No. 21-296

IN THE

Supreme Court of the United States

AMN SERVICES, LLC,

Petitioner,

v.

VERNA CLARKE & LAURA WITTMANN, on behalf of themselves and others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN STAFFING ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The American Staffing Association ("ASA") submits this amicus brief in support of petitioner AMN Services, LLC's Petition for Writ of Certiorari. Founded in 1966, ASA is the largest trade association for the staffing industry, and the leading voice in the country for staffing, recruiting, and workforce-solutions firms. ASA promotes and protects the interests of staffing firms and the temporary and contract employees they employ.

ASA represents more than 1,300 staffing firms, which operate over 12,000 offices throughout the United States. ASA provides staffing-industry information to lawmaking bodies, educates the public and its members regarding applicable laws and regulations, fosters understanding of the industry and its beneficial role in the economy, encourages ethical business conduct, and offers educational updates to members about the staffing industry. ASA is intimately familiar with the challenges its members face complying with the myriad employment and tax laws of the United States and the 50 states.

ASA participates as amicus curiae in cases involving vital staffing industry issues, including this case. *See Risinger* v. *SOC LLC*, 708 F. App'x 304 (9th Cir. 2017). The decision below exposes staffing firms to the risk of liability, their employees to onerous costs and potential administrative burdens, and their clients to potential cost increases due solely to the

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[1] This brief is filed with the consent of all parties. No counsel for any party authored this brief in whole or in part, and no entity or person, other than *amicus curiae*, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

appropriate per diem methods many firms use to reimburse employees with nontaxable payments for expenses incurred while working on assignments far away from their homes. Because these payments are reasonable reimbursements for employee travel expenses, they are not included in employee regular compensation for overtime purposes.

The amicus brief also focuses on the critical need for upholding employer per diem travel expense reimbursements for employees working away from home on their employers' business, and the consistent treatment of such per diems for both employment and tax purposes. By statute and regulation, reasonable per diem travel expense reimbursements are neither included in regular compensation for overtime purposes nor in compensation for federal tax purposes, but the decision below undermines this longstanding reality.

This case involves traveling nurses in the healthcare industry, an industry desperately in need of uniform tax and employment law application during the unprecedented challenges regarding public health in all areas of the country. But it also has a major impact on all staffing firms that provide per diem travel expense reimbursements for their temporary workers, regardless of industry, as well as on any industry that sends employees on temporary work assignments away from their home. As a result, ASA, with its expertise in the staffing industry, has a strong interest in helping the Court assess the adverse impact of the decision below on the proper use of the per diem reimbursement methods used by many staffing firms.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the Ninth Circuit in this case threatens to inflict harm at all levels of the staffing industry, particularly to nurses and hospitals. Staffing firms that employ traveling contract workers need a straightforward and easily administrable test to determine whether expense reimbursements must be included in the regular rate of pay when calculating overtime obligations. The Ninth Circuit's ruling robs them of that clarity, replacing a clear textual standard (that the staffing industry has relied on for years) with a vague "case-specific inquiry based on the particular formula used for determining the amount of the per diem." Pet.App.10. And the harm will not be limited to the staffing firms themselves. Any reasonable business response to the Ninth Circuit's decision will lead to direct or indirect harm to firms' employees or clients, especially in the healthcare sector.

That is because the Ninth Circuit's "function" test creates a significant risk that proportional adjustments to per diem payments (e.g., for failure to complete an assigned workweek) will require the payments to be included in the regular rate of pay under the Fair Labor Standards Act ("FLSA"), on the ground that those payments "function" as hours-based compensation. Firms could respond in various ways to this threat, but all of these options will impose increased burdens on stakeholders in the staffing industry.

Some firms will stop adjusting their per diems when an employee misses work, to avoid the FLSA hammer that the decision below threatens, but that approach risks the tax-exempt status of those per diems and thereby creates a risk that tax authorities

will attempt to collect unpaid taxes from both the employer and the employee, potentially jeopardizing the firm's ability to retain employees. Other employers will leave their per diem arrangements unchanged, but will include the payments in the regular rate calculation. The attendant wage increase will, however, create upward pressure on client fees as staffing firms endeavor to allocate costs. Other employers will just cross their fingers and maintain their existing per diem arrangements, risking liability and exposure if their per diem plans do not pass muster under the Ninth Circuit's open-ended "function" test. Finally, some employers may consider abandoning per diem plans altogether, opting for an expense substantiation model, but that will certainly come at the cost of losing nurses who typically insist that their contracts include a per diem arrangement, and such losses could add to the strain on hospitals that are already crippled by a nursing shortage that is gripping the nation. In short, any reasonable and good-faith response to the Ninth Circuit's ruling will translate into onerous burdens on the entire staffing industry, particularly on nurses and hospitals.

Not surprisingly, the legal analysis of the Ninth Circuit that threatens to impose these dire consequences is fundamentally unsound. The petition for certiorari sets forth the core errors in the Ninth Circuit's analysis. That analysis is, moreover, wrong in additional ways that reinforce the arguments set forth in the petition. The Ninth Circuit misunderstood the structure of the pertinent statute, 29 U.S.C. § 207(e)(2). That provision first lists two discrete payment categories—payments for "occasional periods when no work is performed," and payments for "traveling expenses" incurred on the employer's behalf. *Id.* The statute then provides a catchall for

any "other similar payments" that are not tied to the number of hours worked. *Id.* The Ninth Circuit in effect treated this entire section as creating a single category of payments, with each described payment class sharing the essential characteristic of not being compensation for hours worked. That led the Ninth Circuit to adopt an overarching formula in which the excludability of any payment under that statute—even if the payment closely resembles one of the enumerated types—turns on a case-specific inquiry into whether the payment "functions" in practice as compensation for hours worked.

That approach, however, ignores that § 207(e)(2) identifies "three distinct categories of payment." Regular Rate Under the Fair Labor Standards Act, 84 Fed. Reg. 68736, 68740 (Dec. 16, 2019). The Department of Labor ("DOL") in fact promulgated specific interpretive rules corresponding separately to those categories. See 29 C.F.R. § 778.217-.224. Moreover, treating the entire statute as a single payment category for hours-based compensation renders most of the provision, and its corresponding rulemaking interpretations, surplusage.

Correctly interpreted, the statute requires the court first to determine if one of the enumerated categories applies, and if so, whether the payment is excludable under the pertinent statutory text. If, and only if, the payment arrangement does not qualify as one of those specific payment types does the court then proceed to analyze, under the catchall "other similar payments" clause, whether the payment functions as compensation for hours worked. The Ninth Circuit did not do this, and in so doing cast a devastating shadow of uncertainty over employers' efforts to accurately determine their overtime and federal tax obligations.

This Court should therefore grant the petition for certiorari.

I. THE DECISION BELOW WILL HARM STAFFING FIRMS, TRAVELING EMPLOYEES, AND HEALTHCARE PROVIDERS

Temporary and contract workers deploy to remote areas of the country, often for weeks or months at a time, to fill critical staffing gaps across numerous industries. The staffing firms that employ those workers depend on clear rules governing the calculation of employee wages, including in particular the method for determining the regular rate of pay, and whether payments pursuant to expense reimbursement plans are excludable from that calculation. By replacing a longstanding straightforward test with a vague, multi-factor formula for excluding per diems from the regular rate, the decision below eviscerates the clarity that once existed, and forces staffing firms to proceed without knowing whether their per diem arrangements are lawful. If the Ninth Circuit's ruling is left undisturbed, staffing firms will respond variously in multiple potential ways, which will involve downstream (and in some cases, direct) harm on employees or clients. Nowhere will these harms be more acutely felt than in the healthcare sector, and in nursing staffing in particular, the vitality of which the country needs to maintain now more than ever.

A. The Staffing Industry Deploys Traveling Employees Where They Are Needed Most, Especially in the Healthcare Sector

1. There are thousands of staffing firms in the

United States, most of which are engaged in employing temporary and contract workers. *See Staffing Industry Statistics*, American Staffing Ass'n, https://bit.ly/3lp7jRz. These firms play a critical role in the economy. They provide job opportunities, a bridge to permanent employment, and work-schedule flexibility to millions of people, as well as a broad range of workforce solutions for businesses. They hire nearly 14 million temporary and contract workers annually—employing around 2.5 million workers per week on average. *Id.*

Because staffing firms employ the individuals they assign to work for clients, the firms are responsible for paying wages, withholding and remitting employment taxes, providing workers' compensation, and furnishing a variety of employee benefits. As employers, these staffing firms are responsible for compliance with applicable employment, employee benefit, and tax laws throughout the country. Many employees are performing work away from home and thus incurring costs on their employers' behalf, so such firms must be able to efficiently reimburse those workers for their travel expenses, including housing and meal costs, without triggering unexpected FLSA liability for themselves, or unanticipated tax liabilities for their employees.

Temporary and contract employees work in virtually all occupations, from skilled trades (e.g., nursing, engineering, construction) to degreed professionals (e.g., attorneys, accountants, insurance adjusters), and across industry sectors. The temporary staffing solution allows businesses to tailor their workforce to their current needs, by filling in during employee vacations and illnesses, meeting temporary skill shortages, handling seasonal or other

special workloads, and staffing special projects. As this case demonstrates, staffing firms ameliorate critical labor shortages by recruiting and deploying workers who sign up to work at locations far from home for weeks or months at a time.

Traveling contract employees fill a critical need that is not uniformly distributed across the country. For example, when a nuclear plant goes offline, a rush of temporary contract engineers comes to revive the reactor, before traveling to another site. *See, e.g.*, *Perry Nuclear Plant Begins Refueling Outage*, PR Newswire (Mar. 8, 2021), https://prn.to/3Ccn98P. When natural disaster strikes, insurance adjusters on temporary contract descend on the affected location to facilitate claims processing. *See, e.g.*, Daniel Kerr, *3 Reasons to Become a Claims Adjuster*, AdjusterPro (Dec. 12, 2020), https://bit.ly/3hAhYHX. And, as pertinent here, when a hospital needs more clinical staff to handle escalating numbers of patients, temporary contract nurses from around the country show up to support. *See, e.g.*, Julie Bosman, *As Hospitals Fill, Travel Nurses Race to Virus Hot Spots*, N.Y. Times (Dec. 2, 2020), https://nyti.ms/3tDDNLG.

2. The staffing industry's ability to deploy employees where they are most needed is especially critical in the healthcare sector, both now and over the long term.

A nationwide nursing shortage is crippling hospitals' ability to manage the flood of hospitalized patients. The most significant limiting factor for admitting ill patients is often not total bed count or space in the building, but inadequate clinical staffing. Andrew Jacobs, *'Nursing Is in Crisis': Staff Shortages Put Patients at Risk*, N.Y. Times (Aug. 23, 2021), https://nyti.ms/3C9DafV. In a hospital, too few nurses

leads to "longer emergency room waiting times and rushed or inadequate care" for patients "who often require exacting, round-the-clock attention." *Id.*; *see also* Ben Finley & Sudhin Thanawala, *Explainer: What happens when an ICU reaches capacity*, AP (Aug. 27, 2021), https://bit.ly/3ntGYoa. The shortage causes a bottleneck, as "emergency rooms and I.C.U.s are unable to move out patients" to less intensive care areas because there are no nurses to care for them there, thereby limiting the ability to take new emergency cases. Jacobs, *supra*.

The problem is also self-reinforcing: nurses report that they are feeling increasingly burned out and withdrawing from the profession, citing insufficient staffing levels and job intensity as the primary reasons for leaving. Gretchen Berlin et al., *Nursing in 2021: Retaining the healthcare workforce when we need it most*, McKinsey & Company (May 11, 2021), https://mck.co/399X65G. The staffing crisis in America's hospitals right now is a matter of life and death, making it all the more vital to maintain a robust and active market of traveling healthcare professionals who can relieve the pressure in the hardest hit or most resource-strained regions.

This nursing shortage, unfortunately, is not expected to vanish when the COVID-19 pandemic subsides. In fact, a shortage is expected to persist well into this decade, particularly as the baby boomer generation reaches retirement age. *See* Lisa M. Haddad et. al, *Nursing Shortage*, StatPearls (last updated Dec. 14, 2020), https://bit.ly/2Wk8QQ5; *see also* U.S. Bureau of Labor Statistics, *Employment Projections: Occupational Projections Data*, https://bit.ly/3zyu0rV (projecting severe shortages for nurse practitioners and registered nurses through this

decade). Moreover, as a general matter too few healthcare professionals live in areas where their services are needed, making temporary deployment necessary to ensure the functioning of our health care system. *See* Haddad, *supra*. And, healthcare needs often become especially concentrated in areas of the country at times that cannot easily be predicted, such as after a natural disaster or mass injury event. All of this further underscores the need to maintain a healthy and active labor market of traveling nurses, and to remain cognizant of the business impact of legal rules that affect this market.

B. The Decision Below Damages the Staffing Industry at All Levels, Particularly Hurting Traveling Nurses and Healthcare Providers

The decision below replaces a longstanding, straightforward test for determining whether per diems are excludable from the regular rate, with a vague, multi-factor standard that creates enormous challenges for staffing firms. Some firms will stop adjusting their per diems when an employee misses work, in order to avoid the FLSA liability that the decision below now threatens—but that approach risks exposure under the federal tax laws, both for employees and employers. Others will keep their per diem arrangements unchanged, and simply include the expense payments in the regular rate calculation just as the Ninth Circuit instructs, but that creates upward pressure on the costs of stakeholders who depend on those employees (e.g., hospitals, nuclear facilities, etc.). Others will just roll the dice for lack of other options, risking FLSA exposure if their per diem plans do not survive review under the Ninth Circuit's nebulous approach. Finally, some may be tempted to

switch away from per diem plans altogether, opting for specific expense substantiation instead, but that will lead to lost employees particularly in the nursing sector, and put further strain on healthcare providers that are already crippled by a nursing shortage. In short, the Ninth Circuit's ruling puts the staffing industry between a rock and a hard place, risking significant disruption and harm to all stakeholders.

1. It is axiomatic that clear and simple tests are easier to apply and lead to more predictable results than vague, multi-factor standards. *See, e.g.*, *Illinois* v. *Perkins*, 496 U.S. 292, 308 (1990) (need for clarity and simplicity in *Miranda* doctrine); *Roell* v. *Withrow*, 538 U.S. 580, 596 (2003) (Thomas, J., dissenting) (consent to magistrate judge jurisdiction). Such predictability is especially vital in calculating the regular rate of pay, which is a threshold compensation issue that every employer in the country must face on a regular basis. *See generally, e.g.*, 29 C.F.R. § 778.200(c); *Bay Ridge Operating Co.* v. *Aaron*, 334 U.S. 446, 459 (1948) (granting certiorari "[o]n account of the importance of the method of computing the regular rate").

Prior to the Ninth Circuit's ruling, the law governing the excludability of per diem payments from the regular rate was clear and simple. The plain language of 29 U.S.C. § 207(e)(2) provides that per diem payments for "traveling expenses" are excludable from the regular rate so long as those expenses were "incurred by an employee in the furtherance of his employer's interests and [are] properly reimbursable by the employer." The DOL's corresponding rule confirms this straightforward test: when an employer makes a payment to its employee "to cover . . . expenses" incurred "by reason of action

taken for the convenience of [the] employer," and such payment "reasonably approximates the expense incurred," then the payment is excludable from the regular rate. 29 C.F.R. § 778.217(a); *see also id.* § 778.217(c)(1) (where "'reimbursement' is disproportionately large, the excess amount will be included in the regular rate").

Notably, nowhere in those provisions does Congress, or the DOL, require the employer to demonstrate additionally that its reimbursements for "traveling expenses" do not functionally approximate compensation for hours worked. Instead, the excludability of a per diem turns on whether it reasonably approximates the employee's actual expenses incurred on the employer's behalf. Under that longstanding test, staffing firms have been able to structure their per diem arrangements with a clear understanding of the associated legal obligations.

The Ninth Circuit's novel approach diverges from this straightforward standard, and sows confusion over all per diem arrangements that involve pro rata adjustments designed to reasonably approximate actual expenses. According to the Ninth Circuit, the "function test requires a case-specific inquiry based on the particular formula used for determining the amount of the per diem." Pet.App.10. Under this freewheeling standard, courts must analyze the specific "features" of the per diem, and apply numerous factors to determine the payment's true "function," including (a) "the monetary relationship between payment and hours," (b) "whether the payments are made regardless of whether any costs are actually incurred," (c) "whether the employer requires any attestation that costs were incurred by the employee," (d) the amount of the per diem payment

relative to the regular rate of pay," and (e) "whether the payments are tethered specifically to days or periods spent away from home or instead are paid without regard to whether the employer is away from home." Pet.App.10-11

This multi-factor approach is already disrupting the staffing industry. Analysts are already urging staffing businesses to reevaluate their per diem arrangements in light of the decision below.[2] The decision in particular affects companies that—as required by law—make pro rata adjustments to ensure the payment "reasonably approximates" the actual expenses incurred, *e.g.*, proportional deductions from a weekly per diem when a nurse does not report for an assigned shift. 29 C.F.R. § 778.217(a). And staffing companies around the country, particularly those that offer travel assignments within the Ninth Circuit, are re-evaluating their policies, uncertain whether their existing payment arrangements leave them vulnerable to FLSA exposure.

2. The Ninth Circuit's open-ended approach forces staffing companies using a per diem model to choose among four options in response: (a) stop making proportional adjustments to per diems when the employee incurs expenses for himself rather than for

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[2] *See, e.g.*, Corey J. Cabral, *9th Circuit Decision Requires Employers to Reevaluate Expense Reimbursement Procedures*, CDF Labor Law, Cal. Labor & Emp. Law Blog, (accessed Sept. 13, 2021), https://bit.ly/3husP67; Timothy B. Del Castillo, *Employers Should Review Expense Reimbursements in Light of Recent Ninth Circuit Decision*, Castle Law, Cal. Emp. Law Blog, (Mar. 22, 2021), https://bit.ly/2XetCB4; Joseph Persoff, *Ninth Circuit Holds Employee Expense Per Diem Can Constitute 'Wages' to Determine the Regular Rate*, Baker Hostetler (Feb. 10, 2021), https://bit.ly/3zb1dJA.

his employer in order to avoid FLSA liability; (b) continue making proportional per diem adjustments, but begin including the per diem payments in the calculation of the regular rate; (c) continue making proportional adjustments, but not include the per diems in the regular rate and hope that the design of the plan does not trigger FLSA liability; or (d) abandon the per diem model and switch to expense substantiation. Each of these options imposes burdens either directly on employees, or on staffing companies that ultimately may be forced to pass those costs on to their clients. This dilemma poses a particular threat to healthcare providers, and adds unwanted strain to hospitals and the supply of nurses that is critically needed now more than ever.

a. The Ninth Circuit's approach seriously risks FLSA exposure for staffing firms that make adjustments to per diems in order to reasonably approximate the actual expenses incurred on the employer's behalf. After all, under the court's ruling, a proportional deduction from a per diem when a traveling employee reports for only part of the workweek is a "particularly relevant" factor in determining whether the per diem should be excludable from the regular rate. Pet.App.16. Afraid of the specter of FLSA liability, staffing companies are therefore considering ceasing their practice of downwardly adjusting per diems in order to avert the risk of FLSA liability.

Apart from the certainty that this move will increase expenses for firms (as they would be forced to pay non-reduced per diems even when an employee does not work a full workweek), which may ultimately be passed on to client businesses, this response raises an altogether more serious concern: failure to

calibrate per diems to a reasonable estimate of actual expenses risks audit and enforcement exposure under the federal tax laws.

The Internal Revenue Code treats as tax-exempt certain payments to employees "under a reimbursement or other expense allowance arrangement," 26 U.S.C. § 62(a)(2)(A). To maintain that tax-exempt status, the arrangement must qualify as an "accountable plan," 26 C.F.R. § 1.62-2(c)(2), which requires that all of the expenses under the plan have a "business connection"—*i.e.*, similar to the "traveling expenses" requirement under the FLSA, the expenses must be "paid or incurred by the employee in connection with the performance of services as an employee of the employer." *Id.* § 1.62-2(d)(1). If the reimbursement arrangement involves payment for any expenses that lack a business connection, then the entire plan is "nonaccountable," and all payments thereunder must be reported as taxable wages. *Id.* § 1.62-2(c)(3)(i), (c)(3)(5).

Accordingly, if a staffing firm responds to the decision below by refraining from proportional reductions of per diems (which has long been industry standard prior to the Ninth Circuit's ruling), the firm risks escaping the frying pan and landing in the fire. The Internal Revenue Service ("I.R.S.") may take the position that non-adjusted per diems involve reimbursement for expenses that do not have a "business connection," thereby rendering the entire per diem arrangement "nonaccountable" and taxable. Indeed, the I.R.S. has sought unpaid taxes in disputes about the status of accountable plans before. *E.g.*, *Worldwide Lab. Support of Mississippi, Inc.* v. *United States*, 312 F.3d 712, 713 (5th Cir. 2002).

If the I.R.S. succeeded in imposing liability in these

circumstances, the resulting costs on businesses, employees, and clients would be considerable. First, staffing companies would owe additional Social Security and Medicare contributions on the newly taxable per diem payments—costs that some firms could not easily absorb. Second, employees themselves face a risk of a surprise bill for unpaid income taxes from prior years when such payments were treated as tax-exempt. More problematically, to avoid these complications, some firms may bite the bullet and treat these payments as part of a "nonaccountable" (i.e., taxable) plan, which reduces take-home pay for employees by forcing them to pay employment taxes on the per diems going forward. In many cases, that pay cut would exceed the pay increase from including the per diem in the regular rate for the purpose of calculating overtime rates, particularly for employees that do not habitually work overtime hours.

This problem is especially concerning in the healthcare sector over the long term. Given the current and projected nursing shortage, informing nurses that their travel per diems will be taxed dilutes the attractiveness of a travel nursing job, and many will opt to work locally instead. A robust contingent of traveling nurses is critical to serving our nation's healthcare needs in the coming years, yet the Ninth Circuit's ruling threatens to diminish the incentive for nurses to travel by causing some employers to treat travel per diems as taxable.

b. Some staffing firms may feel they cannot lose employees (especially nurses), and so cannot jeopardize their "accountable plan" tax-exempt status. Those firms may continue making proportional adjustments to per diems in order to reasonably

approximate the actual expense that the employee incurred on behalf of the company, but will also be forced by the Ninth Circuit's broad and unpredictable standard to add the per diem payments into the calculation of the regular rate for purposes of determining overtime obligations. The additional cost of doing so, however, will be enormous for many companies—particularly those employing nurses in states that have 8-hour daily (rather than 40-hour weekly) overtime laws, where each nursing shift is 12 hours (i.e., one third of each shift is overtime). And many clients in the healthcare sector may struggle to shoulder these costs themselves. *See* American Hosp. Ass'n, *Hospitals and Health Systems Face Unprecedented Financial Pressures Due to COVID-19* (May 2020), https://bit.ly/3z6M1Nz.

c. Unable to realistically absorb such an abrupt increase in wage costs themselves, many firms will be left with the unenviable option of rolling the dice and hoping that their practice of adjusting per diems survives under the Ninth Circuit's vague "function" test. But the consequences of losing an FLSA collective action can be dire. Not only does the staffing company face a judgment for back pay, but also it may be liable for an equal amount (i.e., effectively double the unpaid wages) in "liquidated damages," 29 U.S.C. § 216(b), (c), unless the employer can show that it acted in "good faith" and that it "had reasonable grounds for believing" it did not violate the FLSA, *id.* § 260. Indeed, the DOL just lifted significant restrictions on the agency's ability to seek these pre-litigation liquidated damages for FLSA violations. *See* Wage & Hour Division, U.S. Department of Labor, Field Assistance Bulletin No. 2021-2 (Apr. 9, 2021), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2021_2.pdf. In the present healthcare

environment especially, where nurses are sorely needed and hospitals are in dire financial straits, the ripple effects of these added costs are particularly undesirable.

d. Some firms may be tempted to abandon a per diem model altogether, opting instead for an expense substantiation model. With expense substantiation, the employee keeps and submits receipts for reimbursement of each expense, and the employer pays for those expenses incurred on its behalf. For employers, this model involves significant administrative costs, including recordkeeping and auditing costs associated with processing, verifying, and paying each individual expense. Some smaller staffing companies do not have the resources to handle such an operation at all. For employees, this procedure is riddled with frustrations, as it forces the employee to advance funds while he waits for reimbursement, and requires time tediously organizing, storing, locating, and submitting the expenses—time better spent working and, in some cases, saving lives.

In fact, in the healthcare sector in particular, expense substantiation would deviate sharply from the industry standard, precisely because traveling nurses insist on a per diem arrangement in their employment contracts. Traveling nurses voluntarily accept significant burdens—they leave for months at a time, away from their home and families—and many of them have the option to work locally instead. Because the per diem arrangement eliminates the headache of collecting and submitting receipts, nurses insist on per diems as a feature of their travel contracts. For that reason, most staffing firms will not have the ability to demand expense substantiation for

traveling nurses without risking that the nurse will opt for local work or work instead for a competitor staffing firm that can or will pay per diems. The Ninth Circuit's ruling therefore puts unnecessary strain on the critical supply of travel nurses that are needed at this moment, and in the decades to come.

II. THE NINTH CIRCUIT'S STATUTORY APPROACH IS WRONG FOR REASONS BEYOND THOSE IDENTIFIED IN THE PETITION

The decision below is also wrong as a matter of law, as the petition for certiorari explains—and for additional reasons that reinforce the arguments set forth in the petition.

1. As the petition (Pet.20-22) argues, rather than apply the language for the statutory payment category described as "traveling expenses," 29 U.S.C. § 207(e)(2), which are excludable so long as they are "incurred by an employee in the furtherance of his employer's interests and properly reimbursable," *id.*, the Ninth Circuit instead applied the language for the catchall category described as "other similar payments," which are excludable only if they "are not made as compensation for [the employee's] hours of employment," *id.* This was error, the petition explains, because the more specific provision ("traveling expenses") should govern over the general catchall provision ("other similar payments"). *See RadLAX Gateway Hotel, LLC,* v. *Amalgamated Bank,* 566 U.S. 639, 645 (2012). The Ninth Circuit then compounded this mistake by relying on the DOL interpretive rule corresponding to the inapt provision, which in turn provides that excludable payments under that category "do not depend on hours worked . . . ." 29 C.F.R. § 778.224(a). Those missteps,

combined with the Ninth Circuit's improper reliance on an informal guidance document from the DOL, led the court to ask the wrong question: whether the payment "functioned" like hours-based compensation.

Had the Ninth Circuit instead applied the more specific statutory language pertaining to "travel expenses," the court would have looked to the corresponding DOL rule for that category, 29 C.F.R. § 778.217, which straightforwardly permits exclusion of payments that "reasonably approximate" expenses incurred on the employer's behalf. *Id.* §§ 778.217(a), (b)(3). Under that category, the correct question is simply whether the per diem payment reasonably approximates expenses incurred on the employer's behalf.

2. The Ninth Circuit's interpretive error arises from a fundamental misunderstanding of the structure of 29 U.S.C. § 207(e)(2).

The statute lists three payment categories: (a) payments for "occasional periods when no work is performed" for various reasons; (b) payments for "traveling expenses" incurred on the employer's behalf; and (c) "other similar payments" that are not hours-based compensation. *Id.* Rather than treat these payment types as analytically separate, the Ninth Circuit in effect treated the section as a creating a single category of excludable payments, with each listed type sharing the essential characteristic of not being compensation for hours worked. This led the Ninth Circuit to adopt a test in which the excludability of any payment under § 207(e)—no matter which enumerated payment type it resembled—turns on a case-specific inquiry into whether the payment functions as compensation for hours worked. Indeed, the Ninth Circuit's principal basis for this "function"

test was that its own precedent applied that inquiry, even though those cases involved payments that did not purport to resemble reimbursement for travel expenses. Pet.App.9-10.[3]

The Ninth Circuit's interpretation misapprehends the design of the statute. As the DOL explained in its most recent rulemaking, § 207(e)(2)'s listed payment types represent "three *distinct* categories of payment." Regular Rate Under the Fair Labor Standards Act, 84 Fed. Reg. 68736, 68740 (emphasis added); *id.* at 68745 (§ 207(e)(2) "consists of three clauses, each of which address a distinct category of excludable compensation"); *accord* 84 Fed. Reg. 11888 (Mar. 29, 2019) (noticed of proposed rulemaking). Indeed, the DOL promulgated interpretive rules corresponding to those categories separately, which it would not have done if it understood the entire statute to call for a single substantive inquiry into whether a payment resembles hours-based compensation. *See* 29 C.F.R. § 778.217 (relating to "traveling expenses"); *id.* § 778.218-.220 (relating to "occasional periods when no work is performed"); *id.* § 778.221-.222, .224 (relating to "other similar payments").

Treating the entire statute as a single payment category for hours-based compensation also renders the bulk of the statutory provision, and its corresponding rulemaking interpretations,

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[3] First, the Ninth Circuit relied on *Local 246 Utility Workers Union of Am.* v. *S. Cal Edison Co.*, 83 F.3d 292 (9th Cir. 1996), which involved supplemental payments to disabled workers designed to raise their overall compensation to pre-disability rates. Pet.App.9. Second, it cited *Flores* v. *City of San Gabriel*, 824 F.3d 890 (9th Cir. 2016), which involved monthly payments to employees who declined employer-provided medical coverage. Pet.App.9-10.

surplusage. *See, e.g.*, *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) (disfavoring interpretation that makes "another portion of that same law" superfluous); *see also United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) (declining to "read a 'catchall' provision to impose general obligations that would include those specifically enumerated"). If the statute only called for an inquiry into whether the payments were "made as compensation for [the employee's] hours of employment," 29 U.S.C. § 207(e)(2) ("other similar payments" provision), then there would be no reason for Congress to have enumerated specific payment types, or for the DOL to promulgate separate interpretations corresponding to the payment categories. *Id.*

Rather, in amending the FLSA in 1949 to define what is excludable from the "regular rate," Congress identified two discrete payment arrangements that were common in the workplace—payments for "occasional periods when no work is performed" and payments for "traveling expenses." Then, for completeness, Congress also included a catchall provision for any "other similar payments," making clear that to take advantage of that general catchall the employer would need to show that the payment was not "compensation for [the employee's] hours of employment." 29 U.S.C. § 207(e)(2).

Accordingly, the structure of § 207(e)(2) requires first that the court determine if one of the enumerated categories applies, and if so, whether the payment is excludable under the pertinent statutory text (relying on the corresponding regulatory interpretation for guidance). If, and only if, the payment arrangement does not qualify as one of those specific payment types

does the court proceed to analyze whether the payment effectively functions as compensation for hours worked. The Ninth Circuit's contrary approach is therefore mistaken, and certiorari review is warranted for that additional reason.

Respectfully submitted,

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