No. _____

In The Supreme Court of the United States

YASSINE BAOUCH, *et al.*,

Petitioners,

v.

WERNER ENTERPRISES, INC.,
d/b/a WERNER TRUCKING, and
DRIVERS MANAGEMENT, LLC,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Labor Standards Act ("FLSA") and the IRS regulations distinguish wages paid to an employee from reimbursement for employer-related expenses. The respondent trucking companies paid certain drivers what the companies labeled "earnings" of between $1.86 and $12.57 a day, plus an additional $41 a day labeled "per diem."

For tax purposes, respondents sought to treat the per diem as reimbursement rather than wages, thus substantially reducing their liabilities under the Internal Revenue Code. An IRS Examiner concluded that the per diem payments were recharacterized wages, and thus subject to various federal taxes. On appeal, however, the IRS Appeals Commission sustained respondents' contention that under the IRS regulations the per diem payments constituted reimbursement, not wages.

In the instant case, drivers sued the trucking companies under the FLSA, contending that the per diem constituted reimbursement, not wages, and that the small amount denoted "earnings" was less than the federal minimum wage of $7.25 an hour. The court of appeals held that the per diem constituted wages, not reimbursement, under the FLSA. The court of appeals' interpretation of the FLSA conflicts with the interpretation of that statute by other courts of appeals.

The Question Presented is:

> Under what circumstances do per diem payments to an employee constitute wages, rather than reimbursement, under section 207(e)(2) of the FLSA?

PARTIES

The petitioners are

(a) the named plaintiffs: Yassine Baouch, Scott Larrow, Steve N. Neely, Lance Edwards, Mark Sohmer and Joseph Horton,

(b) the class of current or former drivers certified by the District Court on May 12, 2014, and

(c) the former or current drivers who opted to join the collective action conditionally certified by the District Court on May 12, 2014.

The respondents are Werner Enterprises, Inc. and Drivers Management, LLC.

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Petitioners Yassine Baouch, *et al.*, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on November 14, 2018.

OPINIONS BELOW

The November 14, 2018, opinion of the court of appeals, which is reported at 908 F.3d 1107, is set out at pp. 1a-23a of the Appendix. The December 21, 2018, order of the court of appeals denying rehearing and rehearing en banc, which is not reported, is set out at p. 77a of the Appendix. That order was corrected by the court of appeals on January 3, 2019, which is set out at pp. 78a-79a of the Appendix. The March 23, 2017, Memorandum and Order of the district court, which is reported at 244 F.Supp.3d 980, is set out at pp. 24a-76a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on November 14, 2018. A timely petition for rehearing was denied by the court of appeals on December 21, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On March 12, 2019 Justice Gorsuch granted an application extending the time to file the petition to April 20, 2019.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix.

INTRODUCTION

This case presents important conflicts about the meaning of the Fair Labor Standards Act ("FLSA") that arises in part out of the divergent interests of two types of employers. The FLSA requires that covered employers pay a minimum wage of $7.25 per hour. The FLSA distinguishes wages from reimbursement of employees for certain employer-related expenses. Employers in minimum wage cases favor a narrow interpretation of what payments constitute reimbursement, because as a result more types of payments can be counted towards an employer's minimum wage obligation. The FLSA also requires that most employers pay overtime at a rate 150% of the employees' regular wage to employees who work more than 40 hours a week. Employers in overtime cases favor a broad definition of what constitutes reimbursement, because reimbursements are excluded from the regular rate that must be increased by 50% for overtime hours. In the instant minimum wage case, the court of appeals adopted at the urging of the employer an exceptionally narrow interpretation of reimbursement, which conflicts with the standards other circuits have adopted at the behest of employers in overtime cases.

This case also presents important problems about the inter-relationship between the provisions of the IRS regulations and the FLSA regarding compensation practices, and about the administrative agencies which enforce those two statutes. In 2011-13, respondent[1] Werner's compensation practices were the subject of an audit by the Internal Revenue Service. An IRS Examiner concluded that Werner had improperly recharacterized wages paid to certain drivers as non-taxable per diem, resulting in a substantial underpayment of various federal taxes. In the ensuing administrative appeal, the IRS expressed concern about the legality of Werner's practices under the FLSA, and Werner advanced to the IRS a number of arguments whether the Department of Labor would regard Werner's practices as lawful. The Department of Labor, however, was not privy to that administrative proceeding.

In the instant case, involving the same Werner practices and including the same years that were the subject of the IRS audit, the drivers in question claim that Werner's practices indeed violated the FLSA. The drivers contend that representations Werner made in this FLSA suit are inconsistent with the representations that Werner made to the IRS in the earlier audit. Werner, in response, has advanced in this case a number of arguments about the meaning of the Internal

[1] Respondent Drivers Management, LLC, is a subsidiary of Werner Enterprises. For simplicity we refer to the respondents as "Werner."

Revenue Code and the IRS regulations. The IRS itself has not been a party to this FLSA litigation.

In 2013 the IRS ultimately concluded, at the behest of Werner, that under the IRS regulations the company's per diem payments were reimbursement rather than wages. In the instant case, on the other hand, Werner persuaded the court of appeals that under the FLSA the same per diem payments were wages rather than reimbursement. The Eighth Circuit rested its decision on interpretations of the IRS regulations and the FLSA, expressly holding that the two provisions establish sharply different standards regarding what constitutes a reimbursement, rather than a wage. Judge Colloton, in a concurring opinion, suggested that the IRS might want to reconsider its earlier determination regarding the tax status of Werner's practices in light of what the judge characterized as Werner's "twin positions." (23a).

As this case illustrates, divergent interpretations of the distinction between wages and reimbursement under the two statutes create significant administrative problems. This Court is the appropriate judicial forum to resolve the circuit conflicts regarding the FLSA and to consider the inter-related interests of the federal agencies concerned regarding this important problem.

STATEMENT OF THE CASE

Legal Background

Fair Labor Standards Act

Section 206(a) of the FLSA requires that covered employees be paid "wages" of at least $7.25 per hour. 29 U.S.C. § 206(a). Section 207(a) of the FLSA requires that certain covered employees who work more than 40 hours per week be paid "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a). Section 207(e) defines what payments by an employer to an employee are included in that employee's "regular rate." 29 U.S.C. § 207(e). Section 207(h)(1) provides that sums excluded from the regular rate compensation under subsection (e) "shall not be creditable toward wages required under section 206...." 29 U.S.C. § 207(h)(1). Thus payments to employees that are excluded from the regular rate under section 207(e) cannot be counted in determining whether an employer has paid the minimum wage required by section 206(a).

Section 207(e)(2) excludes from an employee's regular rate, and thus from wages in a minimum wage case, "reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer...." 29 U.S.C. § 207(e)(2). Under section 207(e)(2) an employer payment is a reimbursement excluded from the regular rate (and from wages) of the recipient employee if two requirements are met: the employee expenditure was "in furtherance of his employer's interests" and the amount of the

payment was "reasonable." The Department of Labor ("DOL") regulations cite, as illustrative of the "[p]ayment[s] by way of reimbursement for [the] types of expenses [that] will not be regarded as part of the employee's regular rate," "[reimbursement for] [t]he actual or reasonably approximate amount expended by an employee, who is traveling 'over the road' on his employer's business, for ... living expenses away from home...." 29 C.F.R. § 778.217(b). The DOL Field Operations Handbook ("DOL Handbook") advises that the reimbursement excluded from a worker's regular rate includes reasonable per diem payments.

> Situations may be encountered where the employer makes a per diem ... payment[ ] ... to offset the additional expenses incurred by an employee because he/she is required to work at a distant or isolated location and must live away from home. Such payments may be excluded from the regular rate of pay to the extent that they do not exceed a reasonable approximation of actual additional expenses involved in such situation.

DOL Handbook, ch. 32d05a(b).

Employers whose employees work a significant amount of overtime have a financial interest in structuring their payments to those employees as reimbursements rather than wages, because doing so reduces the regular wage that must be increased by 50% for overtime hours. Employers who pay their employees at or near the $7.25 minimum wage level, on the other hand, have a financial interest in structuring their payments to those employees, as much as possible, as wages

rather than reimbursements, because any payment deemed in the nature of a wage reduces the additional amount the employer would have to pay. Both types of employers thus have a compelling interest in the legal standard defining what constitutes reimbursement (rather than wages) under the FLSA, but those interests conflict.

Internal Revenue Code

Under IRS regulations, payments to employees related to employer-related expenses are nontaxable if they meet the requirements of an "accountable plan." 26 C.F.R. § 1.62-2(c)(2)(4). To constitute an accountable plan, the employer's payment must meet three requirements. First, the expense reimbursed must have a "business connection." 26 C.F.R. § 1.62-2(d). That requirement is generally satisfied if the payment is for meals and incidental expenses when the employee is away from home, except that an employer may not simply recharacterize wages as payments for such expenses as a method of avoiding federal taxes. Second, the expense must be substantiated. 26 C.F.R. § 1.62-2(e). With respect to travel away from home, there must be information sufficient to document the time, place, business purpose of the expense, and (ordinarily) the amount. Third, the employer must require an employee to return any amount provided to the employee that exceeds the substantiated amount. 26 C.F.R. § 1.62-2(f). Under section 1.62-2(f)(2), notwithstanding the other provisions of the regulation, an employer can provide employees with a per diem "for ordinary and necessary expenses of traveling away from home"

so long as the per diem is at "a rate for each day ... that is reasonably calculated not to exceed the amount of the employee's expenses or anticipated expenses."

Factual Background

Respondent Werner is a major trucking company, doing business in all forty-eight contiguous states. Werner employs approximately 15,000 drivers. Under the FLSA, the drivers are entitled to be paid the minimum wage, but are not entitled to time-and-one-half overtime if they work more than 40 hours a week. See 29 U.S.C. § 213(b)(1).

Werner hires most of its drivers from driver training schools. Those new drivers, referred to as student drivers, are required to take part in an on-the-job training program that lasts approximately eight weeks. The student drivers travel with regular drivers, share in the driving and other tasks, and are exposed to various types of driving conditions.

Many of Werner's drivers (including student drivers) work as over-the-road drivers; they go on long trips that may keep them away from home for several weeks at a time. Over-the-road drivers generally sleep in compartments in their trucks, but have to pay for meals and incidental expenses out of their own pockets. Werner's Chief Financial Officer estimated that the cost of those meals and incidentals ranged from $59 to $65 a day.[2] Because those costs are large in comparison to the

[2] App. 1905 [App. citations are to the Appendix in the court of appeals].

wages and other payments drivers receive from Werner, drivers (including student drivers) often ask for, and Werner provides, substantial advances that the drivers can use to pay for their food and incidentals. The advances are then deducted from the payments drivers receive each week.[3]

Prior to 2003 Werner paid student drivers a flat daily wage.[4] In 2003, Werner offered student drivers a choice of two methods of payment. Student drivers could receive a flat daily wage, which was initially $46.43 per day, and increased somewhat during the training period.[5] Under the new alternative, the "Payment Plan," participants would receive a nominal amount as "earnings," and a much larger amount as "per diem."[6] The per diem payments were "labeled as reimbursements on every paystub issued to every class member...." (13a). The nominal earning was initially $1.86 a day, and increased somewhat during the training period.[7] The per diem for student drivers was fixed

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[3] During the second week petitioner Baouch worked as a student driver, the advance deducted from his payment was 82% of his total payment. App. 1288.

[4] If the student drivers worked so many hours that the daily wage did not meet the minimum wage requirement, Werner would supplement their wages with an additional amount sufficient to comply with the FLSA.

[5] The flat wage rose to $50.00 after 30 days, and to $53.57 after 59 days. (33a).

[6] The earnings were labeled "Regular Pay" and the per diem was under the heading "Reimbursement." (35a).

[7] The nominal wage rose to $5.43 after 30 days and to $12.57 after 59 days. (33a).

at $41 per day,[8] and did not increase during the training period.

The flat rate wage was apparently the default payment, unless a student driver opted for the Plan. Werner advised student drivers that participation in the Plan would increase their take home pay, and provided student drivers with this chart[9] to induce them to participate in the Plan.

Per Diem pay example:	St. Driver Pay for Active Days 1-30		
	Without Per Diem	With Per Diem	Increase with Per Diem
Gross pay per day	$46.43	$1.86	($44.57)
Per Diem pay per day	$0.00	$41.00	$41.00
Total pay per day	$46.43	$42.86	($3.57)
Soc sec tax (FICA)	($3.55)	($0.14)	$3.41
Fed/St *inc* tax (@15%)	($6.96)	($0.28)	$6.68
Net pay per day	$35.92	$42.44	$6.52
Net pay per week	$251.44	$297.00	$45.64

(58a).

[8] That was the rate in 2008, and is the rate referred to in the decisions below. The rate has increased slightly since.

[9] (58a).

If a student driver chose to participate in the Plan, Werner treated the per diem as a nontaxable payment, which reduced Werner's liability for three different federal taxes. The per diem payment, if nontaxable, was not subject to federal payroll (Social Security) tax of 6.2%, Medicare tax (1.45%), and a federal unemployment compensation tax as high as 6%. In addition, if a student driver chose to participate in the Plan, Werner reduced the total payment to that driver by about 7%; for a new student driver, the reduction was from $46.43 a day to $42.86 a day. Under Werner's benefit plan, the company would match an employee's section 401(k) contribution up to 3% of his or her "earnings." Participation in the Plan substantially reduced Werner's responsibility for section 401(k) matching contributions. Werner claimed that these savings were to some degree cancelled out by increased income taxes, because not all of the per diem payments were deductible on Werner's own income taxes.[10] The degree to which that was true is in dispute.

The extent to which the Plan actually increased a student driver's take home pay is unclear, and depends to a considerable degree on how much would have been withheld for income tax purposes from the paycheck of a student driver who did not participate in the Plan. The paradigm chart given to student drivers assumed that earnings would have been subject to withholding at a 15% rate. That would probably have sounded reasonable to a recent graduate of a truck driving school,

[10] Brief in Support of Defendants' Motion for Summary Judgment, 9.

but a trained tax accountant would have known it was too high.[11] In the absence of tax withholding savings, a student driver who participated in the Plan would actually have had a smaller take home pay under the chart.[12] Student drivers who participated in the Plan were eligible for a far smaller amount of Werner matching contributions to their section 401(k) plan, would be eligible for only nominal unemployment compensation benefits if laid off (because those benefits are based on a worker's wages), and could have received a smaller Social Security benefit upon retirement. There is a dispute about the extent to which Werner alerted student drivers to those long term consequences.

More than 90% of student drivers opted to participate in the Plan. It is not difficult to say why they did so. The flat daily wage Werner was paying, $46.43, was substantially less than the daily expenses that Werner itself estimated student drivers were incurring, $59 to

[11] Under the tax withholding tables for 2012, for a worker paid $232.15 a week ($46.43 x 5), the required withholding is 0 for a married taxpayer, 0 for a single taxpayer with a dependent, and $12 for a single taxpayer with no dependents. The chart estimates the withheld tax as $34.80 ($6.96 x 5). Although the chart hypothesizes that there might be withholding for state income tax purposes, Baouch's 2012 payments never included any state income tax withholding.

[12] The savings from reduced Social Security (and Medicare) taxes in the chart, $3.41, is less than the reduction in total payment, $3.57.

$65 a day. Student drivers were generally[13] losing money every day they worked for Werner until they became regular drivers, and the Plan held out at least the hope of reducing those losses. Although Werner offered regular drivers the option to participate in a somewhat differently structured plan, a large majority of those drivers, whose regular wages were well above those of student drivers, refused to participate.[14]

Internal Revenue Service Audit

In 2011 the Internal Revenue Service initiated an audit of Werner's tax returns for 2009 and 2010. The focus of the inquiry was whether the payments which Werner had characterized as per diem payments, and had treated as nontaxable, were really wages. Following a Revenue Agent Report, that IRS in January of 2013 issued a Notice of Proposed Adjustment, asserting that Werner owed a very large amount of unpaid Social Security, Medicare and FUTA taxes, as well as a substantial amount of withholding. "[T]he tax examiner concluded ... Werner simply 'recharacterized' a portion of drivers' pay as non-taxable payments in an effort to attract drivers and avoid withholding employment taxes." (39a). Such recharacterized wages, the

[13] A student driver's take home could have exceeded his or her expenses if he or she worked so many hours that Werner had to provide additional compensation to meet federal minimum wage requirements. See n.4 *supra*.

[14] App. 1822.

Examiner reasoned, would not satisfy the business connection requirement of section 62-2(d) of the IRS regulations. App. 1812-13.

The Examiner's decision, and the analyses that preceded it, rested in part on the Service's view that if per diem was indeed reimbursement, the nominal wage paid to student drivers would itself be too small to comply with the FLSA. "[T]he Service based the Revenue Agent's Report in part on its ... belief that per diem allowances are not considered for purposes of determining whether an employee's wages meet federal minimum wage requirements." App. 2098. "[IRS] examination documents [from November 2011] cited the U.S. Department of Labor ... and Department of Transportation as the 'sources' underpinning the Service's contention that the government would not include the amounts the Taxpayer treat as nontaxable reimbursements of deductible business expenses in a computation made to determine whether a Plan participant's wages fulfill federal minimum wage requirements." App. 2109. The Tax Examiner observed that as Werner had characterized its payments, "[t]he resulting taxable compensation of the employees ... in some instances does not ... meet minimum wage requirements." App. 1815. Werner has repeatedly correctly described the Examiner's decision as having been based on this concern about the FLSA. Brief in Support of Defendants' Motion for Summary Judgment 14; Reply Brief in Support of Defendants' Motion for Summary Judgment 38.

In its appeal of the Examiner's decision, Werner objected to what it dismissed as the IRS's enigmatic interest in whether the taxable wages the Taxpayer reported for student per diem plan participants fulfilled federal minimum wage requirements. See App. 2109 (objecting to "the Service's efforts to conjure smoke where there is no fire with respect to federal minimum wage requirements"), App. 926 (objecting to "[t]he IRS' focus on the 'compensation' a plan participant earns for purposes of the FLSA"). Werner sent the IRS a series of increasingly detailed legal arguments assuring the IRS that the Department of Labor would treat the per diem payments as wages, even though Werner urged the IRS to treat those same payments as reimbursements. App. 928, 2108-10, 2098.

Werner vigorously pursued an administrative appeal of the Examiner's decision, making a number of arguments and representations that would subsequently become a key issue in the instant action under the FLSA. In December 2013 the IRS Appeals Commission overturned the Tax Examiner's decision. (38a-39a). "The Appeals Commission limited its analysis to whether the Payment Plan met the regulations governing accountable plans and reached its decision independent of whether Werner treated the Payments as compensation for minimum wage purposes under state and federal law." (39a). With regard to the dispute about whether the Department of Labor would treat the per diem payments as wages or as reimbursement, the Commission took no position, explaining that it was not certain whether the minimum wage laws even

applied to student drivers. "Appeals is not sure what the importance of the minimum wage is since it is not unusual for trainings in some occupations to not be paid wages at all and we are given no analysis of what a student driver should be paid in wages." (39a-40a). Werner had actually conceded, in earlier litigation regarding Werner's student drivers, that those drivers were entitled to the minimum wage,[15] but IRS officials were understandably unaware of that fact.

Proceedings below

District Court

The very challenge to Werner's practices that the IRS had repeatedly hypothesized was actually occurring throughout the administrative appeal of the Tax Examiner's decision, apparently unbeknownst to the IRS.[16] In November 2012, petitioner Baouch commenced this action in district court, contending that student drivers[17] who participated in the Plan received

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[15] Werner did so in paragraphs 85-86 of its October 2012 answer to the complaint in *Petrone, et al. v. Werner Enters., et al.*, 8:11-cv-00401 (D.Neb.).

[16] The documents filed by Werner with the IRS during this period did not mention the existence of this litigation.

[17] The complaint also included claims of regular drivers who, although having a (mileage-based) base wage usually far higher than student drivers, might occasionally receive a base rate below the minimum wage. Because the regular driver Plan involved a per diem based on miles driven, rather than a flat rate, and was for that reason subject to special provisions of the IRS regulations and the DOL Handbook, petitioners do not seek review of that aspect of the decision below.

less than the minimum wage required by the FLSA and by the Nebraska Wage & Hour Act. The linchpin of those claims was the plaintiffs' assertion that the per diem payments were not wages under either the federal or state law. The district court certified a collective action with regard to the FLSA claim and a class action with regard to the state law claim.

At some point in the district court litigation, plaintiffs learned about the IRS audit, and sought to discover the documents that Werner had given to the IRS in support of its contention that the per diem constituted reimbursement under the IRS regulations. The district court ordered Werner to provide those documents to plaintiffs.

> Plaintiffs seek tax documents in which Werner took the position that certain payments to its employees were not wages.... Plaintiffs seek ... potentially binding statements defendants made to the IRS in arguing that – for tax purposes – the payments were reimbursements. Though the standard for determining whether the payments were a "wage" may be different under the statutes, the reimbursement concept is similar enough to make production of the documents highly likely to lead to the discovery of admissible evidence.... The information at issue here is the potentially binding statements made by defendant to the IRS.

(Doc. 73, pp. 1-4. Jan 7, 2014). Whether the representations that Werner had made in those tax filings were binding on the company became a central issue in the litigation that followed. (8a-11a).

In a letter to IRS officials in 2013, counsel for Werner had emphatically argued that the per diem payments were bona fide reimbursements. "[T]he Service has no legal basis for finding the per diem allowances in question represent anything but a *legitimate* reimbursement of amounts that reflect the deductible business expenses eligible drivers could otherwise account for when such drivers file their individual tax returns at the end of each tax year." App. 2103 (emphasis added). In the subsequent district court litigation, on the other hand, Werner argued that "the per diem payments ... were just another form of compensation and were not *genuine* reimbursements for expenses actually incurred."[18] Werner repeatedly insisted in the district court that the per diem payments were not "genuine reimbursements," and objected to arguments by plaintiffs that the per diem was indeed a genuine reimbursement.[19]

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[18] Reply Brief in Support of Defendants' Motion for Summary Judgment, p. 1 (emphasis added).

[19] Brief in Support of Defendants' Motion for Summary Judgment, 17-18; Reply Brief in Support of Defendants' Motion for Summary Judgment, 38, 45; Defendants' Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment, 39, 61.

The Tax Examiner had concluded that the per diem was wages on the ground that Werner, rather than providing per diems as additional payments, had simply recharacterized a large portion of the student drivers' wages as per diem. "[Werner]'s per diem plan fails to meet the business connection requirement in that it merely relabels a portion of an employee's taxable compensation for services as nontaxable per diem, thereby impermissibly recharacterizing wages." App. 1817; see App. 1812, 1816. In 2013 Werner denied that there had been a mere recharacterization, objecting in a letter to IRS officials that "the Service drew the erroneous conclusion impermissible 'recharacterization' must be present...." App. 2081. But in 2016 in the district court, Werner insisted that the per diem was wages precisely because the company had merely "reclassif[ied]" a large portion of the wages paid to nonparticipants as per diems. "Through a per diem program, Werner could offer additional tax savings to Werner drivers by reclassifying a portion of the drivers' existing pay as a non-taxable per diem payment...." Brief in Support of Defendants' Motion for Summary Judgment, 3.[20] Werner suggested in the district court that the IRS itself permitted the tax status of wages to

[20] See *id.* at 4 ("simply reclassify a portion of drivers' taxable pay to non-taxable per diem"), 5 ("simply reclassify a portion of drivers' existing pay as per diem"), 28 ("reclassifying a portion of the drivers' existing pay as non-taxable per diem"); Reply Brief in Support of Defendants' Motion for Summary Judgment, 6 ("simply reclassify a portion of drivers' taxable pay to non-taxable per diem"); Defendants' Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment, 75 ("simply reclassify a portion of drivers' taxable pay to non-taxable per diem").

be altered by simply relabeling them. "The optional per diem program was offered as a tax benefit to Werner's drivers, in accordance with IRS regulations that allow drivers to designate a portion of their weekly wages as non-taxable." *Id.* at 39.

The Examiner reasoned that the Payment Plan merely recharacterized wages as per diem reimbursement because the total payments to a Plan participant was about the same as the payments to a non-participant. "[T]he purported per diem payments here are merely recharacterized wages because the drivers received essentially the *same* gross amount regardless of whether they participate in the per diem arrangement." App. 1816 (emphasis added). Werner objected that the similarity of the two amounts was not at all probative; "the Service drew the erroneous conclusion impermissible 'recharacterization' must be present because 'participating drivers receive[] relatively the *same* amount of money that they would have received without reimbursements." App. 2081 (emphasis added). But in the district court, Werner made the very argument to which it had objected when earlier voiced by the Examiner. "A per diem is ... more in the nature of compensation than a reimbursement where there is evidence that employees who do not receive the per diem are paid at the *same* or similar rates, just in taxable form." Brief in Support of Defendants' Motion for Summary Judgment, 20 (emphasis added).

In its arguments to the IRS Appeals Commission, Werner defended the amount of the $41 per diem, insisting it was lower than the typical expenses of its

drivers. Werner submitted an affidavit from its Chief Financial Officer asserting "that the estimated business expenses over-the-road drivers (including student drivers) currently incur range from $59 to $65 per day." App. 1904-05. Counsel for Werner assured the IRS that "the Taxpayer has not unreasonably overestimated the expense the Taxpayer expects that drivers eligible for plan participation ... incur while they are away from home on business." App. 2103-04. But in the district court "Werner denied ... that any driver actually did incur expenses ... approximately in the amount of his weekly per diem in any given week...." Defendants' Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment, 13; *compare* Taxpayer's Response to Service's Position, App. 2905 ("the per diem allowances the Taxpayer treats as nontaxable reimbursements of business expenses have a demonstrable connection to the expense these drivers actually incur....") *with* Reply Brief in Support of Defendants' Motion for Summary Judgment, 14 ("the ... amount of driver expenses ... had no correlation to the amount of per diem pay drivers received").

To substantiate its contention that the $41 per day per diem was reasonable, Werner pointed to a study that its officials had conducted of the expenses of its drivers. A high ranking company official, Werner advised the IRS, had "met with some operations managers and drivers and reviewed industry reports in an effort to estimate deductible and nondeductible business expenses of over-the-road drivers (including student drivers) incur...." App. 1904; see App. 1898

(estimate of $59 to $65 a day is "[b]ased on historical information gathered from employee drivers, operations managers, and industry reports"). But in the subsequent FLSA litigation, when the plaintiffs relied on Werner's own earlier study, the company denounced that study as worthless.

> Contrary to Plaintiffs' claims that the per diem payments were calculated not to exceed drivers' actual expenses, the per diem estimate was made over 10 years ago after discussions with only three drivers and a fleet manager.... Those three drivers did not present receipts or other documents reflecting their expenses, and Werner did not even conduct a survey of a representative sample of drivers to estimate expenses.

Reply Brief in Support of Defendants' Motion for Summary Judgment, 28-29. Werner had told the IRS that driver food expenses were high because drivers had to eat at truck stops that "tend to be more expensive than fast food restaurants." App. 1839, 1899, 1905, 1912 n.1, 1913 n.1. Werner subsequently told the district judge in the FLSA litigation that "[a]t hundreds of truck stops ... , drivers have access to fast-food restaurants, such as Subway and McDonalds." Brief in Support of Defendants' Motion for Summary Judgment, 13.

Plaintiffs asserted that Werner was bound by the representations that it had made to the IRS. Werner, in response, contended that anything it had said in the IRS proceeding was not controlling because the legal standard applied by the IRS was different from the

standard in the FLSA. Reply Brief in Support of Defendants' Motion for Summary Judgment, 35-36. The district court agreed with Werner that the two legal standards were different (68a-72a), and held that the per diem payments to the student drivers[21] were wages, not reimbursement, under the FLSA. (72a). The district court concluded that its rejection of the plaintiffs' FLSA claim compelled dismissal of their state law claim as well. (74a).

Court of Appeals

In the Eighth Circuit, "[a] primary thrust of the class's argument on appeal" was that Werner was bound by the representations it had made to the IRS. (8a). Werner contended that statements it had made were irrelevant to the FLSA claims, "[b]ecause the legal standards [under the FLSA and under the IRS regulations] are different." Brief of Appellees, 41.

The court of appeals reasoned that Werner was not bound by its statements to the IRS because of what the court held were differences in the legal standards in section 207(e)(2) and the IRS regulations. "The IRS regulations governing accountable plans are not identical to the DOL regulations governing the calculation of employees' regular rates for minimum wage purposes. There are legal differences and, in the case of

[21] Werner advised the district court in 2013 that utilization of the Payment Plan for student drivers had been suspended. (34a). Werner advised both the IRS and the district court that its compensation practices were common in the trucking industry.

a regular rate calculation, many additional factors [are] at play." (9a; see 11a ("entirely unique regulatory schemes")). Thus the appellate court concluded that Werner was not "beholden to earlier representations in a legally binding manner." (10a).

The Eighth Circuit identified three distinct legal standards which it held existed under section 207(e)(2) of the FLSA, and which are clearly different from the IRS standards. The court of appeals held that each of those three announced FLSA standards provided an independent ground for concluding that the per diem payments were wages, rather than reimbursements. "Each of those factors ... establish[ed] that the payments were remuneration for employment rather than reimbursement for expenses." (20a-21a).

First, the Eighth Circuit held that the per diem could not be reimbursement under the FLSA because "[t]he Payments were unrestricted in that employees could spend the Payments in any manner and were not required to report expenses or provide receipts...." (20a). Werner had repeatedly urged the district court and the court of appeals to adopt this per se rule that such "unrestricted" payments could not constitute reimbursement under section 207(e)(2) of the FLSA.[22]

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[22] Brief of Appellees, pp. 16, 23 ("Where an employee is not required to report his expenses, can spend a per diem payment however he sees fit, and may retain any portion of the payment that exceeds his actual expenses, the payments are wages."); Brief in Support of Defendants' Motion for Summary Judgment, 17-18, 23-25.

That Eighth Circuit rule meant this a per diem payment could not constitute reimbursement under the FLSA, because the very nature of a per diem is that it provides the employee with a fixed payment and dispenses with any requirement that the employee itemize expenses or provide receipts.

Second, the court of appeals held that the per diem could not be reimbursement under the FLSA because "Werner introduced the Payments as a means to attract new employees...." (20a-21a). Werner had also urged the adoption of this per se rule regarding the meaning of section 207(e)(2). "[P]ayments will be deemed wages, and not genuine reimbursements ... where ... the ... payments were intended to serve as a recruiting tool, for the purpose of attracting new employees." Brief in Support of Defendants' Motion for Summary Judgment, 17-18. This Eighth Circuit rule is distinct from the first standard, and is not limited to payments in the form of a per diem. It applies to any payment "introduced ... as a means to attract new employees," regardless of whether the payment is for an employee expenditure that was reported and documented in a receipt.

Third, the Eighth Circuit held that a payment is necessarily a wage, rather than reimbursement, if the payment was "intended to act as remuneration for work performed." (20a). Werner had also advocated adoption of this per se rule. "[A] payment intended as compensation for wages is a wage even if the payment is labeled as a reimbursement." Brief of

Appellees, p. 15. This standard turns on the subjective intent of the employer. This Eighth Circuit rule is fundamentally different from FLSA cases in other circuits, which hold that a plaintiff may attack the label an employer attaches to a payment, and can argue that the employer secretly intended the payment (even though labeled reimbursement) as remuneration for work performed. The Eighth Circuit rule permits an employer to attack the accuracy of its own label. Werner did precisely that in the court of appeals, describing the per diem payments as only "ostensibly for meals and other incidental expenses," and arguing that those payments were not "genuine reimbursement[s]." Brief of Appellees, pp. 2, 34. This was the broadest of the Eighth Circuit rules; the court of appeals indicated, for example, that a bonus would be part of a worker's regular rate, and would constitute wages under the FLSA, if the employer subjectively intended the bonus to act as remuneration for work performed. (19a n.5) In many instances, employers pay bonuses with precisely that intent.

Werner also argued that its per diem payments were not reimbursement under section 207(e)(2) because there was no evidence that the amount of those payments was "reasonable." Werner had repeatedly represented to the IRS that the company reasonably *expected* drivers to spend far more than $41 a day for meals and incidentals; but Werner contended in court that there was no evidence that drivers *actually* spent as much as $41, and offered in the district court evidence intended to show $41 was not a reasonable

estimate (or underestimate) of driver expenses. The Eighth Circuit opinion rejected this objection to the plaintiffs' claims, holding that the amount of the per diem "payments [was] based on a reasonable estimation of travel expenses." (21a).

Judge Colloton, in a concurring opinion, expressed understandable concern about how Werner could have told the IRS that it reasonably expected drivers would spend over $41 if the company knew or believed that the drivers were in fact not spending that much. "[W]e do not address whether the company's twin positions are sustainable going forward. It presumably will be for the IRS to determine whether to accept future statements by the company about what expenses are expected in light of data showing what expenses were actually incurred during recent periods." (23a). The existence of those "twin positions," in Judge Colloton's view, was a problem for the IRS to address, not the federal courts.

The Eighth Circuit held that its "reasoning ... discussing the matter under the FLSA rubric forecloses the class's state law claims." (22a).

The court of appeals denied a timely petition for rehearing en banc.

REASONS FOR GRANTING THE WRIT

This Court grants review most frequently in cases in which a circuit conflict about the meaning of a

particular statute or constitutional provision has important practical consequences. Such conflicts can impose different standards of conduct on otherwise similar parties, or give one commercial firm an advantage in competing with another firm operating under different legal standards in another circuit. The Eighth Circuit's interpretation of section 207(e)(2) creates circuit conflicts with just that type of impact.

The Eighth Circuit decision also avowedly creates a different type of important legal inconsistency. Both the FLSA and the IRS regulations draw a distinction, with major consequences under each provision, between wages and reimbursement for employer-related expenses. For financial reasons, employers generally must shape their practices in light of the distinction made under those two provisions. The court of appeals held that the standards under those provisions are fundamentally different, and imposed under the FLSA three distinct limitations on what constitutes a reimbursement that clearly do not exist under the IRS regulations. The consequence of interpreting the provisions so differently is that otherwise similar employers in the Eighth Circuit are now subject to different legal regimes, depending, for example, on whether (like Werner) they pay some workers only the minimum wage, or have a significant number of employees who are entitled to overtime pay, or neither. Those differences favor some employers, and disadvantage others, in ways that Congress could not have imagined or intended, and create a number of significant practical problems

for the federal agencies administering these provisions.

I. THE EIGHTH CIRCUIT DECISION CREATES IMPORTANT INCONSISTENT INTERPRETATIONS OF THE IRS REGULATIONS AND THE FLSA

Where Congress has adopted two statutes that apply to the same practice or problem, this Court seeks where possible to harmonize those laws. The Court attempts to read the statutes together, in order to avoid creating serious practical problems for individuals or firms if they were interpreted to establish different standards. The Eighth Circuit decision in this case imposes just the types of practical problems that this Court consistently seeks to avoid, and in this instance those problems are as serious for employers and employees as the difficulties created by circuit conflicts that have prompted this Court to grant review.

(1) The Eighth Circuit's dueling interpretations of the FLSA and the IRS regulations discriminate against employers which have a significant number of employees who are entitled to overtime. Other employers need only conform their practices to the standard imposed by the IRS regulations for accountable plans. But overtime-paying employers must do more; to avoid paying employees in a way which will increase their employees' regular rate, and thus inflate overtime costs, overtime-paying employers must avoid the practices which the Eighth Circuit now holds do not

constitute reimbursement (and thus do constitute wages) under the FLSA.

Overtime-paying employers in the Eighth Circuit cannot, without incurring serious increased overtime costs, provide workers with per diem payments. Under the decision below, a per diem payment is necessarily a wage, and part of a worker's regular rate, because workers receiving per diems are not required to report expenses or provide receipts. Other Eighth Circuit employers remain able to use per diems without financial penalty, because per diems are clearly permitted by the IRS regulations. There are important business reasons why many employers prefer to use per diems. The collection of receipts, preparation of reports, and review of both, all require employee time and impose significant administrative costs. Alternatives such as handing out firm credit cards or cash advances may entail a significant risk of abuse, and require additional monitoring and administrative burdens. Overtime-paying employers will generally have to choose among these less desirable methods when employees travel away from home. Requiring overtime-paying employers to avoid the use of per diems will often be undesirable for employees, who often prefer the simplicity and flexibility afforded by a reasonable per diem payment.

The Eighth Circuit's recruiting-based rule also discriminates against overtime-paying employers. If an employer indicates in an advertisement or on-line announcement that it will reimburse employees for expenses (e.g., "$100 a day plus expenses"), that is not a problem for most employers, because it does not matter

under the IRS regulations. But for an overtime-paying employer, disclosing to prospective employees a policy of expense reimbursement would at least ordinarily convert those reimbursements into wages, increasing the employer's overtime obligations. If overtime-paying employers cannot for that reason disclose their expense-reimbursement policies, other employers competing for the same prospective workers will have an unfair advantage, and individuals seeking employment will be denied information they might deem important in deciding which job to take.

The Eighth Circuit decision also discriminates in favor of certain minimum-wage-paying employers. If a minimum-wage-paying employer has employees who regularly incur employer-related expenses, that employer can, under the decision below, pay part of the minimum wage as nontaxable reimbursement for those expenses, and only a fraction of the required $7.25 an hour as taxable wages. Every dollar paid in the form of such reimbursement saves the employer 6.2% in Social Security taxes, 1.45% in Medicare taxes, and up to 6% in FUTA. Other employers in that circuit, whose business does not afford them a similar opportunity, have to bear the full tax burdens associated with payment of the minimum wage.

(2) Application of the same standard under the IRS regulations and the FLSA materially facilitates the administration of both laws. The courts below acknowledged that if the legal standards under the IRS regulations and the FLSA had been the same, Werner would have been bound in the FLSA litigation by

whatever representations it had made to the IRS. That would have created a compelling incentive for Werner to be accurate and clear in what it told the IRS, because doing otherwise could have significantly increased the company's legal exposure in the FLSA litigation that was occurring at the same time. The differing Eighth Circuit interpretations of the IRS regulations and the FLSA removes that incentive. This Court can reasonably conclude, without resolving any disputes about the exact meaning of Werner's various representations, that the company might well have phrased differently some of its communications with the IRS had it known those statements would be binding, and that Werner made some representations and arguments in the district court that it might prefer not come to the attention of the IRS, as Judge Colloton suggested may now be appropriate.

(3) If the FLSA and the IRS regulations, and their implementing regulations, are not presumed to have the same meaning with regard to the distinction between wages and reimbursements, disputes about what those two bodies of law mean would occur in forums ill-equipped to resolve them. That is precisely what occurred here. When this dispute was under consideration at the IRS, Werner advanced a variety of arguments about the meaning of the FLSA and the DOL regulations, and specifically about what position the DOL would take regarding Werner's practices. Whatever the merits of those legal contentions, the IRS certainly lacked the experience or expertise to evaluate them. The IRS Appeals Commission

ultimately abandoned its efforts to reconcile its handling of the tax issues with possible FLSA problems, because it had been "given no analysis of what a student driver should be paid in wages." (40a). The DOL and the plaintiffs could readily have provided such an analysis, which might have altered the Commission's decision, but could not do so because they were not parties to the confidential IRS proceedings.

Conversely, in the FLSA litigation Werner made a number of important representations to the courts below regarding the IRS and its regulations. Werner asserted that IRS regulations permit employees "to designate a portion of their weekly wages as non-taxable." Brief in Support of Defendants' Motion for Summary Judgment, 39. Werner convinced the district judge that the IRS was only interested in whether the company could reasonably "expect" drivers would have more than $41 in expenses, and would not have cared if Werner knew that the expenses the drivers actually "incur[red]" was less. (70a-72a). The IRS would probably have found these representations surprising. But the IRS was in no position to monitor the thousands of FLSA cases for federal tax issues, and the Werner briefs that contained those representations were sealed.

II. THE EIGHTH CIRCUIT DECISION CREATES TWO IMPORTANT CIRCUIT CONFLICTS REGARDING SECTION 207(e)(2) OF THE FLSA

The straightforward legal standards established by the Eighth Circuit, and expressly advocated by Werner, conflict in an equally straightforward way with decisions in other circuits about the meaning of section 207(e)(2). Those conflicting non-Eighth Circuit decisions were in overtime cases, where defendant employers won a broader interpretation of what constitutes reimbursement under section 207(e)(2), and by doing so avoided increased liability for overtime work. In the instant minimum wage case, the court of appeals adopted a very narrow interpretation of what constitutes such reimbursement. As the court of appeals itself stressed (12a, 16a), and section 207(h)(1) specifically provides, the definition of regular rate, and thus of wages, is the same in overtime and minimum wage cases.

(1) The Eighth Circuit held that a payment to employees cannot constitute reimbursement under the FLSA if the workers are not required to provide reports and receipts, and are thus free to spend the payments as they wish. That standard was violated here, because the workers received a per diem, which lacks such requirements. Under the Eighth Circuit standard, a per diem could not be a reimbursement under section 207(e)(2).

Other circuits have repeatedly held, in overtime cases, that a per diem constitutes reimbursement,

rather than wages, so long as the amount of the per diem payment is reasonable. In *Berry v. Excel Group, Inc.*, 288 F.3d 252 (5th Cir. 2002), the plaintiff, who was paid $20 per hour, plus $150 a week per diem, while working away from home, claimed that the per diem should have been treated as part of his regular wage for overtime purposes. The Fifth Circuit rejected that claim.

> [T]he ... $150 per week per diem is certainly not excessive.... [P]laintiff would be expected to pay rent on a lot to park his trailer [away from home], utilities, and meals.... The regulations sensibly authorize the employer to approximate such expenses so long as the amount of the per diem is not "disproportionately large."

288 F.3d at 254 (quoting 28 C.F.R. § 278.271(c)). In *Sharp v. CGG Land (U.S.) Inc.*, 840 F.3d 1211 (10th Cir. 2016), the Tenth Circuit rejected a claim that the flat $35 a day which an employer paid for food away from home should have been treated as part of the plaintiff's regular rate for overtime purposes. That claim was precluded, the court of appeals reasoned, by the plaintiff's concession that the amount of the payment was "reasonable" 840 F.3d at 1216.

The Eighth Circuit rule unquestionably departs from well-established practice outside that circuit. The DOL Handbook expressly authorizes "a per diem ... payment[] ... because an employee ... must live away from home." DOL Handbook, ch. 32d05a(b). Overtime-paying employers that operate in both the

Eighth Circuit and other circuits can no longer use per diems in the Eighth Circuit without substantially increasing their overtime liabilities. Such overtime-paying firms must either establish in the Eighth Circuit a special non-per diem system, requiring reports and receipts, or conform their entire payment system to the Eighth Circuit standard. An overtime-paying employer that has workers only in the Eighth Circuit, which must now require reports and receipts instead of using per diems, will be at a disadvantage compared to firms in other circuits, which can continue to use per diems, both to minimize administrative costs and to attract prospective employees.

The text of the FLSA provides no support for the Eighth Circuit's interpretation. Section 207(e)(2) requires only that payments for expenses be "reasonable." That cannot mean, as the decision below holds, that the payments must be equal to reported expenses documented by actual receipts. The DOL regulations have long provided that payments for living expenses away from home can be the "actual *or reasonably approximate* amount expended." 29 C.F.R. § 778.217(b) (emphasis added). The DOL Manual expressly authorizes per diem payments, and the Eighth Circuit for other purposes treated that DOL handbook "as persuasive authority." (17a).

(2) The Eighth Circuit also departs from established law by holding, as Werner urged, that any payment to employees constitutes wages if the employer made that payment with the subjective intent of providing remuneration for services rendered by the

recipient. Decisions in other circuits will disregard an employer's characterization of a payment only at the behest of an FLSA plaintiff or the DOL, and only on a showing that an employer mislabeled a payment in order to artificially reduce an employee's regular rate. *Gagnon v. United Technisource, Inc.*, 607 F.3d 1036, 1041 (5th Cir. 2010) ("a scheme to avoid paying overtime"). The Eighth Circuit rule is dramatically different; it permits an employer to attack its own decision to characterize a payment as something other than wages, and allows an employer to do so without admitting to any intent to violate the FLSA. That rule conflicts with the Fifth Circuit decision in *Berry*, which refused to consider a claim that the company, which had not substituted per diem for existing wages, had provided additional per diem for the purpose of compensating employees for their work. 288 F.3d at 254.

The consequences of the Eighth Circuit's subjective intent rule are considerably more far reaching than its holding regarding per diems. This subjective intent rule is not limited to reimbursements; it would apply to payments otherwise within any of the exceptions in section 207(e). The Eighth Circuit specifically suggested, for example, that this aspect of its decision would apply to bonuses. An interpretation of section 207(e) that turns purely on a subjective intent to remunerate, without any evidence or claim of an intent to evade the requirements of the FLSA, could be advanced by plaintiffs in almost any FLSA overtime case. In this case, Werner officials gave deposition testimony that they decided to pay overtime because they wanted

to provide remuneration; a plaintiff could seek to elicit such testimony in any overtime case, where it would increase rather than (as in this minimum wage case) reduce the employer's liability.

The Eighth Circuit decision in this regard is palpably incorrect. The court of appeals acknowledged that the per diems were "payments based on a reasonable estimate of travel expenses." (21a). That should have been the end of the matter, because that is all that section 207(e)(2) requires. The court of appeals mistakenly went on to hold that "[i]n addition to" being such a payment, the per diem was also intended to provide remuneration, and was therefore outside the exception for reimbursements established by section 207(e)(2). The plain language of the statute simply does not contain any such additional element.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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