JUSTICE THOMAS:  No, just -- I'm only  
10 interested in the compensation features.  Let's  
11 say the first year a person is salaried at  
12 \$50,000 a year or basically \$200,000, as we have  
13 in this case.

14          MR. YANG:  Okay.

15          JUSTICE THOMAS:  But then the second  
16 year the pay structure is like the pay structure  
17 here.

18          MR. YANG:  Right.

19          JUSTICE THOMAS:  Does that person who  
20 was an executive in year one --

21          MR. YANG:  Yeah.

22          JUSTICE THOMAS:  -- with a \$200,000  
23 salary --

24          MR. YANG:  Right.

25          JUSTICE THOMAS:  -- cease to be an

1 executive in the second year because of the pay  
2 structure?

3 MR. YANG: The answer is yes because  
4 they're not a bona fide executive. And -- and  
5 let me explain why. Let me --

6 JUSTICE THOMAS: What were they the  
7 first year?

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

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

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

23 That's why they talk about -- the  
24 regulation, 602(a), talks about a predetermined  
25 amount. You -- you have to know in advance what

1 is the predetermined amount for the week.

2           And the next sentence is critical. It  
3 talks about, therefore, the -- the full salary  
4 has to be provided without regard to the number  
5 of days or hours worked. That means for the  
6 week you get this chunk.

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

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

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

24           But then the sense -- second sentence  
25 is important. It says: However, you're not

1 paid on a salary basis within the meaning of the  
2 regulations if you're employed occasionally for  
3 a few days and you only get a proportionate  
4 amount of the weekly salary. That just  
5 reinforces you get a few days' salary. It's not  
6 a weekly salary. Since --

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

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

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

24 CHIEF JUSTICE ROBERTS: Mr. Yang, I'm  
25 -- I'm sorry, but -- and I'm sorry to refer back

1 to the statute.

2 MR. YANG: Right.

3 CHIEF JUSTICE ROBERTS: But I -- I  
4 think it is significant. I gather that the  
5 statement, their concession or not, concerning  
6 executive duties was not that the individual was  
7 an executive but that he performed executive  
8 duties.

9 MR. YANG: That's my understanding.

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

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

20 CHIEF JUSTICE ROBERTS: Well, do you  
21 have any idea if that's like 90 percent of his  
22 work --

23 MR. YANG: It's not -- it's --

24 CHIEF JUSTICE ROBERTS: -- or  
25 80 percent?

1                   MR. YANG: That is not in the record.  
2                   And I don't have any independent knowledge of  
3                   that. But -- but -- but, Your Honor, I think  
4                   what's important is that Congress said that you  
5                   -- a bona fide executive is subject to  
6                   exemption. And then it gave the power to the  
7                   Department of Labor not only to define that term  
8                   but to delimit the term. That's broad authority  
9                   that the Court's already recognized as broad  
10                  authority.

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

24                  That has a real-world impact. You  
25                  know --



1 CHIEF JUSTICE ROBERTS: Well, but on  
2 the other --

3 MR. YANG: -- pay predictability is  
4 important. If I get \$500 a day, it matters to  
5 me whether I'm going to get \$2500 a week or  
6 maybe just sometimes \$500 a day because my life  
7 I have to organize to know am I going to just  
8 only have \$500 a -- a week?

9 CHIEF JUSTICE ROBERTS: Well, but we  
10 heard earlier that what -- the most significant  
11 characteristic of an executive is the amount of  
12 pay.

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

15 CHIEF JUSTICE ROBERTS: What's not  
16 correct? That that's not what it says or that  
17 that's not what we heard earlier?

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

23 The executive exemption requires three  
24 things. You have to be paid \$455 a week on a  
25 salary basis, the first two requirements. And

1 then there are three duties tests you have to  
2 meet. Three -- you have to meet all of them.

3 Look at 601. 601(b)(1) says, with  
4 respect to the total compensation, it must  
5 include at least \$455 a week on a salary or fee  
6 basis. That parallels exactly the general  
7 requirement for the executive. All it says is  
8 you have to meet that part of the executive.

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

17 And that's why the ratio that you were  
18 concerned about is completely -- it's -- it's a  
19 different ratio.

20 JUSTICE KAVANAUGH: About that, let me  
21 ask about that.

22 MR. YANG: Sure.

23 JUSTICE KAVANAUGH: And interrupt you.  
24 I'm sorry. You can be a highly compensated  
25 employee by getting \$30,000 in guaranteed and a

1 \$70,000 catch-up, correct? 455 a week --

2 MR. YANG: You have -- it has -- the  
3 30,000 has to be paid on a salary basis.

4 JUSTICE KAVANAUGH: Paid on a salary  
5 basis.

6 MR. YANG: Which means --

7 JUSTICE KAVANAUGH: So you receive it  
8 -- week --

9 MR. YANG: Each week, you're getting,  
10 let's say --

11 JUSTICE KAVANAUGH: Say 500 a week.

12 MR. YANG: Okay.

13 JUSTICE KAVANAUGH: Say 500 a week.

14 MR. YANG: Yep.

15 JUSTICE KAVANAUGH: Okay? And then  
16 you --

17 MR. YANG: Regardless of how much you  
18 work.

19 JUSTICE KAVANAUGH: Yep.

20 MR. YANG: Yep.

21 JUSTICE KAVANAUGH: And then you get a  
22 \$70,000 catch-up.

23 MR. YANG: Yep.

24 JUSTICE KAVANAUGH: That qualifies you  
25 as a highly compensated employee, correct?

1                   MR. YANG: It would. It would. Now  
2 the catch-up is not salary.

3                   JUSTICE KAVANAUGH: And -- and here's  
4 the inconsistency that I think the other side  
5 raises, and you may have an answer to this, but  
6 that is explicitly authorized by 601, the  
7 \$30,000 plus the \$70,000 catch-up. That's  
8 explicitly authorized as I understand it.

9                   MR. YANG: Yeah.

10                  JUSTICE KAVANAUGH: You -- correct me  
11 if that's wrong, but I think you've agreed with  
12 it.

13                  MR. YANG: But that's -- that's for  
14 compensation.

15                  JUSTICE KAVANAUGH: Let -- let me --  
16 let me finish. Yeah. Let me finish. And that  
17 would not satisfy, however, the 604 reasonable  
18 relationship test.

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

25                  And the reason there's a proportion

1 there is because the premise of 602 is you get a  
2 full weekly salary without regard to the number  
3 of days or hours worked, right? So, if you get  
4 payment based on each day that you work, it's  
5 not 602(a). So 604(a) says, hey, but you can  
6 calculate -- and I'd like to discuss "calculate"  
7 versus "receive" because it --

8 JUSTICE KAVANAUGH: Well, let's --

9 MR. YANG: -- it --

10 JUSTICE KAVANAUGH: -- put that aside.

11 MR. YANG: But -- but I'll put that  
12 aside.

13 JUSTICE KAVANAUGH: What I -- I just  
14 want to know 30/70 --

15 MR. YANG: Right.

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

23 MR. YANG: No, no, no, no, no. No.

24 JUSTICE KAVANAUGH: Okay.

25 MR. YANG: That -- that -- that's not

1 correct. That -- that's not reading the whole  
2 provision. It's the amount normal -- earned for  
3 days -- the time worked during a normal work  
4 week. And then, if you go further on, it says,  
5 no, no, this does not apply to things like  
6 bonuses, that really reasonable relationship.

7           And the reason why that exists is  
8 because, if you're paid on a daily basis, you're  
9 not really receiving anything that is like a  
10 salary unless that guarantee is basically what  
11 you would get as a weekly salary.

12           And so the reasonable relationship  
13 test is, look, what would you get normally for  
14 the full week? And if you have a guarantee that  
15 has a reasonable relationship test -- to that,  
16 that's going to function as a salary. But  
17 that's a different question.

18           The second question for 601 is a  
19 second and different question, which is, once  
20 you've established you're on a salary basis, you  
21 also have to show total compensation exceeding  
22 \$100,000. These are like different ratios for  
23 different functions --

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

25           MR. YANG: -- but they're just

1 unrelated.

2 JUSTICE JACKSON: -- can I ask you  
3 something that hasn't come up yet, and I just  
4 want to make sure that you get a chance to  
5 address it, and that is what do we take from the  
6 fact that both the statute and the regulation  
7 seem to have separate provisions for certain  
8 categories of people that are outside --  
9 exemptions that are not in EAP that cover hourly  
10 work for that category?

11 So what am I talking about? If you  
12 look at the statute, I understood that the  
13 statute had a carveout from the FLSA rule for  
14 computer analysts, and those people -- are you  
15 familiar with that one? Or, if -- if not --

16 MR. YANG: There's a lot of exemptions  
17 --

18 JUSTICE JACKSON: Okay.

19 MR. YANG: -- in the FLSA. I'm not as  
20 familiar --

21 JUSTICE JACKSON: Okay. I guess my --  
22 the thrust of my question is I -- I noticed that  
23 there are exemptions in the statute for  
24 computers and an exemption elsewhere in the  
25 regulation for movie industry people.

1 MR. YANG: Mm-hmm.

2 JUSTICE JACKSON: Those people make  
3 very high hourly rates compared to people who  
4 would otherwise be in EAP. If Petitioner was  
5 right in this case, why would we have needed  
6 those carveouts?

7 MR. YANG: Oh --

8 JUSTICE JACKSON: In other words --

9 MR. YANG: -- you don't. You  
10 wouldn't.

11 JUSTICE JACKSON: Right. You  
12 wouldn't.

13 MR. YANG: The -- the reason that  
14 there's a -- I think the movie exception is just  
15 regulatory, is useful because they petitioned  
16 for rulemaking, saying in our industry, there's  
17 no good way to actually pay a salary. And so  
18 they petitioned for rulemaking. They got an  
19 exception for salary basis allowing daily rate  
20 pay.

21 JUSTICE JACKSON: Exactly.

22 MR. YANG: You would never need that  
23 -- you would never need that if they were right  
24 about 602(a).

25 JUSTICE JACKSON: And if -- and if --



1 and the oil and gas industry could do the same  
2 thing, could they not?

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

5 JUSTICE JACKSON: Is another --

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

7 JUSTICE JACKSON: -- issue, but if  
8 they say --

9 MR. YANG: -- the merits of their  
10 petition.

11 JUSTICE JACKSON: If they're saying  
12 the -- the nature of our payments and the way  
13 we're paid in this industry is not amenable to  
14 salaries in the way that you've listed it here,  
15 we need an exemption.

16 MR. YANG: Yep.

17 JUSTICE JACKSON: Then they could  
18 potentially petition the way the movie industry  
19 did --

20 MR. YANG: They could.

21 JUSTICE JACKSON: -- and get a  
22 separate exemption.

23 MR. YANG: And the danger of my  
24 friend's argument is it applies not just as  
25 those who paid \$200,000; it applies to people

1 who make down to \$24,000 a year. And if those  
2 hourly wage people are converted into salary  
3 basis employees, then, you know, there's going  
4 to be a whole swath of people who have vested  
5 interests -- I mean, these are real people in  
6 the world that are going to lose their overtime,  
7 they're not going to be able to -- I mean, this  
8 is -- and nurses are just one of the many  
9 examples of these people.

10 And the reason that the whole high --  
11 highly compensated exemption is a -- is a red  
12 herring is because it just builds on the normal  
13 exemption, which builds on the normal salary  
14 basis test, and has a relaxed duties  
15 requirement, only a relaxed duties requirement,  
16 because it has the same salary basis requirement  
17 as the normal exemption.

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

1 a salary basis --

2 MR. YANG: Well --

3 JUSTICE ALITO: -- that seems  
4 inconsistent.

5 MR. YANG: No, I -- I don't think so.  
6 So give -- let me give you an example. I'd like  
7 to talk about the "compute" versus "received"  
8 and also about paycheck frequency, but let me  
9 give you the example here in the regulations.

10 For the executive exemption, there --  
11 you -- that's the normal rule we've been talking  
12 about. But Section 101 deals with people with a  
13 20 percent equity stake in the company that --  
14 generally engage in management of the company.  
15 Those people are exempt regardless of salary.

16 So the ultimate question is, what  
17 constitutes an executive? And you can do that  
18 through these duties, right? Three duties test  
19 normally. You can go to one if you're highly  
20 compensated. But you also -- always,  
21 regardless, for all of the exemptions, you have  
22 to be paid on a salary basis, and that's been in  
23 -- a hallmark of executive discretion since the  
24 '40s.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 Justice Alito?

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

6 MR. YANG: Yes.

7 JUSTICE SOTOMAYOR: -- and "compute"

8 --

9 MR. YANG: Yes.

10 JUSTICE SOTOMAYOR: -- in 604.

11 MR. YANG: The reason why you receive  
12 sick -- receives on a -- on a weekly or less  
13 frequent basis in 602 is you actually have to  
14 receive it, right?

15 The whole point of 604 is you do not  
16 have to receive the pay on a daily basis. The  
17 whole point of 604 is you get a weekly guarantee  
18 that functions like a salary.

19 So, if you only work one day, you  
20 don't receive daily pay. You receive the  
21 guarantee. That's why it says it has to be --  
22 the -- the pay is calculated on the daily basis,  
23 but what you actually receive may be that weekly  
24 guarantee, and the weekly guarantee has to  
25 function like a full weekly salary because it

1 has a reasonable relationship to what you would  
2 earn for the entire week.

3 That's why there's a textual  
4 difference there. And that's also -- I think  
5 this concerns paycheck frequency too. I mean,  
6 this is all interrelated, but the whole idea of  
7 paycheck frequency, there's no sensible reason  
8 to distinguish an executive from a salaried  
9 worker or a -- a wage worker based on when you  
10 receive a paycheck. That's regulated --

11 CHIEF JUSTICE ROBERTS: Justice Kagan,  
12 any --

13 MR. YANG: -- by state law.

14 CHIEF JUSTICE ROBERTS: Justice Kagan,  
15 anything further?

16 Justice Gorsuch?

17 Justice Kavanaugh?

18 Justice Barrett?

19 Justice Jackson? Thank you.

20 Thank you, counsel.

21 Rebuttal, Mr. Clement?

22 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

23 ON BEHALF OF THE PETITIONERS

24 MR. CLEMENT: Thank you, Mr. Chief

25 Justice. Just a few points in rebuttal.

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

6           Now we would say the far more logical  
7 reading of what 602 actually says is to say he  
8 receives at least \$963 in salary every week in  
9 which he works. And then you compare that to  
10 the statutory -- or rather the regulatory test,  
11 it -- total compensation has to include \$455 per  
12 week, paid on a salary basis. He satisfies it.

13           The contrary view requires you to say  
14 that this person gets no salary at all, which  
15 defies reality and common sense. And it doesn't  
16 make any difference that this is a day rate  
17 because what matters is the day rate's above the  
18 weekly minimum.

19           We can easily say, okay, you make 90  
20 -- \$963 if you work a day, even a minute, and we  
21 give you a weekly guarantee of \$963. It would  
22 be redundant. Anytime somebody is paid a day  
23 rate that's above the weekly minimum, they  
24 satisfy the terms of 602.

25           Second point I want to make is I

1 thought it was very revealing that my friends on  
2 the other side really couldn't answer the  
3 question about what 602 means, particularly with  
4 respect to "receives" and "all or part" without  
5 directing you to 604. But the problem with that  
6 is twofold. One is, if you get to 602, it uses  
7 "calculates," rather "computes," rather than  
8 "receives." So the regulators knew how to use  
9 those differently.

10           The second problem, though, and I  
11 think this is very telling, is if you start to  
12 hear what their theory is, they say, well, for  
13 602, you can get commissions and things like  
14 that, but if it's pay for time worked, then you  
15 have to figure out what the normal work week is,  
16 or if you get to 604(b), you have to figure out  
17 what the person's scheduled normal work week is.

18           And this is all in the context of 601  
19 that's supposed to be a streamlined,  
20 easy-to-administer exemption that captures the  
21 common-sense instinct that somebody's getting  
22 six figures is very, very likely to be exempt.

23           Now there's no threat to lower-income  
24 workers here. And I want to be clear about  
25 this. Just because 602 allows you to figure out

1 that somebody's made a certain -- paid a certain  
2 amount on a salary basis, if they don't qualify  
3 for the HCE 601 exemption, then you still have  
4 to go to 604(b) and you still have to satisfy  
5 that, and that -- that protects the lower-income  
6 workers.

7           This is all about 601 and its  
8 interaction with 604, and, with respect to those  
9 two provisions, 604 is duplicative and  
10 contradictory. And this I want to reinforce as  
11 well, that 601 is absolutely a stand-alone  
12 exemption. You get that from the text of the  
13 statute -- of the regulation, which says you can  
14 be exempt under this section, but you also get  
15 it from the fact that it's got that subsection  
16 (d) that's entirely duplicative of 541.3, and  
17 you also get it from the fact that in the  
18 regulatory history, excuse me, they had to add  
19 the 455 per week paid on a salary basis after  
20 the proposed regulation.

21           They wouldn't have needed to do that  
22 if 601 automatically picked up 600, which has  
23 the 455 for every executive employee, so further  
24 evidence that 601 operates independently as a  
25 stand-alone exemption and it's supposed to be



1 streamlined.

2           On the carveouts -- with respect, the  
3 carveouts for special workers aren't carveouts  
4 just for the special workers over \$100,000. So  
5 we're not asking for a carveout for the whole  
6 industry. We're just asking for a sensible rule  
7 that says that when somebody concededly does  
8 executive functions and is paid six figures that  
9 that person is, as the regulatory language says,  
10 strongly likely to be an exempt person, the  
11 detailed inquiry into both salary details and  
12 into duties is not worth the candle.

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

23           Thank you.

24           CHIEF JUSTICE ROBERTS: Thank you, Mr.  
25 Clement, Mr. Sullivan. The case is submitted.

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