No. 23-10781

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HERMAN GREINSTEIN; KATHLEEN CANCIENNE; EDWIN COLLAZO; ERIC FARMER; ANTONIO FLORES; RAY HIGHTOWER; JESSE JACKSON, SR.; STEPHEN JONES; CALVIN OBERNDORFER; ADILSON QUINTELA; CULTON SPEER; MATTHEW STARR; BYRON WHITE; ALTONIA WILLIAMS,
Plaintiffs-Appellees

v.

GRANITE SERVICES INTERNATIONAL, INCORPORATED; FIELDCORE SERVICES SOLUTIONS, L.L.C.,
Defendants-Appellants

On Appeal from the United States District Court
for the Northern District of Texas
No. 2:18-cv-00208

BRIEF OF THE STATES OF MISSISSIPPI, ALABAMA, ALASKA, INDIANA, LOUISIANA, MONTANA, AND SOUTH CAROLINA AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

LYNN FITCH
Attorney General
WHITNEY H. LIPSCOMB
Deputy Attorney General
SCOTT G. STEWART
Solicitor General
JUSTIN L. MATHENY
ANTHONY M. SHULTS
Deputy Solicitors General
MISSISSIPPI ATTORNEY GENERAL'S OFFICE
P.O. Box 220
Jackson, MS 39205-0220
Telephone: (601) 359-3680
E-mail: justin.matheny@ago.ms.gov
Counsel for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS

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

s/ Justin L. Matheny
Justin L. Matheny
Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rule

Regulations

Other Authorities

INTRODUCTION, INTEREST OF AMICI CURIAE, AND SUMMARY OF ARGUMENT

The district court in this case held that the plaintiff employees—managers who oversee health-and-safety compliance for defendant FieldCore—are not exempt from the Fair Labor Standards Act's overtime-pay requirement. To reach that holding, the court read the Act's implementing regulations to bestow overtime pay on the plaintiffs because of how FieldCore structured their compensation. As FieldCore shows, that holding conflicts with the regulatory text. Opening Br. 20-33. That conclusion is reinforced, as FieldCore explains, by multiple canons of construction. These include the canons directing that regulations be read as a whole, *id.* at 20-21; *see id.* at 20-26, that regulations be read to harmonize with each other, *id.* at 22-24, that vague regulatory terms not be read to fundamentally alter a regulatory scheme, *id.* at 26, and that regulations be read to avoid absurd results, *id.* at 38-40.

This amicus brief emphasizes yet another reason why the district court's ruling should be rejected: That ruling cannot be squared with the clear statutory text. *Cf.* Opening Br. 31-32. The Fair Labor Standards Act provides that "any employee employed in a bona fide executive, administrative, or professional capacity" is exempt from the Act's overtime-pay requirement. 29 U.S.C. § 213(a)(1). This exemption carves out certain employees from that requirement based on their duties

alone—no matter how their compensation is structured. In the district court, FieldCore made a powerful showing that the plaintiffs are, based on the duties they perform, administrators or professionals. The district court did not cast doubt on that showing. By nonetheless ruling against FieldCore based on features of the plaintiffs' compensation, the court below reached a decision that conflicts with the statute. That is a powerful reason—on top of those that FieldCore offers—to reject the decision below. Consistent with the statute, this Court should hold that the plaintiffs are exempt from the Act's overtime-pay requirement.

The sound resolution of this appeal is important to the amici curiae—the States of Mississippi, Alabama, Alaska, Indiana, Louisiana, Montana, and South Carolina.* Several amici have filed briefs on issues similar to those presented in this appeal, including before the U.S. Supreme Court. *E.g.*, Brief for the States of Mississippi, et al. as Amici Curiae in Support of Petitioners, *Helix Energy Solutions Group, Inc. v. Hewitt*, S. Ct. No. 21-984, 2022 WL 2834664 (filed July 15, 2022). The decision below upends a balance that Congress struck in the FLSA. To protect workers, the FLSA sets a 40-hour workweek and guarantees overtime pay for work beyond that. To sustain employment and promote

* The States may file this brief without the parties' consent or leave of the Court. Fed. R. App. P. 29(a)(2).

economic growth, however, the Act exempts many categories of employees from the overtime-pay requirement. The ruling below broadens the overtime-pay requirement's scope in conflict with the Act's text and thus thwarts Congress's effort to achieve multiple goals. In doing so it imperils protected business activity, awards sweeping windfalls, and upends employers' and employees' expectations—threatening the economic well-being of the amici States' employers and residents. This Court can avoid all that by ruling in line with the statute's text.

ARGUMENT

The Decision Below Conflicts With The Fair Labor Standards Act And Should Be Reversed.

A. Under The Statute, Employees Who Perform Executive, Administrative, Or Professional Duties Are Not Entitled To Overtime Pay—Regardless Of How Their Compensation Is Structured.

The Fair Labor Standards Act is clear: If someone is employed to perform and does perform the duties of an executive, administrator, or professional then he is exempt from the Act's overtime-pay requirement. It does not matter how his compensation is structured. The statute does not permit an agency to deem someone who is employed in an executive, administrative, or professional capacity to be subject to the overtime-pay requirement based on features of his compensation.

The statute's text compels this conclusion. The Act exempts from its overtime-pay requirement "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). The exemption rests on an employee's functions and duties—requiring just that they be one of the three listed. The exemption does not turn on compensation. *See Helix Energy Solutions Group, Inc. v. Hewitt*, 143 S. Ct. 677, 695 (2023) (Kavanaugh, J., dissenting) ("The Act focuses on whether the employee performs executive duties, not how much an employee is paid or how an employee is paid.").

To start, *capacity* means "[o]utward condition or circumstances; relation; character; position." Webster's New International Dictionary 396 (2d ed. 1934); *see* 2 Oxford English Dictionary 89 (1933) ("[p]osition, condition, character, relation"). "The statute's emphasis on the 'capacity' of the employee counsels in favor of a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 161 (2012) (construing FLSA's outside-salesman exemption). The word *capacity* conveys that the executive, administrative, or professional exemption turns on the functions that an employee performs. The word does not suggest that the

exemption turns on the employee's compensation—whether it be his level of compensation or how his compensation is structured.

The words *executive*, *administrative*, and *professional* drive home that function-based understanding. Each of those words focuses on "a person's performance, conduct, or function." *Nevada v. U.S. Dep't of Labor*, 275 F. Supp. 3d 795, 804 (E.D. Tex. 2017). *Executive* means "[c]apable of performance," "operative," "[a]ctive in execution," "[a]pt or skilful in execution," "[p]ertaining to execution," or "having the function of executing or carrying into practical effect." 3 Oxford English Dictionary 395. *Administrative* means "[p]ertaining to, or dealing with, the conduct or management of affairs," "executive," "[o]f the nature of stewardship, or delegated authority," or "a company of men entrusted with management." 1 Oxford English Dictionary 118. And *professional* means "[p]ertaining to, proper to, or connected with a or one's profession or calling" or "[e]ngaged in one of the learned or skilled professions, or in a calling considered socially superior to a trade or handicraft." 8 Oxford English Dictionary 1428. Each word affirms what *capacity* denotes: The exemption turns on an employee's functions, duties, or conduct—in particular, on whether those features place an employee in a category for which overtime compensation would not be expected or appropriate. None of the terms—*capacity*, *executive*, *administrative*, *professional*—

"suggest[s]" that "salary" or compensation is relevant to the exemption. *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 529 (E.D. Tex. 2016); *cf. Helix*, 143 S. Ct. at 695 (Kavanaugh, J., dissenting) ("I am hard-pressed to understand why it would matter for assessing executive status whether an employee is paid by salary, wage, commission, bonus, or some combination thereof.").

The modifying term *bona fide* reinforces this function-based understanding of the statute's text. *Bona fide* means "[i]n good faith, with sincerity; genuinely." 1 Oxford English Dictionary 980. The term modifies "executive, administrative, or professional capacity." "The plain meaning of 'bona fide' and its placement in the statute indicate" that the exemption applies "based upon the tasks an employee actually performs," *Nevada*, 218 F. Supp. 3d at 529—not, say, the job title that an employee is given. A business cannot apply the exemption to a janitor by calling him an Executive Vice President. But the exemption covers someone who performs executive, administrative, or professional duties.

Last, the statute says that the executive, administrative, or professional exemption applies to "any" employee who is employed in a listed capacity. Here, *any* "is best read to mean 'one or some indiscriminately of whatever kind.'" *Christopher*, 567 U.S. at 162 (some

internal quotation marks omitted). *Any* denotes breadth and affirms that the exemption covers all employees who perform the duties listed.

Taking the words of the exemption together leads to an unmistakable conclusion: If someone is employed to perform and does perform the duties of an executive, an administrator, or a professional, then he falls outside the overtime-pay requirement. He is "employed" in an enumerated "capacity" based on his functions and duties alone. If his duties are "executive," "administrative," or "professional," then he is exempt. The statute requires no more. And it allows no more requirements—including compensation-based requirements. The exemption says nothing of compensation and nothing in it denotes or connotes compensation. So it leaves no room for the agency to "fill a gap" by adding a compensation requirement.

The statute does permit the agency to "define[ ] and delimit[ ]" the exemption's terms. 29 U.S.C. § 213(a)(1). That authority may give the agency some latitude in (for example) defining what duties are executive, administrative, or professional. *Nevada*, 218 F. Supp. 3d at 530. But the authority to define and delimit "is limited by the plain meaning of the statute" and does not allow the agency to rewrite the statute by adding a compensation requirement that has no basis in statutory text. *Ibid.* "Congress gave the" agency "the authority to define what type of duties

qualify"; "it did not give" it "the authority to supplant the duties test and establish a salary test that causes bona fide" executives, administrators, or professionals to "lose their exemption irrespective of their job duties and responsibilities." *Id.* at 531 n.6 (internal quotation marks omitted).

The statute's clear text is grounds enough to conclude that a regulation may not, based on features of an employee's compensation, bestow overtime pay on him when his duties qualify him for the executive, administrative, or professional exemption. The Supreme Court has thus construed another FLSA overtime exemption based only on the exemption's text—in an analysis that consumed barely a page in the Supreme Court Reporter. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1140-41 (2018); *id.* at 1140 ("Under the best reading of the text" of the statute, service advisors are "salesm[e]n ... primarily engaged in ... servicing automobiles.") (internal quotation marks omitted). The text here is similarly decisive.

But here there is more. The statutory structure confirms that an employee cannot be excluded from the exemption here based on how he is compensated. That structure shows that Congress knows how to make an overtime exemption turn on compensation. Congress has set forth dozens of exemptions from the overtime-pay requirement. *See* 29 U.S.C. § 213(a), (b). In several of those exemptions, Congress specified that the

exemption turns on a feature of compensation. Certain agriculture employees may be exempt if they are "paid on a piece rate basis." *Id.* § 213(a)(6). Some computer workers who are paid on an hourly basis may be exempt—but only if they are paid at least $27.63 per hour. *Id.* § 213(a)(17). A local-delivery driver may be exempt if he is "compensated ... on the basis of trip rates." *Id.* § 213(b)(11). A baseball player is exempt only if he is provided a minimum weekly salary. *Id.* § 213(a)(19). Certain persons employed "by a nonprofit educational institution" must, to be exempt, be paid, "on a cash basis, at an annual rate of not less than $10,000." *Id.* § 213(b)(24). A criminal investigator is exempt if he is paid "availability pay" under 5 U.S.C. § 5545a. *Id.* § 213(a)(16).

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

B. This Court Should Construe The Regulations To Align With The Statute And Reject The Decision Below.

The district court recognized that, consistent with a regulation implementing the FLSA's executive, administrative, or professional

exemption, the plaintiffs here were promised "a weekly salary at a set rate regardless of the number of hours worked in the week." ROA.5782. (internal quotation marks omitted). But the court reasoned that the plaintiffs' employment did not satisfy another regulation governing how employers may provide additional compensation beyond a set salary "without losing the exemption." ROA.5780. According to the district court, that regulation requires that any employee who receives such additional compensation be provided a "guarantee of weekly payment" to retain exempted status. ROA.5782. Because FieldCore gave the plaintiffs additional hourly compensation when they worked more than 40 hours in a week, but did not pay them in weeks they did not work, their pay structure did not (the lower court ruled) meet this weekly guarantee requirement.

FieldCore shows why that ruling is wrong under the regulatory text. As it explains (Opening Br. 18, 20-26), the regulations establish that executives, administrators, and professionals are exempt if they are paid on a "salary basis," which means that "all or part of the employee's compensation" consists of "a predetermined amount," provided "on a weekly, or less frequent basis," that "is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602(a). The plaintiffs' compensation met these requirements. The

additional-compensation regulation's reference to "a guarantee" of weekly payment "paid on a salary basis," *id.* § 541.604(b), is best read as incorporating the "[g]eneral rule" defining "salary basis"—including its express statement that "[e]xempt employees need not be paid for any workweek in which they perform no work." *Id.* § 541.602(a), (a)(1). As FieldCore explains, this straightforward interpretation honors several important canons of interpretation: it reads the regulations as a whole and in context, Opening Br. 20-21; *see id.* at 20-26; it reads the regulations to harmonize rather than conflict with each other, *id.* at 22-24; it avoids reading vague regulatory terms to fundamentally alter a regulatory scheme, *id.* at 26; and it avoids absurd results, *id.* at 38-40.

There is a further strong reason to embrace FieldCore's interpretation: it respects the statutory text—while the district court's view does not. Again, that text exempts from overtime pay "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). The statute thus makes clear that certain employees are exempt based on their duties alone—no matter how their compensation is structured. *Supra* Part A. Reading the regulations to allow otherwise would cause the regulations to conflict with the statute.

Courts generally try to avoid that result. The Supreme Court has thus often construed regulations in light of the governing statute and reads regulations to harmonize with that statute when fairly possible. *E.g.*, *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 401 (2008) (rejecting a view of a regulation that "is in considerable tension with the structure and purposes of the" statute); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) (refusing to apply a regulation to negligent conduct when the "statute speaks so specifically in terms of ... intentional wrongdoing ... and when its history reflects no more expansive intent").

The Supreme Court has taken this approach with regulations implementing FLSA overtime exemptions. In *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), the Court rejected the Department of Labor's view of regulations—regarding the "outside salesman" exemption from the overtime-pay requirement—in part because that view was "flatly inconsistent with the FLSA." *Id.* at 159. The Court then evaluated the Act's text and aims in concluding that a pharmaceutical sales representative is an "outside salesman" under the regulations. *See id.* at 161-67. Similarly, in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), in holding that an FLSA regulation exempting domestic-service employment controlled over a conflicting regulation, a unanimous

Court relied on the FLSA's aims in resolving a conflict between a literal reading of the two regulations. *Id.* at 169-70.

This Court should take the same approach here. This Court should be "quite unwilling" to read the regulations to bestow overtime pay on the plaintiffs when the "statute speaks so specifically in terms" that show that it does not bestow overtime pay on them. *Ernst & Ernst*, 425 U.S. at 214. This Court can and should construe the regulations to harmonize with the statute, which makes clear that administrative and professional employees are exempt based on their duties alone—no matter how their compensation is structured. Adopting FieldCore's view of the regulations allows this Court to avoid reading the regulations to bestow overtime pay on employees who are exempt under the statute's clear terms. That reading is especially warranted because FieldCore powerfully showed below that the plaintiffs are administrators or professionals. The district court cast no doubt on that showing. So this Court has every reason to embrace FieldCore's argument, construe the regulations to harmonize with the statute, hold that the plaintiffs are not entitled to overtime pay, and reverse the order below.

CONCLUSION

This Court should reverse the district court's order.

Respectfully submitted,

LYNN FITCH
Attorney General

s/ Justin L. Matheny

WHITNEY H. LIPSCOMB
Deputy Attorney General
SCOTT G. STEWART
Solicitor General
JUSTIN L. MATHENY
ANTHONY M. SHULTS
Deputy Solicitors General
MISSISSIPPI ATTORNEY
GENERAL'S OFFICE
P.O. Box 220
Jackson, MS 39205-0220
Telephone: (601) 359-3680
E-mail: justin.matheny@ago.ms.gov
Counsel for Amici Curiae

November 8, 2023

Counsel for Additional Amici States

Steve Marshall
Attorney General
State of Alabama

Jeff Landry
Attorney General
State of Louisiana

Treg Taylor
Attorney General
State of Alaska

Austin Knudsen
Attorney General
State of Montana

Theodore E. Rokita
Attorney General
State of Indiana

Alan Wilson
Attorney General
State of South Carolina

CERTIFICATE OF SERVICE

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

Dated: November 8, 2023

s/ Justin L. Matheny
Justin L. Matheny
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the content and form requirements of Fed. R. App. P. 29(a)(4)-(5) and 32(a) and Fifth Circuit Rule 29.2, and comports with the word-limitation requirements of those rules because the brief, excluding the parts of the document exempted by Fed. R. App. P. 32, contains 2,793 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface, including serifs, using Microsoft Word 2016, in Century Schoolbook 14-point font, except for footnotes, which appear in Century Schoolbook 12-point font.

Dated: November 8, 2023

s/ Justin L. Matheny
Justin L. Matheny
Counsel for Amici Curiae