No. 18-1541

In The
Supreme Court of the United States

YASSINE BAOUCH, et al.,

Petitioners,

v.

WERNER ENTERPRISES, INC. and
DRIVERS MANAGEMENT, LLC,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the District Court and the Eighth Circuit correctly determined, based on the specific facts of this case, that certain nontaxable payments paid to Petitioners by their employer as compensation for services rendered should be included in the regular rate calculation for purposes of computing whether Petitioners received minimum wage.

CORPORATE DISCLOSURE STATEMENT

Respondent Werner Enterprises, Inc. is a publicly-traded corporation. Respondent Drivers Management, LLC is a wholly owned subsidiary of Gra-Gar, LLC, which is a wholly owned subsidiary of Respondent Werner Enterprises, Inc.

RELATED CASES

Yassine Baouch, et al. v. Werner Enterprises, Inc., et al., Case No. 8:12CV408, U.S. District Court for the District of Nebraska. Judgment entered March 23, 2017.

Yassine Baouch, et al. v. Werner Enterprises, Inc., et al., Appeal No. 17-1661, U.S. Court of Appeals for the Eighth Circuit. Judgment entered on November 14, 2018. Petitions for rehearing and rehearing en banc denied on December 21, 2018, with a corrected order entered on January 3, 2019.

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STATEMENT OF THE CASE

The Eighth Circuit Court of Appeals affirmed the detailed, well-reasoned opinion of the United States District Court for the District of Nebraska and correctly determined, based on the specific facts of this case and established legal standards, that certain payments issued to Petitioners were properly counted as wages for minimum wage purposes. The Eighth Circuit's decision is consistent with case law from other Circuits holding that the determination of whether a per diem payment qualifies as a wage is a fact-intensive analysis. Petitioners misstate the facts and the conclusions reached by the Court of Appeals and ask this Court to overturn well-established legal principles. The Petition for Writ of Certiorari should be denied.

BACKGROUND

Respondent Werner Enterprises, Inc. ("Werner") is a trucking company.[1] (Petitioners' Appendix ("Appx.") p. 3a). Petitioners are current and former Werner truck drivers who elected to enroll in Werner's optional per diem payment plan (the "Payment Plan"), which was developed in accordance with certain Internal Revenue Service ("IRS") regulations (the "Accountable Plan"

[1] Respondent Drivers Management, LLC is a wholly owned subsidiary of Werner that employs Werner's company drivers. For purposes of this lawsuit, Werner admitted that Werner and Drivers Management could be treated as a single employer. Accordingly, Respondents are collectively referred to as "Werner."

rules). (Appx. pp. 3a-4a). Drivers who elected to enroll in Werner's optional Payment Plan received a portion of their pay in the form of a nontaxable reimbursement, ostensibly for meals and other incidental expenses drivers were expected to incur while traveling. (Appx. p. 3a). Under the IRS Accountable Plan rules, amounts paid by an employer under an accountable plan are excluded from employees' gross income and exempt from withholding of employment and income taxes. (Appx. pp. 3a-4a; *see also* 26 C.F.R. §§ 1.62-2(c)-(f)). "[B]ecause the Payments were not subject to employment and income tax withholding, the Payment Plan's primary effect was to cause participating drivers to receive more money in the form of take-home pay in their weekly paychecks." (Appx. p. 4a). Drivers who chose to participate in the Payment Plan received a portion of their pay in the form of taxable compensation and a portion of their pay in the form of nontaxable Payments. (Appx. p. 4a). Drivers who elected not to participate in the Payment Plan received all of their pay as taxable compensation, subject to applicable employment and income taxes. (Appx. p. 4a).

The IRS audited Werner's Payment Plan for tax years 2009 and 2010. (Appx. p. 38a). Initially, a tax examiner concluded Werner's Payment Plan did not qualify as an accountable plan under the Accountable Plan rules. (*Id.*). On appeal, the IRS Appeals Commission reversed. (Appx. p. 39a). Werner explained to the IRS during the course of that appeal that Payments were counted as wages to drivers but were not included in drivers' taxable income. (8th Cir. Appx. p. 1942). The

IRS Appeals Commission confirmed that Werner's Payment Plan qualified as an accountable plan. (Appx. p. 39a).

Petitioners filed this lawsuit, alleging minimum wage claims under the Fair Labor Standards Act ("FLSA"), the Nebraska Wage & Hour Act ("NWHA"), Neb. Rev. Stat. § 48-1201, *et seq.* and the Nebraska Wage Payment & Collection Act ("NWPCA"), Neb. Rev. Stat. § 48-1229, *et seq.* (Appx. pp. 5a, 42a). Petitioners' claims hinged on the premise that because the Payments were excluded from drivers' gross income for tax purposes, the Payments could not be counted as wages for minimum wage purposes and so drivers in the Payment Plan did not receive minimum wage for all hours worked. (Appx. p. 5a).

The District Court granted Werner's motion for summary judgment and dismissed Petitioners' claims with prejudice. (Appx. p. 25a). After making detailed findings of fact, the District Court concluded, based on the facts of this case, that the Payments at issue were properly included as wages for minimum wage purposes. A unanimous panel of the Eighth Circuit affirmed the District Court's order in all respects, noting the analysis of whether a payment qualifies as a wage for minimum wage purposes is "a highly fact intensive inquiry" and the undisputed facts of this case establish that the Payments were properly classified as wages. (Appx. pp. 3a, 11a, 18a-21a). In December, 2018, in unreported opinions, the Eighth Circuit summarily denied Petitioners' motions for rehearing and rehearing en banc. (Appx. pp. 77a-79a).

ARGUMENT

I. PETITIONERS MISSTATE THE FACTS.

Petitioners do not contend that the District Court or the Eighth Circuit made erroneous findings of fact. Instead, Petitioners misstate the undisputed evidence submitted by Werner and relied upon by the District Court and the Eighth Circuit. For example, Petitioners incorrectly suggest the IRS audit focused on "whether the payments which Werner had characterized as per diem payments, and treated as nontaxable, were really wages." (Petition p. 13). However, the focus of the IRS audit was whether Werner's Payment Plan met the IRS requirements for an accountable plan. (8th Cir. Appx. pp. 1798 & 1820).

Petitioners also repeatedly suggest Werner misled the IRS as to whether the Payments were counted as wages to drivers. (*See, e.g.*, Petition p. 18). Contrary to Petitioners' statements, Werner repeatedly advised the IRS that the Payments were part of drivers' pay but were excluded from taxable income. (8th Cir. Appx. pp. 878, 884, 1952). The IRS Appeals Commission specifically acknowledged the Payments were counted as compensation to drivers, stating "[drivers] have the opportunity to receive a significantly higher net pay through the per diem program – ***almost 1/3 of the drivers' pay can be non-taxable***." (8th Cir. Appx. pp. 1821-1823) (emphasis added).

Werner also challenges Petitioners' characterization of the evidence because Petitioners take numerous statements out of context. Petitioners argue Werner

made certain admissions to the IRS but fail to acknowledge those statements were made in the context of the IRS Accountable Plan rules. (*See, e.g.*, Petition p. 8 (citing 8th Cir. Appx. p. 1905)). As the Eighth Circuit recognized, the standards under the IRS Accountable Plan rules for determining whether a payment is excluded from taxable income are different than the standards set forth in the FLSA and the Department of Labor ("DOL") regulations for when a payment must be excluded from wages. (Appx. p. 9a). That is also why the Eighth Circuit correctly rejected the same arguments Petitioners make here. (Appx. pp. 9a-11a). For example, Petitioners misquote from an affidavit submitted to the IRS and falsely claim "Werner's Chief Financial Officer estimated that the cost of [drivers'] meals and incidental expenses ranged from $59 to $65 a day." (Petition p. 8 (citing 8th Cir. Appx. p. 1905)). However, the affidavit refers to "**estimated business expenses**" in the context of the IRS Accountable Plan Rules. (8th Cir. Appx. p. 1905) (emphasis added). An employer can satisfy the IRS accountable plan requirements simply by prospectively estimating the expenses the employer *expects* employees will incur in connection with the performance of services as an employee, *without proof of the expenses actually incurred*. By contrast, an expense reimbursement will only be excluded from wages under the FLSA if it is equal to or reasonably approximates the expenses *actually incurred*. *Compare* 26 C.F.R. § 1.62-2(d)(3)(i) *with* 29 C.F.R. § 778.217(a) & (c). In this case, Petitioners did not produce receipts or any other proof of the expenses actually incurred by even one driver. (Appx. pp. 46a,

65a-72a). Because the affidavit does not speak to the expenses *actually incurred* by drivers in the class, the Eighth Circuit correctly concluded "Petitioners' attempt to conflate Werner's words and representations, out of context, is misplaced and 'in no way binds this court in this case.'" (Petitioners' Appx. p. 11a) (quoting *Acton v. City of Columbia*, 436 F.3d 969, 978 & n.11 (8th Cir. 2006)).

Petitioners also mischaracterize statements in handouts available to drivers about the Payment Plan, claiming Werner "induced" drivers to participate in the Payment Plan, and speculate about drivers' alleged motives for participating in the Plan. (Petition pp. 10, 13). Contrary to Petitioners' mischaracterizations, the District Court found and the Eighth Circuit confirmed that "the Payment Plan's primary effect was to cause participating drivers to receive ***more money*** in the form of 'take-home' pay in their weekly paychecks." (Appx. p. 28a) (emphasis added). Petitioners do not dispute that finding.

Petitioners also suggest, without evidence, that Werner hid the IRS appeal from Petitioners and the Department of Labor and hid this case from the IRS. (*See, e.g.*, Petition pp. 3, 4, 16). Contrary to Petitioners' assertions, Werner repeatedly advised the IRS that the Payments, *although excluded from taxable income*, were counted as wages to drivers and the Department of Labor has never questioned Werner's treatment of the Payments as wages. (8th Cir. Appx. pp. 878, 884, 1821-1823, 1942, 1952).

Nothing about the facts found by the District Court, or Petitioners' misstatements regarding those facts, warrants granting the Petition.

II. PETITIONERS MISSTATE THE EIGHTH CIRCUIT'S HOLDINGS.

Petitioners also repeatedly misstate the Eighth Circuit's holdings. First, Petitioners incorrectly claim the Eighth Circuit's conclusion that the Payments were wages was based on a legal determination that the applicable FLSA standards differed in three "distinct" ways from the IRS Accountable Plan Rules. (Petition p. 24). However, contrary to Petitioners' assertions, the Eighth Circuit did not establish three "distinct legal standards . . . under section 207(e)(1)" or base its decision that the Payments are wages on the conclusion that the IRS Accountable Plan rules differed from the applicable FLSA standards in "three distinct" ways. The Eighth Circuit simply rejected Petitioners' contention that Werner was "estopped" by certain statements made to the IRS from disputing whether the Payments are wages under the FLSA and then determined, in a separate analysis and based solely on the FLSA regulations and the facts of this case, that the Payments were wages under the FLSA. (*Compare* Appx. pp. 9a-11a *with* Appx. pp. 20a-22a).

The Eighth Circuit first concluded Werner was not estopped by its statements to the IRS from claiming the Payments were wages to drivers because the requirements for excluding a payment from taxable

income under the IRS Accountable Plan Rules are "not synonymous with how Werner must calculate its employees' regular rate." (Appx. p. 11a). The Eighth Circuit recognized "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 a regular rate calculation, many additional factors at play." (Appx. p. 9a). The Eighth Circuit also recognized that "although both calculations require an analysis of how to treat per diem allowances, they are done for different purposes and under entirely unique regulatory schemes." (Appx. p. 11a). Next, in rejecting Petitioners' argument that the Payments should not be counted as wages, the Eighth Circuit concluded that issue was a "highly *fact-intensive* inquiry" that turned on a "case specific *factual* inquiry" and *not* any bright line legal rules. (Appx. pp. 11a, 13a) (emphasis added). The Eighth Circuit did not create any new "distinct legal standards." The Eighth Circuit simply applied the text of the FLSA and its applicable regulations to the specific facts of this case, consistent with established case law. (Appx. pp. 18a-22a).

Petitioners also incorrectly claim the Eighth Circuit "rejected" the District Court's conclusion that Petitioners failed to offer evidence that the Payments reasonably approximated each driver's actual expenses. (Petition p. 27). Without specifically discussing all of the District Court's conclusions, the Eighth Circuit affirmed the District Court's opinion in all respects and

did not reject any of the District Court's findings or analysis. (Appx. p. 3a).

Nothing about the Eighth Circuit's decision or Petitioners' misstatements regarding the Eighth Circuit's decision provides a basis for granting the Petition.

III. PETITIONERS' DISSATISFACTION WITH THE CONTENT OF THE IRS AND DOL REGULATIONS IS NOT A BASIS FOR GRANTING THE PETITION.

Petitioners claim the writ should be granted to allow this Court to rewrite the IRS Accountable Plan Rules and the FLSA regulations, arguing the outcome below would have been different "if the legal standards under the IRS regulations and the FLSA had been the same[.]" (Petition p. 31). Petitioners speculate at length regarding the allegedly far-reaching implications that the "distinct legal standards" allegedly announced by the Eighth Circuit will have on other unidentified employers. (Petition pp. 32-33). These arguments miss the mark for several reasons. First, the Eighth Circuit did not create any "distinct legal standards." Instead, the Eighth Circuit specifically noted that "**because a per diem either can be excluded from, or included in, a regular wage depending on myriad factors and purposes, *a case-specific factual inquiry is required***" to determine whether a payment should be included in the regular rate. (Appx. pp. 13a, 16a). Second, although Petitioners may prefer "application of the same standard under the IRS

regulations and the FLSA" (Petition p. 31), the Eighth Circuit concluded "the IRS regulations governing accountable plans are not identical to the DOL regulations governing the calculations of employees' regular rates for minimum wage purposes." (Appx. p. 9a). Petitioners do not provide this Court with any analysis of the actual language of the IRS Accountable Plan Rules or the applicable FLSA statutory and regulatory language to suggest that conclusion is erroneous. "It is not for [this Court] to rewrite [a] statute [or a regulation] so it covers . . . what [this Court or Petitioners] think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010).

IV. THE EIGHTH CIRCUIT'S FACT-BASED OPINION DOES NOT CONFLICT WITH CASES FROM OTHER CIRCUITS.

Petitioners incorrectly suggest the Eighth Circuit's opinion "conflict[s] . . . with decisions in other circuits about the meaning of section 207(e)(2)." (Petition p. 34). However, the Eighth Circuit did not establish *any* bright line legal rules related to whether per diem payments are wages. Instead, the Eighth Circuit specifically noted "**the calculation of the regular rate is a *factual analysis***" and "**because a per diem either can be excluded from, or included in, a regular wage depending on myriad factors and purposes, *a case-specific factual inquiry is required***." (Appx. pp. 13a, 16a) (emphasis added). After reviewing the specific facts of this case, the Eighth

Circuit concluded numerous undisputed facts indicated the Payments were properly included in the regular rate. (Appx. pp. 19a-21a).

Contrary to Petitioners' arguments, the Eighth Circuit did not hold either "that a payment to employees cannot constitute reimbursement under the FLSA if the workers are not required to provide reports and receipts" or "that any payment to an employee constitutes wages if the employer made that payment with the subjective intent of providing remuneration for services rendered." (Petition pp. 34, 36). What Petitioners characterize as "distinct legal standards" are simply statements of fact taken out of context from the Eighth Circuit's discussion of the facts supporting the District Court's conclusion. Specifically, the Eighth Circuit noted a number of undisputed facts indicated the Payments at issue here were wages, including (1) that the total pay (Payments + taxable pay) to drivers who elected to enroll in the Payment Plan was "identical to, or close to, that of other employees who opted out of the Payment Plan"; (2) the form and purpose of the Payments indicated they were intended to act as compensation for work performed; (3) the Payments were unrestricted and employees were not required to provide receipts; and (4) Werner introduced the Payments as a means to maximize drivers' take home pay and attract new drivers. (Appx. pp. 19a-20a). In light of those undisputed facts, the Eighth Circuit concluded "*these* Payments" were made as compensation for employment and were properly included in the regular rate. (Appx. p. 21a) (emphasis added).

Petitioners are also wrong when they argue the Eighth Circuit's decision creates a conflict among the Circuits. (Petition pp. 33-34, 37 (citing *Berry v. Excel Group, Inc.*, 288 F.3d 252 (5th Cir. 2002) and *Sharp v. CGG Land (U.S.) Inc.*, 840 F.3d 1211 (10th Cir. 2016)). Although Petitioners contend the Eighth Circuit's opinion "conflicts" with *Berry*, the Eighth Circuit actually *relied* on *Berry*. (Appx. p. 13a). In *Berry*, the Fifth Circuit specifically recognized the fact-intensive inquiry required to determine, in any particular case, whether a per diem payment qualifies as a wage. *Berry*, 288 F.3d at 254. The Eighth Circuit cited *Berry* and held that "**because a per diem either can be excluded from, or included in, a regular wage depending on myriad factors and purposes, *a case-specific factual inquiry is required***." (Appx. p. 13a) (citing *Berry v. Excel Group, Inc.*, 288 F.3d 252, 254 (5th Cir. 2002)). The fact that the Eighth Circuit ultimately reached a different conclusion than the Fifth Circuit did in *Berry*, about whether certain payments designated as per diem payments were wages, does not mean the Eighth Circuit's opinion creates a Circuit conflict. The two decisions uniformly underscore the highly fact-intensive nature of the inquiry required to determine whether a per diem payment should be counted as a wage under the FLSA.

The Eighth Circuit's decision also does not conflict with *Sharp*, as Petitioners claim. (Petition p. 34) (citing *Sharp v. CGG Land (U.S.), Inc.*, 840 F.3d 1211, 1215-1216 (10th Cir. 2016)). The Eighth Circuit recognized that in order to prove the Payments are excluded from

the regular rate, Petitioners had to prove both (1) that the Payments were reimbursements for expenses incurred solely for Werner's benefit or convenience; and (2) that the Payments approximated actual expenses. (Appx. pp. 15a, 46a). That proof was offered by stipulation in *Sharp*. 840 F.3d 1211, 1215-1216 (10th Cir. 2016). By contrast, Petitioners did not offer *any* evidence of drivers' actual expenses in this case. (Appx. pp. 65a-72a). Nothing about the Eighth Circuit's opinion conflicts with the holding in *Sharp*.

CONCLUSION

Petitioners' dissatisfaction with the outcome below is not a basis for granting the Petition. Petitioners' misstatements about the Eighth Circuit's opinion and its interplay with cases from other Circuits do not provide a basis for reviewing the Eighth Circuit's opinion. The Eighth Circuit's opinion is consistent with decisions from other Circuits holding that the determination of whether a per diem payment is a wage is a highly fact-intensive inquiry and Petitioners do not challenge any of the District Court's factual findings. The Petition for Writ of Certiorari should be denied.

Dated July 11, 2019

Respectfully submitted,

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