No. _____

In the
Supreme Court of the United States

AMN SERVICES, LLC,
Petitioner,

v.

VERNA CLARKE & LAURA WITTMAN, 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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Labor Standards Act (FLSA) makes determining an employee's base pay or "regular rate" critical, because employers must pay overtime at one-and-one-half times an employee's "regular rate." The FLSA expressly excludes "reasonable payments for traveling expenses … incurred by an employee in the furtherance of his employer's interests" from the "regular rate." And it is both permissible and standard practice to provide workers with a reasonable per-diem allowance for traveling expenses, in lieu of requiring them to document and seek reimbursement for every expenditure. The Ninth Circuit nonetheless held that the per-diem allowances for traveling expenses Petitioner provided to its traveling healthcare workers (pegged to the federal government's own per-diem allowances) were wages that are part of the workers' "regular rate." The court emphasized that per-diem allowances were reduced when workers did not report for assigned shifts, even though that commonsense limitation is driven by the FLSA's text and tax-law requirements. The decision threatens employers with massive unanticipated liabilities and upsets longstanding business practices. It also harms workers who will either see their taxable income increase or be saddled with burdensome recordkeeping requirements.

The question presented is:

Whether, under the FLSA, per-diem allowances for traveling expenses, which are reduced when the employee fails to work a contractually required shift, are excluded from the employee's "regular rate" as "reasonable payments for traveling expenses … incurred by an employee in the furtherance of his employer's interests."

CORPORATE DISCLOSURE STATEMENT

Petitioner AMN Services, LLC is a wholly-owned subsidiary of AMN Healthcare, Inc., which in turn is a wholly-owned subsidiary of AMN Healthcare Services, Inc. More than 10% of the stock of AMN Healthcare Services, Inc. is held by BlackRock Institutional Trust Company, N.A., whose parent is the publicly traded entity BlackRock, Inc. No other publicly held company owns 10% or more of the stock/equity of Petitioner or AMN Healthcare Services, Inc.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings:

- *Clarke v. AMN Services, LLC*, No. 19-55784 (9th Cir.) (opinion reversing judgment of district court), issued February 8, 2021; and
- *Clarke v. AMN Services, LLC*, No. 2:16-cv-04132-DSF-KS (C.D. Cal.) (order granting in part and denying in part defendant's motion for summary judgment and denying plaintiffs' motion for partial summary judgment), issued June 26, 2018.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

This case presents the latest example of the Ninth Circuit disregarding statutory text and this Court's precedent by converting longstanding and sensible practices that benefit both workers and employers alike into FLSA violations. The Ninth Circuit's latest effort is particularly remarkable given the clarity with which the FLSA's text speaks to the issue and the need for that clarity. The question whether an employee's "regular rate" includes reimbursements or allowances for traveling expenses is critical to determining the base rate on which FLSA overtime liability turns. As a consequence, the statute answers that question directly and clearly, expressly providing that when calculating an employee's "regular rate" of pay, an employer may exclude "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). The Ninth Circuit's decision to nonetheless include per-diem allowances for traveling expenses in an employee's "regular rate" defies both statutory text and the industry's reasonable expectations. It cries out for this Court's review.

Petitioner AMN Services, LLC is a healthcare staffing company that places employees on lengthy assignments in areas of critical need away from their homes. Consistent with longstanding practice in the staffing industry and beyond, AMN does not require its traveling employees to accumulate weeks' worth of receipts and document every travel-related expenditure, but instead provides per-diem allowances (based on the federal government's own

locality-based allowances) to cover work-related travel expenses. Consistent with the statutory text, AMN does not include those "reasonable payments for traveling expenses" in calculating its employees' "regular rate," but does reduce the allowances when employees fail to report for scheduled shifts, to ensure that the travel expenses are "incurred by" employees "in the furtherance of" AMN's interests.

Despite that clear text, respondents, two former AMN employees, brought suit under the FLSA and California law, claiming on behalf of similarly-situated employees that their per diems should have been included in their "regular rate" and that AMN accordingly paid insufficient overtime to thousands of employees for years. Respondents stressed that AMN's policy of proportionally reducing an employee's per diem if she fails to work a contractually required shift converts the per diem into compensation for work that must be included in the "regular rate." But as the district court recognized in granting summary judgment for AMN, that practice merely ensures that an employee's travel expenses are incurred "in the furtherance of" AMN's interests and that reimbursements are business-related and thus tax-exempt.

The Ninth Circuit reversed in an opinion by Judge Berzon holding that AMN's per-diem payments are not reimbursements for expenses but instead compensation for hours worked. In so holding, the Ninth Circuit barely acknowledged the relevant statutory and regulatory language, relying instead on non-authoritative (and inapposite) agency guidance and marginal features of AMN's per-diem policy—

including its practice of pro-rata reductions when an employee fails to work a required shift. That decision upsets longstanding industry practices and threatens to make both employers and workers worse off.

This Court has not hesitated to intervene when a lower court's interpretation of the FLSA threatened employers with massive liability for doing nothing more than following longstanding industry practice. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1138 (2018); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124 (2016); *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 31 (2014); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 153 (2012). This Court's intervention is particularly warranted here because the statutory language is clear, the need for clarity is paramount, and the calculation of an employee's "regular rate" is an issue affecting virtually all employers. Unlike questions concerning the scope of an industry-specific exemption, or calculations applicable to only specialized employees, the proper calculation of a "regular rate" is foundational for every employee. Moreover, the Ninth Circuit's decision makes both employers and workers worse off, with no apparent solution. The decision puts employers between a rock and a hard place in terms of complying with both the FLSA and federal tax law. And it harms *employees* by incentivizing employers either to eliminate per diems altogether (in favor of burdensome recordkeeping requirements) or to treat them as taxable income. The need for this Court's intervention is clear.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 987 F.3d 848 and reproduced at App.1-20. The district court's decision granting summary judgment to petitioner is available at 2018 WL 3357467 and reproduced at App.23-31.

JURISDICTION

The Ninth Circuit issued its decision on February 8, 2021, and denied a timely petition for rehearing on May 7, 2021. This Court has extended the deadline for petitions in cases in which rehearing was denied before July 19, 2021, to 150 days from the date of such order. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the FLSA and relevant regulations are reproduced at App.32-40.

STATEMENT OF THE CASE

A. Legal Background

The FLSA requires employers to pay overtime to non-exempt employees who work more than forty hours in a week. 29 U.S.C. §207(a). An employee's "regular rate" is critical to determining an employer's overtime obligations, as the rate of overtime pay must be "not less than one and one-half times the [employee's] regular rate." *Id.* The FLSA presumptively treats an employee's "regular rate" as including "all remuneration for employment paid to, or on behalf of, the employee." *Id.* §207(e). But the FLSA expressly excludes from an employee's "regular rate" several types of payments to employees, including

> payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; *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*; and other similar payments to an employee which are not made as compensation for his hours of employment.

Id. §207(e)(2) (emphasis added).

The Labor Department has promulgated a regulation interpreting the second/italicized clause of §207(e)(2). *See* 29 C.F.R. §778.217. Titled "Reimbursement for expenses," the regulation provides that "[w]here an employee incurs expenses on his employer's behalf or where he is required to expend sums by reason of action taken for the convenience of his employer," the exclusion in §207(e)(2) "is applicable to reimbursement for such expenses." 29 C.F.R. §778.217(a). "Payments made by the employer to cover such expenses are not included in the employee's regular rate," provided the payments "reasonably approximate[]" the expenses incurred. *Id.* The regulation then provides an "illustrative" list of reimbursement payments that "will not be regarded as part of the employee's regular rate." *Id.* §778.217(b). These include reimbursement for "[t]he actual or reasonably approximate amounts expended by an employee, who is traveling 'over the road' on his employer's business," for "living expenses away from home" and "other travel

expenses … incurred while traveling on the employer's business." *Id.* §778.217(b)(3). The regulation further explains that "to merit exclusion from the regular rate," expenses reimbursed "must … be expenses incurred by the employee on the employer's behalf or for [the employer's] benefit or convenience." *Id.* §778.217(d).

As the multiple references to "reasonably approximate amounts" make clear, the regulation expressly permits employers to use reasonable per-diem payments in lieu of requiring documentation of actual travel-related expenditures. Indeed, the most recent version of the regulation specifically provides that "[a] reimbursement amount for an employee traveling on his or her employer's business is per se reasonable" if it does not exceed the federal government's own reimbursement guidelines and otherwise complies with the statutory and regulatory provisions. 29 C.F.R. §778.217(c)(2).

The treatment of such reasonable per-diem allowances is also critical for tax purposes, and the Labor Department regulations expressly cross-reference IRS guidance. *See id.* §778.217(c)(2)-(3). The Internal Revenue Code generally treats qualifying per-diem reimbursement payments as tax-exempt. In particular, the Code exempts from an employee's adjusted gross income payments received "under a reimbursement or other expense allowance arrangement with his employer." 26 U.S.C. §62(a)(2)(A); 26 C.F.R. §1.62–1(c)(2). An arrangement that qualifies as tax-exempt under §62 is known as an "accountable plan." 26 C.F.R. §1.62–2(c)(2). A plan is "accountable" when, *inter alia*, it covers only expenses

with a "business connection," meaning "paid or incurred by the employee in connection with the performance of services as an employee of the employer." *Id.* §1.62–2(c)-(f). Amounts paid under an accountable plan "are excluded from the employee's gross income, are not reported as wages or other compensation on the employee's Form W-2, and are exempt from the withholding and payment of employment taxes." *Id.* §1.62–2(c)(4). If reimbursement is not limited to expenses with a "business connection," a plan is considered "nonaccountable," and the reimbursement payments "are included in the employee's gross income, must be reported as wages or other compensation on the employee's Form W-2, and are subject to withholding and payment of employment taxes." *Id.* §1.62–2(c)(5). *See generally Trucks, Inc. v. United States*, 234 F.3d 1340, 1342-43 (11th Cir. 2000).

B. AMN's Per-Diem Payments for Traveling Clinicians' Expenses

Petitioner AMN is a healthcare staffing company that places hourly workers—primarily nurses—on assignments in hospitals with staffing shortages throughout the United States. App.3. These traveling clinicians fill critical gaps in hospital staffing in areas with high seasonal demand or other unusual spikes in the need for healthcare. They generally receive assignments far from home that are thirteen weeks long and require the clinician to work three twelve-hour shifts each week. CA9.ER.050-51. Consistent with standard practice in the industry, AMN does not require these clinicians to document every expenditure over the course of their thirteen-week

assignments, but instead provides a daily allowance, paid weekly, for travel-related expenses like meal, lodging, and incidental expenses. App.4, 24-25. To qualify for the regulatory safe harbor and ensure that the per-diem allowance "reasonably approximates" the clinician's actual travel-related expenses, 29 C.F.R. §778.217(a), AMN uses the federal government's locality-based Continental United States (CONUS) rates for federal-government travelers; no per-diem exceeds the federal CONUS per-diem amount. App.4 n.3, 24-25.

Clinicians do not receive a higher per-diem payment if they work more than their contracted shifts. App.4-5. But in order to comply with federal tax law regarding "accountable plans" and the FLSA's requirement that reimbursed expenses be incurred on AMN's behalf, AMN reduces the per-diem payment if a clinician does *not* work all of the shifts required by his or her contract. App.5. Specifically, AMN applies a prorated reduction of the weekly allowance based on the number of shifts the clinician failed to work, in order to "account for employee time spent away from home that was not for [AMN's] benefit." App.5, 25. AMN does not reduce a clinician's per-diem payments if the clinician's hospital cancelled his or her shift or if the employee had "banked" enough hours or shifts by previously working more than required. App.5-6.

Before beginning an assignment, a clinician typically signs a Professional Services Agreement (PSA), which specifies the terms and conditions of the assignment, including its location, length, start and end dates, minimum required shifts per week, minimum required hours per shift, hourly rate, and

per-diem amount. CA9.ER.046-49. Through the PSA, a clinician agrees to be bound by the policies in AMN's Healthcare Professional Handbook. CA9.ER.049-50. The AMN Handbook includes AMN's per-diem policy, including its practice of reducing weekly payments if a clinician fails to work contractually required shifts. CA9.ER.069-70, 73.

Consistent with the FLSA's text and longstanding industry practice, AMN treats traveling clinicians' per diems as payments "for traveling expenses, or other expenses, incurred by [traveling clinicians] in the furtherance of [AMN's] interests," and it therefore excludes them when calculating a traveling clinician's "regular rate" of pay. 29 U.S.C. §207(e)(2); App.4. Furthermore, AMN treats the per diems as payments from an "accountable plan" and thus excludes them from clinicians' taxable income pursuant to 26 C.F.R. §1.62–2. App.4.

C. Proceedings Below

1. Respondents are former AMN employees who worked as traveling nurses between 2014 and 2016. App.6. Both were given assignments in California. Respondent Clarke, a Georgia resident, had a thirteen-week assignment in Los Angeles; respondent Wittman, a North Carolina resident, had a thirteen-week assignment in Vallejo. CA9.ER.051-53. Per AMN's policy, respondents were paid a designated hourly wage and received a per diem covering their traveling expenses. App.1-2. Like other AMN traveling clinicians, respondents were not taxed on their per-diem payments. CA9.ER.069.

In 2016, respondents filed suit in California state court, and AMN removed to federal court. App.6. As

relevant here, respondents' third amended complaint alleged violations of the FLSA, the California Labor Code, and other California state law based on AMN's purportedly improper failure to include respondents' per-diem payments in their "regular rate" of pay when calculating respondents' overtime. Specifically, respondents alleged that when clinicians did "not work the minimum number of hours and/or shifts per week required by" their contract, AMN reduced "their per diem benefits." CA9.ER.704. Because "the amount of per diem benefits" was thus "based upon, and varies with, the number of weekly hours worked," respondents alleged, AMN should have "include[d] the value of per diem benefits" in employees' "regular rates of pay for purposes of calculating overtime pay." CA9.ER.704-705; App.7. Respondents sought and obtained class certification for their state-law claims and conditional certification of a nationwide FLSA collective action, with the class and collective actions covering similarly-situated traveling clinicians. *See* 29 U.S.C. §216(b).

2. AMN and respondents cross-moved for summary judgment on liability, with the motions presenting "the central question in the case," as the district court put it: whether the per-diem payments to AMN employees "should be considered part of the employees' 'regular rate' and therefore considered when calculating overtime pay rates." App.23. The parties agreed that determination of that question under the FLSA would be dispositive as to the California state-law claims. App.6.

The district court granted summary judgment for AMN on that "central question." The court first noted

that AMN's per-diem payments were based on the federal reimbursement rates and thus there was "no dispute" that the per-diem "reasonably approximates" the expenses incurred by the traveling clinicians. App.24. The "primary question," the district court then explained, is "whether [AMN's] reduction of the per diem amount when an employee worked less than his contracted hours per week changed the per diem payment from one based on reimbursement of expenses to one tied to hours worked." App.25. The court held that "this per diem reduction practice" does not "alter the characterization of the per diem as not part of the 'regular wage.'" App.26. In the court's view, "reducing payments for time not worked … make[s] the payments better at reflecting expenses incurred for the benefit of the employer." App.26. "By reducing the payments for time not worked," AMN was "erring on the side of" avoiding "compensating [employees] for personal expenses." App.26.

The district court rejected respondents' reliance on a section of the Labor Department's Wage & Hour Division Field Operations Handbook (FOH), which provides:

> If the amount of per diem or other subsistence payment is based upon and thus varies with the number of hours worked per day or week, such payments are a part of the regular rate in their entirety. However, this does not preclude an employer from making proportionate payments for that part of a day that the employee is required to be away from home on the employer's business. For

> example, if an employee returns to his/her home or employer's place of business at noon, the payment of only one-half the established per diem rate for that particular day would not thereby be considered as payment for hours worked and could thus be excluded from the regular rate.

FOH §32d05a(c), *available at* https://www.dol.gov/agencies/whd/field-operations-handbook. The district court explained that "the FOH is not authoritative" or "binding," and that respondents' argument "takes the FOH out of context and ignores the second part of the quoted passage," which "approves of the practice of cutting a per diem proportionately if only part of a day was spent away from home or the employee's normal workplace." App.27-28. The Court concluded that this "is what [AMN] was doing"; AMN "starts with a reasonable reimbursement level connected to estimated actual expenses and then reduces it for time it deems not to have been used for [AMN]'s benefit." App. 28.

The district court also rejected respondents' argument that "the per diems are not really for travel expenses because [AMN's] employees who are not traveling away from home also get the same fixed per diem." App.29. Although most of AMN's employees were assigned to work at facilities more than 50 miles from their homes, some AMN clinicians worked at facilities within 50 miles of their homes. Those local clinicians received "per-diem" payments, but those payments were included in both the local clinicians' taxable wages and their FLSA "regular rate." App.6. The district court concluded that the treatment of local

clinicians was immaterial: "[W]hat other employees may or may not be paid does not change the underlying fact that traveling employees are receiving per diem payments that reasonably approximate travel costs incurred for the benefit of the employer," which are properly excluded from the traveling clinicians' "regular rate." App.29.

3. The Ninth Circuit reversed. In an opinion authored by Judge Berzon, the Ninth Circuit barely addressed the statutory and regulatory language specifically addressing travel expenses. Instead, it drew on prior circuit precedent interpreting *different* statutory language to embrace an amorphous "inquiry that turns on whether the payments function to reimburse employees for expenses or instead operate to compensate employees for hours worked." App.16.

The Ninth Circuit found "support" for its novel functional approach in 29 C.F.R. §778.224—a regulation addressing a different clause of §207(e)(2)—while largely ignoring 29 C.F.R. §778.217, which addresses "reasonable payments for traveling expenses" in detail. And the court stated that the FOH "support[s] assessing how payments operate to determine if they are properly excluded." App.14. Citing the same passage from the FOH that the district court rejected as inapposite and unauthoritative, the Ninth Circuit concluded that the DOL's "guidance" was "consistent in focusing on the substance or function of payments as payments for expenses incurred while away from home rather than on their form or label." App.15.

Purporting to apply that functional test, the Ninth Circuit then determined that "[s]everal features

of AMN's per diem payments make evident that they function as remuneration for hours worked rather than reimbursement for expenses." App.16. First, the court stated that AMN's pro-rata reductions for shifts not worked "connect the amount paid to the hours worked," which was "particularly relevant" and an "important indication"—the "through line here," as the court put it—that the per diems "function[] as work compensation rather than expense reimbursement. App.10, 16-17.[1] Second, the court pointed to AMN's policy of not reducing per-diem payments when a clinician has "banked" enough hours to make up for missed hours, which, in the court's view, meant that AMN was using the allowances to "compensate employees for total hours worked." App.17. Third, the court noted that "AMN pays local clinicians the same per diems it would if the clinicians were traveling." App.18. The court considered that fact "quite pertinent," ignoring that AMN treats the allowances for non-traveling clinicians differently for both tax and "regular rate" purposes. App.19.

In the court's view, this "combination of factors … together indicate[s]" that AMN's per-diem payments "functioned as compensation for hours worked" and thus had to be included in respondents' "regular rate." App.19-20. The court accordingly ordered the district court to enter summary judgment treating AMN's per-

[1] The court observed that AMN pays a weekly allowance notwithstanding that most clinicians only work three days a week—though, in the next sentence, the court acknowledged that this practice is "justifiable" because "the clinicians are scheduled to work away from home for a prolonged period." App.16-17.

diem payments to the traveling clinicians as "part of the employees' regular rate of pay." App.20.

AMN petitioned for panel rehearing and rehearing en banc. The Ninth Circuit denied the petition. App.21-22.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has yet again transformed a longstanding industry practice that benefits employers and employees alike into a font of FLSA liability. The only things that distinguish this latest effort from prior decisions this Court has reviewed and reversed are the clarity of the relevant statutory text and the ubiquity of the issue. Countless companies reimburse their employees for travel-related expenses, many by providing per-diem allowances to save employees from the burden of collecting receipts documenting every expenditure. The relevant statute makes clear that "reasonable payments for traveling expenses … incurred by" the clinicians "in the furtherance of his employer's interests" may be excluded from the employees' "regular rate" of pay. 29 U.S.C. §207(e)(2). The relevant regulation goes further and specifies that if employers provide per diems pegged to the federal government's own reimbursement rates, the payments are "per se" reasonable. 29 C.F.R. §778.217(c)(2). The clarity with which the statute and regulations address this question is no accident: Employers need clarity in calculating employees' "regular rate" as a threshold step in complying with the FLSA's overtime obligations.

The Ninth Circuit's decision gives short shrift to those specific provisions and sows confusion on an

issue that demands clarity. The Ninth Circuit failed to engage with the pertinent statutory or regulatory text, instead looking to different provisions employing different language. It then embraced a novel and amorphous test that deprives employers of any clear path for FLSA compliance while penalizing employers for reductions that are fully supported, if not compelled, by the FLSA's text and related tax-law requirements. The Ninth Circuit drew support from a Labor Department handbook that expressly states that it is *not* authoritative. In sum, the Ninth Circuit ignored on-point statutory and regulatory provisions that provide needed clarity, in lieu of inapposite and unauthoritative materials that invite routine second-guessing on a question as basic and recurring as whether a per diem for traveling expenses is part of the base pay on which essentially all FLSA overtime obligations turn.

This Court's review is critical. The Ninth Circuit's decision upends longstanding practice in the staffing industry and threatens significant liability for the countless businesses that offer per-diem payments to traveling employees. The decision not only upsets longstanding practices but deprives businesses of the predictability that the statute provides and employers need. And the decision harms employers and employees alike. Employers now face FLSA liability for making adjustments to per-diem allowances that the tax code (and the FLSA itself) demands. And employees will now either see their taxable income rise or become saddled with onerous record-keeping requirements to document every jot and tittle of thirteen weeks' worth of travel expenses.

This Court has not hesitated to intervene in similar circumstances. Absent intervention, the prospect for nationwide collective actions will make the Ninth Circuit's misguided decision the *de facto* national rule, opening up employers nationwide to the prospect that commonsense and mutually beneficial reimbursement policies that mirror those of the federal government will become the source of unexpected and unjustified FLSA liability. The Ninth Circuit's plainly incorrect and far-reaching decision cannot stand.

I. The Ninth Circuit's Decision Is Profoundly Wrong.

The Ninth Circuit plainly erred in holding that AMN must include the per diems it provides its traveling employees in their "regular rate." The FLSA is clear: an employer may exclude from the regular rate "reasonable payments for traveling expenses" incurred "in the furtherance of [an] employer's interests." 29 U.S.C. §207(e)(2). AMN's per diems readily satisfy that requirement: they cover traveling clinicians' meal, lodging, and incidental expenses while on assignments away from home; they are pegged to the federal-government allowances and are thus per se reasonable under the applicable regulation; and they are reduced when an employee is incurring expenses while not furthering AMN's interests. The Ninth Circuit reached its contrary conclusion only by ignoring the relevant statutory and regulatory text and fashioning an amorphous test from inapposite provisions, while invoking guidance that even the Labor Department disclaims as non-authoritative and placing undue emphasis on features

of AMN's per-diem policy that are driven by the need to comply with the tax code and the text of the FLSA itself.

A. AMN's Per-Diem Payments Are Expense Reimbursements Properly Excluded From the "Regular Rate" Under Clear Statutory and Regulatory Text.

The FLSA requires an employer to pay overtime at a rate "not less than one and one-half times the regular rate at which" an employee is employed. 29 U.S.C. §207(a). Because FLSA overtime obligations turn on the "regular rate," determining an employee's regular rate is "of prime importance." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945). Indeed, unlike questions concerning the scope of exemptions applicable only to particular industries or specific types of employees, ascertaining an employee's "regular rate" is an essential first step in determining every employer's FLSA overtime obligations to every employee. Given the need for clarity on that critical threshold question, the FLSA provides clear direction when it comes to the ubiquitous practice of reimbursing travel-related expenses. While the FLSA presumptively treats an employee's "regular rate" as including "all remuneration for employment paid to, or on behalf of, the employee," it expressly excludes "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" from the regular rate. 29 U.S.C. §207(e)(2).

An on-point regulation provides additional clarity. *See* 29 C.F.R. §778.217. It explains that

§207(e)(2)'s exclusion "is applicable" when "an employee incurs expenses on his employer's behalf or where he is required to expend sums by reason of action taken for the convenience of his employer." *Id.* §778.217(a). An employer's "[p]ayments … to cover such expenses" are "not included in the employee's regular rate," provided the reimbursement amount "reasonably approximates the expense incurred." *Id.* It clarifies that a payment covering "[t]he actual or reasonably approximate amount expended by an employee … for … living expenses away from home … incurred while traveling on the employer's business" will "not be regarded as part of the employee's regular rate." *Id.* §778.217(b)(3). And, underscoring the permissibility of per-diem payments and the need for clarity, it provides that a reimbursement to "an employee traveling on his or her employer's business" is "per se reasonable" if it does not exceed the federal government's own reimbursement guidelines and otherwise complies with the statutory and regulatory provisions. *Id.* §778.217(c)(2).

By any measure, AMN's per-diem payments satisfy this clear statutory and regulatory language. AMN provides weekly allowances to its traveling clinicians to cover their expenses for meals, lodging, and incidentals while they are on lengthy assignments (usually thirteen weeks) far from home. Such "traveling expenses" are plainly incurred "in the furtherance of [AMN's] interests," for they are incurred while an employee is on assignment by AMN and contractually obligated to work a certain number of shifts per week, and adjustments are made if the employee takes personal time or misses contractually

required shifts. 29 U.S.C. §207(e)(2). And there is no dispute that the per diems are "reasonable" and "reasonably approximate" the traveling clinicians' expenses, as they correspond to, and never exceed, the federal government's own CONUS per-diem rates, thus satisfying the regulatory safe harbor. 29 U.S.C. §207(e)(2); App.24; CA9.ER.076.

In short, AMN's reimbursement payments clearly comply with statutory and regulatory requirements that clearly allow such payments to be excluded from an employee's "regular rate." It should have been that simple.

B. The Ninth Circuit's Decision Disregards the Statutory and Regulatory Text and Employs Deeply Flawed Reasoning.

Defying that straightforward conclusion, the Ninth Circuit held that AMN's per diems "function as remuneration for hours worked rather than reimbursement for expenses." App.16. That startling determination is clearly wrong and deprives AMN—and all other employers—of the clarity that they need and that the applicable statutory and regulatory provisions provide.

1. The Ninth Circuit's first and most fundamental error was to give short shrift to the relevant statutory and regulatory text. Aside from reciting it once at the outset, the court never returned to the directly on-point statutory clause—expressly excluding "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." App.2. Indeed, the only other time the court engaged with §207(e)(2), it invoked a

different clause—the "other similar payments" clause, which covers "other similar payments to an employee which are not made as compensation for his hours of employment." *See* App.9. That general catch-all provision is of limited relevance, where a more specific clause directly addresses the exact category of payments at issue, using materially different language. *See, e.g., RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("'[I]t is a commonplace of statutory construction that the specific governs the general.'"). While §207(e)(2)'s specific language about traveling expenses certainly informs the "other similar payments" clause, focusing on the general catch-all to narrow the scope of the specific (and different) language directly on-point is plainly erroneous.

The Ninth Circuit's analysis of the equally clear regulatory text was equally deficient. The court barely paused over the on-point regulation, 29 C.F.R. §778.217, in interpreting and applying §207(e)(2)'s "traveling expenses" clause. Instead, the court repeatedly cited a different regulation, 29 C.F.R. §778.224, which addresses the inapposite "other similar payments" clause of §207(e)(2). App.14-16. The court observed that §778.224 states that excludable payments "do not depend on the hours worked, services rendered … or other criteria that depend on the quality or quantity of the employee's work." But that language is not found in 29 C.F.R. §778.217, which instead squarely allows the exclusion of "reasonably approximate amount[s] expended by an employee … incurred while traveling on the employer's business" and specifically recognizes per-diem allowances pegged to the federal government's

per diems as "per se reasonable." 29 C.F.R. §778.217(b)(3), (c)(2). As with the statutory text, by focusing on the wrong provision, the Ninth Circuit ignored regulatory text that makes clear that AMN's per diems are per se reasonable and may be permissibly excluded from an employee's "regular rate.[2]

While largely ignoring the applicable and authoritative Labor Department regulation, the Ninth Circuit found "support" in the "guidance" provided by §32d05a(c) of the DOL's Field Operation Handbook. App.14-15. But while that FOH provision at least addresses the relevant regulation—29 C.F.R. §778.217—it expressly disclaims any pretense of being authoritative. The FOH itself states that "[i]t is not used as a device for establishing interpretative policy." Dep't of Labor, Wage & Hour Division, Field Operations Handbook.

The Ninth Circuit's reliance on the FOH thus violates this Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), twice over. In *Kisor*, the Court held that relying on an agency's interpretation of its own regulation is warranted only where, *inter alia*, "the regulation is genuinely ambiguous" after "exhaust[ing] all the 'traditional tools' of

[2] All of this may explain why, the one time the court cited §778.217 (the correct regulation), it acknowledged that this regulation *supported* AMN's policy. *See* App.16-17 (citing §778.217(b)(3) in noting that "[r]eimbursing traveling clinicians for seven days of expenses even though most clinicians only work three days a week is justifiable because the clinicians are scheduled to work away from home for a prolonged period and are not expected to travel back and forth to their home base each week").

construction," *id.* at 2415, and the "regulatory interpretation" is "the agency's 'authoritative' or 'official position,'" *id.* at 2416. Here, there is nothing "genuinely ambiguous" about 29 C.F.R. §778.217; nor, for that matter, did the Ninth Circuit apply, let alone exhaust, traditional tools of construction. Even worse, the FOH does not constitute DOL's "official position" on "regulatory interpretation," but is explicitly non-authoritative. *See Exelon Generation Co. v. Local 15, Int'l Bhd. of Elec. Workers*, 676 F.3d 566, 576-78 (7th Cir. 2012) (declining deference when agency had itself "disclaimed the use of regulatory guides as authoritative"), *cited with approval in Kisor*, 139 S. Ct. at 2417.

The problems with the FOH run even deeper. In ruling against AMN, the Ninth Circuit held that its analysis "comports with out-of-circuit case law" that similarly invoked the FOH. *See* App.11-12 (citing *Newman v. Advanced Tech. Innovation Corp.*, 749 F.3d 33 (1st Cir. 2014); *Baouch v. Werner Enters., Inc.*, 908 F.3d 1107 (8th Cir. 2018), and *Gagnon v. United Technisource, Inc.*, 607 F.3d 1036 (5th Cir. 2010)). Every one of these decisions, however, predates *Kisor* and relied on the FOH in a way that *Kisor* no longer permits. *See Newman*, 749 F.3d at 37; *Baouch*, 908 F.3d at 1117; *Gagnon*, 607 F.3d at 1041 n.6. It is no accident that the only other out-of-circuit decision the Ninth Circuit discussed, *Sharp v. CGG Land (U.S.), Inc.*, 840 F.3d 1211 (10th Cir. 2016), did *not* cite the FOH and did *not* hold that payments were compensation to be included in the "regular rate." App.14. The Ninth Circuit thus erred not only in relying on the FOH in its own right, but by relying on

decisions that likewise invoked the FOH under a now-rejected approach.

2. In lieu of applying the apposite and clear statutory and regulatory text, the court employed a hopelessly amorphous test to conclude that a "combination of factors … together indicate" that AMN's per-diem payments "function as remuneration for hours worked rather than reimbursement for expenses." App.16, 19-20. That approach not only deprives employers of the kind of clarity they need in calculating something as foundational as every employee's "regular rate," but is flatly wrong. None of the factors emphasized in the Ninth Circuit's "free-floating" inquiry "untethered to the statutory text," *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 572 U.S. 915, 926 (2014), transforms AMN's per-diem payments into anything other than reasonable expense reimbursements that AMN may properly exclude from the "regular rate" under §207(e)(2).

The Ninth Circuit placed significant emphasis on AMN's practice of reducing a traveling clinician's per diem if the clinician failed to work a contractually required shift. That practice was central to respondents' theory of liability throughout this case: that "because [AMN's] per diem system 'varies with the number of hours worked per day or week'—in that it reduces payments based on hours of work missed—the per diem payments are part of the regular rate in its entirety." App.27; *see* p.8, *supra*. The district court, accordingly, phrased the "primary question" in the case as "whether [AMN's] reduction of the per diem amount when an employee worked less than his contracted hours per week changed the per diem

payment from one based on reimbursement of expenses to one tied to hours worked." App.25. And the Ninth Circuit observed that "[t]he AMN policy underlying the … issue before us" is "the company's practice of prorating traveling clinicians' per diem payments when they work fewer hours or shifts than required by their employment contracts." App.5. The Ninth Circuit held that "[t]he fact that a payment varies with hours worked" is "particularly relevant" and the "through line here" in determining whether a payment functions as compensation rather than reimbursement. App.16-17. Because AMN's pro rata reductions "connect the amount paid to the hours worked," the court concluded, the per diems "function[] as work compensation rather than expense reimbursement." App.17.

That determination is deeply flawed. Even putting aside the irony of using AMN's treatment of employees who *under*perform—*i.e.*, *fail* to work their contractually required shifts—to impose inflated *over*time obligations, AMN's policy of reducing per diems when a clinician fails to work a required shift is undisputedly designed to ensure that clinicians are reimbursed only for expenses incurred *on AMN's behalf*. Far from triggering massive overtime obligations, that practice is fully consistent with §207(e)(2). When a clinician misses a week of a thirteen-week assignment or fails to work the contractually required number of shifts in a week, she is not furthering AMN's interests during that period, and her expenses accordingly are not "in the furtherance of [her] employer's interests." 29 U.S.C. §207(e)(2). As such, AMN reduces the clinician's weekly allowance to ensure that that week's payment

more closely corresponds to expenses actually incurred by the clinician "in the furtherance of [her] employer's interests." That practice does not convert expense reimbursements into payments for work, but ensures that only those expenses incurred for the employer's benefit are reimbursed. As the district court correctly observed, "reducing payments for time not worked … make[s] the payments better at reflecting expenses incurred for the benefit of the employer." App.26. If the allowance were not reduced, the allowance would exceed the expenses incurred *in furtherance of the employer's interests*. AMN's reduction policy thus corresponds directly to the relevant FLSA text.

Equally important, AMN's reduction policy follows the relevant tax-law requirements and protects the tax-free status of the per diems for the employees. For a per-diem payment to qualify as non-taxable under an "accountable plan," it must, *inter alia*, satisfy the "business connection" requirement. 26 C.F.R. §1.62–2(c). That requirement is met only if the per diem is for a "business expense[]" that is "incurred by the employee in connection with the performance of services as an employee of the employer." *Id.* §1.62–2(d)(1). If an employee is reimbursed for an expense that does not satisfy that requirement, then "*all* amounts paid under the arrangement" are treated as paid under a "nonaccountable plan" and thus taxable to the employee. *Id.* §1.62–2(d)(3) (emphasis added). By proportionally reducing the amount of a clinician's allowance when a clinician fails to work the required time, AMN ensures that the allowance satisfies the "business connection" requirement, thereby

preserving its non-taxable status and avoiding the risk that *all* of a clinician's reimbursements will be deemed taxable.

The Ninth Circuit had almost nothing to say about any of this. It merely noted that AMN's reduction policy "connect[s] the amount paid to the hours worked," App.17, but that "connection" is directly responsive to the FLSA's text and to tax-law provisions that disfavor reimbursing travel expenses not incurred in furthering the employer's business. Telling an employee who voluntarily works only half a week that they will receive only half their weekly allowance for travel *on the employer's behalf* thus comports with both common sense and the applicable statutory and regulatory language. What makes no sense and draws no support from the statute is the notion that a traveling employee can voluntarily *decline* to work a contractually required shift or an entire week of a thirteen-week assignment, and then claim a greater entitlement to overtime in other periods if the employer reduces the per-diem reimbursements for periods in which the employee was not working on the employer's behalf at all. Yet that is the counterintuitive result the Ninth Circuit embraced.

None of the other aspects of AMN's per diems that the Ninth Circuit emphasized renders them compensation rather than reimbursements. The court cited "the default payment of per diem on a weekly basis … without regard to whether any expenses were actually incurred on a given day," specifically faulting AMN for covering "seven days of expenses" and thus "*already* pay[ing] clinicians a per diem for days they

are not working for AMN" since clinicians typically work three shifts per week. App.16, 19-20. But in the very next breath, the court acknowledged the flaw in faulting AMN for providing reimbursement on a weekly basis: "Reimbursing traveling clinicians for seven days of expenses even though most clinicians only work three days a week is justifiable because the clinicians are scheduled to work away from home for a prolonged period and are not expected to travel back and forth to their home base each week." App.16-17.[3] That acknowledgment is correct, but even so, it embeds a mistaken premise, as traveling clinicians are generally obligated to work three twelve-hour shifts—not just three days—per week, and nurses assigned a "night shift" will work on two days in a single shift and could work on as many as six days in a week.

The court also pointed to AMN's policy that clinicians who failed to work shifts would not have their weekly allowances reduced if they had "banked" hours from prior work. In the court's view, the "only reason" to "consider 'banked hours' in calculating a weekly per diem payment is to compensate employees for total hours worked." App.17. But that observation misses the point: if a clinician has made up for missed time by having "banked" hours, she has met her contractual obligations, and thus her traveling expenses were incurred "in furtherance of [her] employer's interests." 29 U.S.C. §207(e)(2). That would be particularly clear if an employee missed her assigned shift because she already worked a previous

[3] As noted, this was the *only* point in the Ninth Circuit's opinion where the court cited the relevant regulation, 29 C.F.R. §778.217.

unassigned shift, but in any case, an employee working a full workweek is plainly furthering her employer's interests during that workweek.

Finally, the Ninth Circuit observed that because "AMN pays local clinicians the same per diems it would if the clinicians were traveling," then "the per diem payments made to both groups of clinicians function as compensation for labor." App.18-19. That is a *non sequitur*. Local clinicians do not incur meal, lodging, or incidental expenses associated with work away from home. Thus, although the local clinicians' payments may be labeled "per diems," AMN does not treat them as falling under the FLSA's exclusion—instead, AMN includes the *local* clinicians' "per diems" in *both* their "regular rate" *and* their taxable income. *See Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 461 (1948) (explaining that "label[s] chosen by the parties" are irrelevant when determining the "regular rate"). But none of that has anything to do with the *traveling* clinicians, who work far from home for thirteen weeks, indisputably incur "traveling expenses," receive per diems to cover those expenses to the extent those expenses were "incurred … in the furtherance of [AMN's] interests," and may exclude those per diems from their taxable income. As the district court aptly explained, "what other employees may or may not be paid does not change the underlying fact" that "traveling employees are receiving per diem payments that reasonably approximate travel costs incurred for the benefit of the employer." App.29. Under the clear statutory and regulatory text, that is all that is required for the traveling clinicians' per diems to satisfy §207(e)(2) and to warrant exclusion from the "regular rate."

At bottom, the Ninth Circuit transformed what should have been a straightforward application of the clear language of 29 U.S.C. §207(e)(2) and 29 C.F.R. §778.217 into an amorphous, multi-factor inquiry that allowed the court to fixate on peripheral aspects of AMN's per-diem policy and reach a conclusion at odds with both common sense and the applicable statutory and regulatory text. That decision is plainly wrong and sows confusion on a question where clarity is at a premium.

II. The Question Presented Warrants The Court's Review In This Case.

The Court's intervention is imperative. Whether an employee's "regular rate" includes reimbursements for traveling expenses is a threshold question that is foundational for every employer's overtime obligations under the FLSA. Accordingly, the FLSA answers that question clearly in the second clause of §207(e)(2), reinforced by an equally clear on-point regulation, 29 C.F.R. §778.217, which even expressly provides a "reasonableness" safe harbor for per diems that—like AMN's—are pegged to the federal government's allowances. The Ninth Circuit's decision destroys the certainty and predictability that employers need and the FLSA provides by replacing the clear statutory and regulatory text with a novel and open-ended multi-factor inquiry under which no employer could ever rest secure that its per-diem policies will be free from collateral attacks by the FLSA bar. The nebulous nature of the Ninth Circuit's test invites FLSA lawyers to roll the dice, and the stakes in nationwide collective actions make coerced settlements inevitable. Simply put, the Ninth Circuit's decision not only

converts longstanding industry practice into a font of FLSA liability, but also threatens continued uncertainty and litigation on a threshold issue that affects every employer subject to the FLSA.

The consequences are especially dire for the staffing industry, which often hires temporary employees for multi-week assignments precisely so they can travel to locations where short-term staffing needs are particularly acute. Staffing companies in the United States hire 16 million temporary and contract workers annually—employing, on average, more than three million employees per week and contributing over $140 billion to the Nation's economy. *See* American Staffing Ass'n, *Staffing Industry Statistics*, https://bit.ly/3y4Xxt9. Those temporary employees travel disproportionately. It is thus vital for staffing companies to adopt practical reimbursement policies, and critical that such policies do not trigger unanticipated FLSA liability for employers or unexpected tax liabilities for workers.

In the healthcare industry in particular—the industry AMN principally serves—staffing companies are especially important, and now more than ever. The staffing needs of hospitals and clinics across the country fluctuate significantly during the course of an ordinary year, and they rely on traveling clinicians, like AMN's employees, to mitigate healthcare labor shortages and provide vital patient care. Many hospitals find themselves critically understaffed during winter months (when populations swell in states with warmer climates, such as Florida, Arizona, and Texas), during flu season, when permanent staff members take parental leave, or when local conditions

produce a deluge of patients—as in this last year, when COVID-19 "hotspots" flared up unpredictably across the map. Moreover, some regions of the country experience persistent shortages of healthcare professionals throughout the year and consistently rely on traveling clinicians to meet patient needs. *See* Lisa M. Haddad et. al, *Nursing Shortage* (last updated Dec. 14, 2020), https://bit.ly/2Wk8QQ5 ("Nursing shortage amounts can vary greatly depending on the region … Some areas have real deficits when looking at critical care nurses, labor and delivery, and other specialties.").

The importance of traveling healthcare professionals will only grow in coming years, particularly as Baby Boomers retire and increase the demand for healthcare. *See* Haddad, *supra*. In fact, the Bureau of Labor Statistics projects that, between 2019 and 2029, the number of nurse practitioners will need to increase by 52.4%, and the number of jobs needed to be filled by registered nurses will exceed 1.75 million. U.S. Bureau of Labor Statistics, *Occupational Projections Data*, https://bit.ly/3zyu0rV. In 2030 alone, California is projected to face a shortage of nearly 45,000 nurses. Catherine Burger, *The States with the Largest Nursing Shortages* (last updated Apr. 14, 2021), https://bit.ly/2VcoGLQ. The COVID-19 pandemic has accelerated these trends, as the challenges of caring for COVID-19 patients have driven many healthcare practitioners from the field. *See, e.g.*, Andrew Jacobs, *'Nursing Is In Crisis': Staff Shortages Put Patients at Risk*, N.Y. TIMES (Aug. 21, 2021), https://nyti.ms/3y9JFNh; Theresa Brown, *Covid-19 Is 'Probably Going to End My Career'*, N.Y. TIMES (Feb. 25, 2021), https://nyti.ms/2UPCDjd.

Traveling healthcare professionals will therefore continue to serve as ever-more-indispensable parts of the nation's healthcare system.

While the impact on staffing companies, where extensive traveling and associated expenses are unavoidable, is particularly dramatic, the fallout from the Ninth Circuit's decision is hardly limited to that sector. Numerous and varied employers depend on staffing companies to fill their short-term or seasonal needs, and virtually every employer has some employees who travel. Moreover, every single employer has a need to ascertain its employees' "regular rate" as a first step in determining its FLSA obligations. It is the very last issue on which uncertainty is tolerable, and yet the Ninth Circuit's amorphous test virtually guarantees confusion and litigation.

The Ninth Circuit's decision is especially problematic because it upsets longstanding practices that have served the interests of employees and employers alike while satisfying the demands of the FLSA and the Internal Revenue Code. The decision requires an employer to include per-diem allowances in an employee's "regular rate" if it makes adjustments when an employee works less than a normal workweek. But §207(e)(2)'s plain text allows employers to exclude per-diem payments that are made "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) (emphasis added). AMN's prorating policy is entirely consistent with the italicized text and longstanding industry norms, as it

declines to reimburse employees when they are not, in fact, working in furtherance of the employer's interest.

To make matters worse, the Ninth Circuit's interpretation threatens to make *employees* worse off by saddling them with unanticipated tax bills or burdensome recordkeeping requirements. Under 26 C.F.R. §1.62–2(d)(1), employers that pay non-taxable per diems are required to limit them to "business expenses" incurred by the employee. To comply with that restriction, it is standard practice for employers to reduce an employee's per diem when the employee does not work an assigned shift. If that commonsense practice triggers substantial FLSA liabilities, some employers may provide per-diem payments regardless of whether shifts are worked, but treat the payments as taxable income. Other employers may abandon per-diem payments and force employees to account for each and every travel-related expenditure. Either way, employees will be worse off, as they will either be saddled with onerous record-keeping and paperwork requirements or see their net take-home pay go down.

This Court has often intervened when, as here, an erroneous lower-court decision allows a novel theory of FLSA liability to create a risk of significant liability for employers who have done nothing more than follow longstanding industry practice. *See, e.g.*, *Encino Motorcars*, 138 S. Ct. at 1138; *Encino Motorcars*, 136 S. Ct. at 2124; *Integrity Staffing*, 574 U.S. at 31; *Christopher*, 567 U.S. at 156. As the Court has explained, it may be "possible for an entire industry to be in violation of the [FLSA] for a long time" with no one noticing, but the "more plausible hypothesis" is that the industry's practices simply were not

unlawful. *Christopher*, 567 U.S. at 158. The decision below saddles AMN with liability for following standard industry practice and despite its compliance with a regulatory safe harbor. The decision produces "precisely the kind of 'unfair surprise' against which [this Court's FLSA] cases have long warned." *Id.* at 156.

The case for intervention is particularly strong here both because the statutory and regulatory text are clear, and because the decision affects the calculations that every employer must make. Unlike decisions affecting workers in a single industry, *see*, *e.g.*, *Encino Motorcars*, 138 S. Ct. at 1138; *Christopher*, 567 U.S. at 147, or decisions affecting only the subset of employees who must don or doff protective gear, *see, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 446 (2016); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 24 (2005), or egress through security check points, *see, e.g.*, *Integrity Staffing*, 574 U.S. at 29, the decision below affects a foundational calculation that must be made for every employee subject to the FLSA. While not every employee travels, many do, and all must have their "regular rate" calculated as a first step in determining their employer's FLSA obligations. For that reason, in the early days of the FLSA, this Court routinely considered "regular rate" questions in light of the "importance" of this foundational question. *Bay Ridge*, 334 U.S. at 448; *accord, e.g.*, *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 200-01 (1947); *Walling*, 325 U.S. at 421. While most of those questions were long ago settled—either by judicial decisions or regulations providing clear guidance and safe harbors—the decision below unsettles these matters

and embraces an amorphous test wholly unsuited for this basic, threshold calculation.

The concerns with that novel and problematic test are magnified because the FLSA provides for nationwide collective actions. *See* 29 U.S.C. §216(b). As a consequence, the Ninth Circuit's decision will likely become the *de facto* nationwide rule for all companies with at least some employees within the Ninth Circuit. The combination of the Ninth Circuit's amorphous standard and the prospect of nationwide collective actions is a particularly dangerous combination, as evidenced by the numerous cases raising this issue that have already been filed in the Ninth Circuit. FLSA lawyers will have every incentive to try to satisfy the Ninth Circuit's test, and employers will have considerable incentives to settle rather than risk nationwide liability based on the uncertain contours of the Ninth Circuit's multi-factor test.

Finally, this case is an excellent vehicle. The question whether AMN's per-diem payments are part of its employees' "regular rate" is the only issue left in this case. The question is cleanly presented, for the relevant facts are undisputed. And the question is outcome-determinative: if AMN's per-diem payments are not part of the "regular rate," this case is over, because AMN is not liable under either the FLSA or California law, which follows the FLSA here. Finally, the district court issued a thorough opinion holding in favor of AMN, while Judge Berzon's opinion for the Ninth Circuit thoroughly set forth the (unpersuasive) arguments on the other side. In light of those opinions and the unquestionable reality that the FLSA's

nationwide collective-action provision will funnel further cases to the Ninth Circuit, there is no reason for the Court to delay review. Certiorari is warranted here and now.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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