

No. 21-296

IN THE
Supreme Court of the United States

AMN SERVICES, LLC,

Petitioner,

v.

VERNA CLARKE & LAURA WITTMAN, on behalf of them-
selves and others similarly situated,

Respondents.

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

**BRIEF OF NATIONAL ASSOCIATION OF
TRAVEL HEALTHCARE ORGANIZATIONS AS
AMICUS CURIAE SUPPORTING PETITIONER**

CHRISTOPHER F. DRONEY

Counsel of Record

JOSEPH T. NAWROCKI

DAY PITNEY LLP

242 Trumbull Street

Hartford, CT 06103

(860) 275-0100

cdrone@daypitney.com

Counsel for the Amicus Curiae

TABLE OF CONTENTS

| | |
|--|----|
| INTEREST OF THE <i>AMICUS CURIAE</i> | 1 |
| INTRODUCTION AND SUMMARY OF ARGUMENT | 2 |
| BACKGROUND..... | 4 |
| A. The Traveling Healthcare Staffing Industry Is Critical to the Nation’s Healthcare Sys- tem | 4 |
| B. Traveling Healthcare Work Requires That Medical Professionals Receive Per Diem Expense Payments | 7 |
| ARGUMENT..... | 10 |
| I. The Ninth Circuit’s Decision Creates Con- fusion for Employers That Must Comply with Both the FLSA and IRS Regulations | 10 |
| A. IRS Regulations Limit How Employ- ers Can Structure Per Diems..... | 10 |
| B. The Ninth Circuit’s Decision Creates the Risk of FLSA Liability for Proce- dures Adopted to Reasonably Comply with IRS Regulations | 13 |
| II. The Ninth Circuit’s Novel Interpretation of Section 207(e)(2) Finds No Support in Other Circuits’ Precedent | 15 |
| III. The Ninth Circuit’s Decision Will Harm Healthcare Staffing Companies, Profes- sionals, and Patients Unless Certiorari Is Granted..... | 18 |
| CONCLUSION | 19 |

TABLE OF AUTHORITIES

| | Page |
|---|------------|
| Cases | |
| <i>Baouch v. Werner Enterprises, Inc.</i> , 908 F.3d 1107 (8th Cir. 2018) | 16 |
| <i>Gagnon v. United Technisource, Inc.</i> , 607 F.3d 1036 (5th Cir. 2010) | 15, 16 |
| <i>Newman v. Advanced Technology Innovation Corp.</i> , 749 F.3d 33 (1st Cir. 2014)..... | 16 |
| Regulatory and Statutory Provisions | |
| 26 C.F.R. § 1.62-2(d)(1)..... | 10, 12, 14 |
| 26 C.F.R. § 1.62-2(d)(3)(i) | 11 |
| 26 C.F.R. § 1.62-2(h)(2)(ii) | 11 |
| 26 C.F.R. § 31.3102-1(d) | 11 |
| 29 C.F.R. § 778.217(c)(2) | 9 |
| 29 U.S.C. § 207(e)(2) | 13, 15, 17 |
| 29 U.S.C. § 216(b) | 18 |
| Other Authorities | |
| Wendy Altschuler, <i>What It's Like to Be a Travel Nurse During a Pandemic</i> , FORBES (June 23, 2020), https://www.forbes.com/sites/ wedyaltschuler/2020/06/23/what-its-like-to-be-a- travel-nurse-during-a-pandemic | 5 |

- Scottie Andrew, *Traumatized and Tired, Nurses Are Quitting Due to the Pandemic*, CNN.COM (Feb. 25, 2021), <https://www.cnn.com/2021/02/25/us/nurses-quit-hospitals-covid-pandemic-trnd/index.html>..... 7
- Julie Bosman, *As Hospitals Fill, Travel Nurses Race to Virus Hot Spots*, N.Y. TIMES (Dec. 2, 2020), <https://www.nytimes.com/2020/12/02/us/covidtravel-nurses.html>..... 5, 7, 8
- Theresa Brown, *Covid-19 Is ‘Probably Going to End My Career’*, N.Y. TIMES (Feb. 25, 2021), <https://www.nytimes.com/2021/02/25/opinion/nursing-crisis-coronavirus.html> 7
- Gen. Servs. Admin., *Frequently Asked Questions, Per Diem*, GSA.GOV, <https://www.gsa.gov/travel/plan-book/per-diemrates/frequently-asked-questions-per-diem#4>. 9
- Christi M. Grimm, *Hospital Experiences Responding to the COVID-19 Pandemic: Results of a National Pulse Survey March 23–27, 2020*, HHS.GOV (Apr. 2020), <https://oig.hhs.gov/oei/reports/oei-06-20-00300.pdf>..... 6
- Lisa M. Haddad *et al.*, *Nursing Shortage*, NIH BOOKS (last updated Dec. 14, 2020), <https://www.ncbi.nlm.nih.gov/books/NBK493175/> 4, 5, 6

- Internal Rev. Serv., *Publication 463, Travel, Gift, and Car Expenses*, Adequate Accounting, IRS.GOV (2019), <https://www.irs.gov/publications/p463> 9, 11, 12, 14
- Andrew Jacobs, *‘Nursing Is in Crisis’: Staff Shortages Put Patients at Risk*, N.Y. TIMES (Aug. 21, 2021), <https://www.nytimes.com/2021/08/21/health/covidnursing-shortage-delta.html>. 4, 8
- Kansas Hospitals Seek Traveling Nurses Amid COVID Surge*, AP NEWS (Aug. 26, 2021), <https://apnews.com/article/health-coronavirus-pandemic-kansas-6d3dbf89ebc8c0cebbf85ec643c8aa03> 6
- Sean McMinn & Selena Simmons-Duffin, *1,000 U.S. Hospitals Are ‘Critically’ Short on Staff – More Expect to Be Soon*, NPR.ORG (Nov. 20, 2020), <https://www.forbes.com/sites/wendyaltschuler/2020/06/23/what-its-like-to-be-a-travel-nurse-during-a-pandemic>..... 5, 6
- Hannah Sampson, *Travel Nurses Typically See the Country. During the Last Year, Many Saw the Worst of the Pandemic*, WASH. POST (Mar. 8, 2021), <https://www.washingtonpost.com/travel/2021/03/08/travel-nurse-covid-pandemic/>..... 8
- U.S. Bureau of Labor Statistics, *Employment Projections*, <https://data.bls.gov/projections/occupationProj> 6

INTEREST OF THE *AMICUS CURIAE*¹

The National Association of Travel Healthcare Organizations (“NATHO”) is a non-profit association of healthcare staffing companies, founded in 2008, to promote ethical business practices in the travel healthcare staffing industry, setting a standard for conduct that is aligned among member agencies on behalf of travel healthcare candidates and clients in all fifty states. NATHO’s fifty-nine members agree to abide by a strict code of ethics that protects healthcare providers and healthcare professionals from unscrupulous business practices.

The organization primarily serves to:

- Educate the healthcare industry on the benefits of travel healthcare staffing;
- Establish a set of service standards among healthcare staffing companies;
- Share resources among member organizations;
- Offer a formal dispute resolution process through an arbitration committee; and
- Aid all members in cultivating market growth.

¹ Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief’s preparation or submission. Pursuant to Rule 37.2, counsel of record for all parties received notice of *amicus*’s intent to file this brief at least ten days before the due date and have consented to the filing of this brief.

NATHO serves as *amicus curiae* to inform the Court of the wide-ranging, adverse consequences that the decision below, unless reversed, will have on the healthcare staffing industry, traveling healthcare professionals, and patient care.

INTRODUCTION AND SUMMARY OF ARGUMENT

A panel of the Ninth Circuit wiped away decades of standard practice across swaths of the United States' temporary labor industry, including the traveling healthcare market. In the process, the court below demonstrated a blindness to the day-to-day realities of traveling healthcare work and a disregard for the practical consequences of its decision. If the decision is allowed to stand, the healthcare staffing industry will be hobbled, traveling healthcare professionals will be overburdened with clerical tasks, patients will be deprived of healthcare services, and the nation will face higher healthcare costs. This case calls out for the Court's review.

Healthcare staffing companies play a vital role in the nation's healthcare system. Their employees follow "snowbirds" in the winter, ameliorate regional labor shortages, fill in when permanent staff take maternity or FMLA leave, and—this past year—race between COVID "hotspots." To recruit professionals for the job, healthcare staffing companies must persuade qualified individuals to leave their families and temporarily move to new communities, often across differ-

ent time zones for months at a time. Those professionals expect to receive not only wages, but also allowances for the extra living expenses they incur when away from home in service of their employers. To provide those allowances, healthcare staffing companies have crafted per-diem policies in accordance with FLSA and IRS regulations and court precedents construing those provisions.

The Ninth Circuit’s decision disregards all of that. Seemingly oblivious to employers’ obligations to simultaneously comply with the FLSA and IRS regulations, the Ninth Circuit faults AMN for adopting commonsense policies that comply with both. If the decision stands, the Ninth Circuit will require employers providing non-taxable per diems to ensure that the professionals are “incurring expenses for [the employer’s] benefit,” but curtail employers’ ability to prorate per diems when an employee fails to work—a contradiction further heightened by IRS regulations prohibiting employers from reimbursing expenses that lack a business connection on a non-taxable basis. The Ninth Circuit also misreads precedent from other circuits, sowing confusion and subjecting employers to the risk of liability for engaging in long-standing industry practices. Absent the Court’s review, the decision will have ramifications far beyond the parties and, indeed, the industry as a whole.

For these reasons, NATHO respectfully asks the Court to grant AMN’s petition for a writ of certiorari.

BACKGROUND

A. The Traveling Healthcare Staffing Industry Is Critical to the Nation's Healthcare System.

Healthcare staffing is serious business; for “[w]hen hospitals are understaffed, people die.” Andrew Jacobs, *Nursing Is in Crisis: Staff Shortages Put Patients at Risk*, N.Y. TIMES (Aug. 21, 2021) (quotation marks omitted).² And the nation depends on traveling healthcare professionals—including registered nurses, licensed practical nurses, certified nursing assistants, technicians, and allied professionals—to ensure that its hospitals and clinics are adequately staffed.

In ordinary times, traveling healthcare professionals remedy unexpected labor shortages—such as when staff take maternity or FMLA leave. They also ameliorate persistent regional labor shortages by serving communities that are unable to train or permanently attract adequate numbers of healthcare professionals. See Lisa M. Haddad *et al.*, *Nursing Shortage*, NIH BOOKS (last updated Dec. 14, 2020) (“Nursing shortage amounts can vary greatly depending on the region of the country as well. Higher shortages are seen in different areas depending on the specialty of nursing. Some areas have real deficits when looking at critical

² Available at <https://www.nytimes.com/2021/08/21/health/covid-nursing-shortage-delta.html>.

care nurses, labor and delivery, and other specialties.”).³ And without traveling healthcare professionals, the nation could not meet the healthcare needs of “snowbird” retirees who travel every winter to a handful of southern states.

Of course, crises can heighten the need for traveling healthcare professionals, as the COVID-19 pandemic brings into sharp focus. “As the coronavirus has spiked across the country, ... travel nurses, who work on temporary contracts for higher fees and move from city to city, have become more urgently needed than ever.” Julie Bosman, *As Hospitals Fill, Travel Nurses Race to Virus Hot Spots*, N.Y. TIMES (Dec. 2, 2020).⁴ These healthcare professionals “put themselves in the eye of the hurricane, helping those in great need, which is why they’re our nation’s heroes.” Wendy Altschuler, *What It’s Like to Be a Travel Nurse During a Pandemic*, FORBES (June 23, 2020).⁵ Yet, even with their sacrifices, “[m]ore than 1,000 hospitals across the United States” found themselves “critically” short-staffed at the pandemic’s peak. Sean McMinn & Selena Simmons-Duffin, *1,000 U.S. Hospitals Are ‘Critically’ Short on Staff – More Expect to Be Soon*,

³ Available at <https://www.ncbi.nlm.nih.gov/books/NBK493175/>.

⁴ Available at <https://www.nytimes.com/2020/12/02/us/covid-travel-nurses.html>.

⁵ Available at <https://www.forbes.com/sites/wendyaltschuler/2020/06/23/what-its-like-to-be-a-travel-nurse-during-a-pandemic>.

NPR.ORG (Nov. 20, 2020);⁶ *see also* Christi M. Grimm, *Hospital Experiences Responding to the COVID-19 Pandemic: Results of a National Pulse Survey March 23–27, 2020*, HHS.GOV (Apr. 2020).⁷ With the surge of the Delta variant, hospitals are once again “clamoring for traveling nurses” to treat COVID patients. *Kansas Hospitals Seek Traveling Nurses Amid COVID Surge*, AP NEWS (Aug. 26, 2021).⁸

The nation’s reliance on traveling healthcare professionals will grow in coming years, even after the worst of the pandemic has subsided. The National Institutes of Health warns of a looming “nursing shortage,” with Baby Boomers retiring and the population aging. *See* Haddad *et al.*, *supra*, n.3. Indeed, the Bureau of Labor Statistics projects that, between 2019 and 2029, the number of nurse practitioner positions will increase by 52.4% and the number of unfilled job openings for registered nurses will exceed 1.75 million. U.S. Bureau of Labor Statistics, *Employment Projections*.⁹ The pandemic has accelerated these trends, as the overwhelming demands of caring for COVID patients have driven many from the profession. *See, e.g.*, Theresa Brown, *Covid-19 Is ‘Probably Going to End My Career’*, N.Y.

⁶ Available at <https://www.npr.org/sections/health-shots/2020/11/20/937152062/1-000-u-s-hospitals-are-short-on-staff-and-more-expect-to-be-soon>.

⁷ Available at <https://oig.hhs.gov/oei/reports/oei-06-20-00300.pdf>.

⁸ Available at <https://apnews.com/article/health-coronavirus-pandemic-kansas-6d3dbf89ebc8c0cebbf85ec643c8aa03>.

⁹ Available at <https://data.bls.gov/projections/occupationProj>.

TIMES (Feb. 25, 2021);¹⁰ Scottie Andrew, *Traumatized and Tired, Nurses Are Quitting Due to the Pandemic*, CNN.COM (Feb. 25, 2021).¹¹ Because the supply of and demand for credentialed medical professionals will remain unevenly distributed across the country, traveling healthcare professionals will continue to be an indispensable part of the nation's healthcare system.

B. Traveling Healthcare Work Requires That Medical Professionals Receive Per Diem Expense Payments.

Serving as a traveling healthcare professional can be grueling, lonely work. Leaving friends and family behind, traveling professionals settle temporarily in a new city for months. But just because they are far from home and incurring additional lodging and living expenses, their mortgage payments and other financial obligations back home do not stop. Responsive to this reality, per diems help to defray the extra expenses the professionals incur in service of patients and their employers.

Traveling healthcare service involves sacrifice, as the *New York Times* describes:

The nurses parachute into cities like New York, Phoenix, Los Angeles and Green Bay for weeks or months at a time, quickly learning the ways of a new

¹⁰ Available at <https://www.nytimes.com/2021/02/25/opinion/nursing-crisis-coronavirus.html>.

¹¹ Available at <https://www.cnn.com/2021/02/25/us/nurses-quit-hospitals-covid-pandemic-trnd/index.html>.

hospital and trying to earn the trust of the existing staff.

At the end of their shifts, they return to their temporary homes: hotels, Airbnb apartments or rented houses. Their families and friends are sometimes thousands of miles away, available only through phone calls or FaceTime.

Bosman, *supra*, n.4. Adding to these challenges, traveling healthcare professionals often take irregular overnight and weekend shifts. *See* Hannah Sampson, *Travel Nurses Typically See the Country. During the Last Year, Many Saw the Worst of the Pandemic*, WASH. POST (Mar. 8, 2021).¹² They arrive back at their temporary accommodations “exhausted, both physically and emotionally.” Jacobs, *supra*, n.2 (quotation marks omitted).

When geographical distance and the demands of work make it impractical for a traveling professional to return home between shifts, most healthcare staffing companies choose to pay allowances to their employees for the additional housing, meal, and travel expenses they incur in furtherance of their employers’ interests. It is thus customary practice in the traveling healthcare industry to provide per diems based on federal CONUS rates set by the General Services Administration—as AMN did here. Pet. App.3–4. The

¹² Available at <https://www.washingtonpost.com/travel/2021/03/08/travel-nurse-covid-pandemic/>.

CONUS rates are deemed per se reasonable reimbursement amounts for an employee traveling on his or her employer’s business. 29 C.F.R. § 778.217(c)(2). The CONUS rates set forth these “fair and equitable” daily allowances “for lodging (excluding taxes), meals and incidental expenses.” Gen. Servs. Admin., *Frequently Asked Questions, Per Diem*, GSA.GOV.¹³ They also relieve the substantial burden—to employer and employee—of itemizing and substantiating each individual expenditure, an even greater than usual burden here because of the extended periods of time healthcare professionals are away. See Internal Rev. Serv., *Publication 463, Travel, Gift, and Car Expenses, Adequate Accounting*, IRS.GOV (2019) (“*IRS Pub. 463*”) (stating that a per diem can “satisf[y] the adequate accounting requirement”).¹⁴

The Ninth Circuit’s decision upends this well-settled industry practice by creating the risk of legal exposure for healthcare staffing companies that wish to provide per diems to their employees and to the employees who receive them. Unless the Court intervenes, healthcare staffing companies and their traveling professionals will find it even more difficult to carry out their essential work.

¹³ Available at <https://www.gsa.gov/travel/plan-book/per-diem-rates/frequently-asked-questions-per-diem#4>.

¹⁴ Available at <https://www.irs.gov/publications/p463>.

ARGUMENT

I. The Ninth Circuit’s Decision Creates Confusion for Employers That Must Comply with Both the FLSA and IRS Regulations.

To provide employees with non-taxable per diems, traveling healthcare organizations must comply with both IRS accountable plan regulations and the FLSA. The Ninth Circuit’s decision creates the risk of legal exposure under the FLSA for those features of per diem programs specifically adopted by healthcare staffing companies to comply with IRS regulations. Unless the Court intervenes, healthcare staffing companies will find it exceedingly difficult to provide their traveling employees with a means of efficiently reimbursing the expenses they incur while traveling in furtherance of their employer’s business interests. As a result, healthcare professionals and patients will suffer.

A. IRS Regulations Limit How Employers Can Structure Per Diems.

Under IRS regulations, an employer can provide an employee with non-taxable per diems only for “business expenses ... that are paid or incurred by the employee in connection with the performance of services as an employee of the employer.” 26 C.F.R. § 1.62-2(d)(1). Expense reimbursements that lack a business connection (*e.g.*, expenses an employee incurs for personal reasons, or business expenses an employee incurs in furtherance of a different employer’s business interests), do not qualify as non-taxable accountable

plan reimbursements. Instead, they must be treated as taxable “wages and are subject to withholding and payment of employment taxes when paid.” *Id.* § 1.62-2(h)(2)(ii).

If an IRS review or audit reveals that the employer’s accountable plan improperly reimbursed an employee’s expenses on a non-taxable basis, then “*all* amounts paid under the arrangement are treated as paid under a nonaccountable plan,” and thus must be treated as taxable income to the employee.¹⁵ *Id.* § 1.62-2(d)(3)(i) (emphasis added). In that case, the IRS can change the plan’s tax treatment not just prospectively, but retroactively. As a result, healthcare professionals *themselves* could face substantial obligations for back taxes. *See* 26 C.F.R. § 31.3102-1(d) (“Until collected from him the employee also is liable for the employee tax with respect to all the wages received by him.”).

Despite these implications, the IRS provides employers with little specific guidance on how to design a legally compliant accountable plan for per diems. Publication 463 instructs that employers must “reasonably limit[] payments of [an employee’s] expenses to those that are ordinary and necessary *in the conduct of the trade or business.*” *IRS Pub. 463, Per Diem and Car Allowances* (emphasis added). Publication 463

¹⁵ The Tax Cuts and Jobs Act of 2017 eliminated itemized deductions for amounts paid under a nonaccountable plan, except for a few limited classes of employees not relevant here. *See IRS Pub. 463, Nonaccountable Plans*. Accordingly, amounts paid to traveling healthcare professionals under a nonaccountable plan are not tax deductible.

further states that “personal side trip[s]” cannot be reimbursed on a non-taxable basis. *Id.*, Travel in the United States. And IRS accountable plan regulations prohibit employers from paying non-taxable per diems when the underlying expenses lack a “business connection” to the reimbursing employer. *See* 26 C.F.R. § 1.62-2(d)(1) (limiting payment of per diems on a non-taxable basis under the accountable plan rules “only for business expenses ... that are paid or incurred by the employee in connection with the performance of services as an employee of the [paying] employer”). But beyond such general guideposts, employers are left without clear direction on how to adjust the per diems when a traveling employee has incurred personal expenses on an extended temporary assignment, or how to calculate time and expenses not incurred on the employer’s behalf.

In the face of this lack of specific guidance, healthcare staffing companies such as AMN craft reasonable rules to ensure that employees do not receive per diems on a non-taxable basis for expenses lacking a “business connection.” AMN prorated its employees’ per diems for shifts missed, recognizing that an employee may take a “personal side trip” or even work a shift for a competitor, and if that happens a reduction in the weekly per diem amount must be made in order to maintain an accountable plan with that employee under IRS rules. AMN’s program was a reasonable effort to comply with this requirement.

B. The Ninth Circuit’s Decision Creates the Risk of FLSA Liability for Procedures Adopted to Reasonably Comply with IRS Regulations.

The Ninth Circuit’s decision faults AMN for precisely those aspects of its program that were adopted to comply with IRS accountable plan regulations. If the decision is allowed to stand, healthcare staffing companies will face the risk of legal exposure under the FLSA if they continue to reimburse, on a non-taxable basis, business expenses incurred by employees through per diems based on CONUS rates with a reasonable method for reducing those payments for scheduled work missed by the traveling healthcare professional, as IRS regulations require.

As an initial matter, the Ninth Circuit holds that, under FLSA Section 207(e)(2), the per diems functioned as wages because AMN “connect[ed] the amount paid to the hours worked while still away from home.” Pet. App.17. The decision states that, instead, the program should have focused on “whether the employee remains away from home incurring expenses for AMN’s benefit.” *Id.* But it is unclear how an employer of professionals who travel substantial distances from home for extended periods of time can ensure that an employee is “incurring expenses for [the employer’s] benefit” *without* accounting for the scheduled shifts the employee fails to work for the assigned hospital or healthcare provider.

Nor do IRS regulations permit employers to provide non-taxable per diems for *all* expenses an employee

incurs away from home on a business trip. Rather, the regulations require that employers limit non-taxable per diems to “business expenses ... that are paid or incurred by the employee *in connection with the performance of services as an employee of the employer.*” 26 C.F.R. § 1.62-2(d)(1) (emphasis added). That, in turn, requires that an employer determine whether a per diem, if paid, would be reimbursing a traveling employee for other expenses, such as a “personal side trip.” *IRS Pub. 463*, Travel in the United States. Yet the Ninth Circuit’s decision rejects AMN’s approach for reducing per diems when a traveler fails to perform scheduled services for the hospital or clinic and requires treating them as part of the “regular rate” under the FLSA.

Compounding this problem, the decision contradicts itself. At one point, the Ninth Circuit appears to sanction AMN’s program, stating: “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.” Pet. App.16. But the decision continues on to conclude that the per diems functioned as compensation in part because they were provided “on a weekly basis, *including for days not worked away from home*, without regard to whether any expenses were actually incurred on a given day.” Pet. App.19 (emphasis added). To the extent these two statements can be reconciled, the Ninth Circuit seems to be suggesting that healthcare staffing companies should require employees on months-long assignments to substantiate each individual business

expense—for every meal, parking meter, and hotel night—with receipts. The suggestion is impractical on its face, particularly for professionals away from home for months at a time who need to recover between physically and emotionally taxing twelve-hour shifts.

In sum, the Ninth Circuit’s application of FLSA Section 207(e)(2) makes it exceptionally difficult for healthcare staffing companies to comply with IRS regulations without exposing themselves—and their employees—to the risk of substantial liability under the FLSA and federal taxes.

II. The Ninth Circuit’s Novel Interpretation of Section 207(e)(2) Finds No Support in Other Circuits’ Precedent.

The Ninth Circuit’s decision departs radically from the law of its sister courts. Indeed, the Ninth Circuit cites just three “disguised wage” decisions for ostensible support, and each shows how far the Ninth Circuit has strayed. Each also highlights the difficulties that healthcare staffing companies—which serve clients in all fifty states—will have operating in the Ninth Circuit.

Consider *Gagnon v. United Technisource, Inc.*, 607 F.3d 1036 (5th Cir. 2010). *See* Pet. App.13–14 (discussing *Gagnon*). There, an employer hired “a skilled craftsman with many years of experience” at a wage of just \$5.50, when comparable craftsmen in the area earned two to four times that—between \$13 and \$24 an hour—for the same work. 607 F.3d at 1039 & n.2. To make up the difference, the employer also paid a

“per diem” of \$12.50 an hour, untethered to actual expenses. *Id.* This was obviously an attempt to disguise the difference as a per diem expense reimbursement.

Similarly, in *Newman v. Advanced Technology Innovation Corp.*, the employer promised an hourly rate of \$60 to two employees, but then paid that amount as part wage and part per diem in an amount that added up to the \$60 actual wage rate: “(\$35.32 + \$24.68 for Newman; \$42.37 + \$17.63 for Patague).” 749 F.3d 33, 35 (1st Cir. 2014). *See* Pet. App.11–12 (discussing *Newman*). Again, the First Circuit saw this scheme for what it was: an attempt to disguise wages by classifying part of the compensation as a “per diem.”

Perhaps even more blatant as a disguised wage scheme is *Baouch v. Werner Enterprises, Inc.*, 908 F.3d 1107 (8th Cir. 2018). *See* Pet. App.12–13 (discussing *Baouch*). In *Baouch*, the employer claimed that per diems were “non-taxable” expense reimbursements for purposes of IRS accountable plan regulations, but wages for purposes of the FLSA’s minimum wage requirements. 908 F.3d at 1111–12. Ruling only on the FLSA issue, the Eighth Circuit held that the payments were “wages,” leaving it to the IRS to determine whether the employer had mischaracterized the per diem payments as non-taxable expense reimbursements. *See* 908 F.3d at 1119 (Colloton, J., concurring) (“[W]e do not address whether the company’s twin positions are sustainable going forward. It presumably will be for the IRS to determine.”).

This case is entirely different from those decisions. The Ninth Circuit faults AMN for providing its employees, who travel far from their homes for many weeks at a time while incurring lodging, meal, and other incidental expenses, with reasonable per diems based on federal CONUS rates. But AMN does not pay its traveling employees a fraction of their market-rate salaries as wages, while “making up the difference” in per diems. Nor does AMN promise its traveling employees a set wage, and then concoct various combinations of hourly wages and per diems to arrive at that figure. Absent too are allegations that AMN treats the per diems as part of the “regular rate” for purposes of the FLSA’s minimum wage provisions, and also as non-taxable reimbursements under IRS regulations. AMN’s policy thus bears no resemblance to those addressed by the First, Fifth, and Eighth Circuits.

With its novel interpretation of FLSA Section 207(e)(2), the Ninth Circuit introduces unwarranted uncertainty into compliance with the FLSA and IRS regulations, and imposes new and heavy burdens on healthcare staffing companies found nowhere else in the country. In so doing, the Ninth Circuit substantially increases the industry’s costs of doing business. But the consequences will not be geographically confined, as healthcare staffing companies aim to craft consistent, equitable policies to enable traveling professionals to serve patients in every state. These organizations must now decide whether to adopt Ninth-Circuit-specific policies or alter their practices across the nation in light of the FLSA’s provision for nation-

wide collection actions. *See* 29 U.S.C. § 216(b). The result in either case will be significant burdens on healthcare staffing companies and traveling clinical professionals alike.

III. The Ninth Circuit’s Decision Will Harm Healthcare Staffing Companies, Professionals, and Patients Unless Certiorari Is Granted.

The Ninth Circuit’s decision will have consequences reaching far beyond the parties and class members. Since the decision was issued, many NATHO members have invested considerable resources reassessing their per diem expense reimbursement programs in light of the decision to ensure compliance with IRS regulations and minimize potential liability under the FLSA and similar state statutes. A number of NATHO members have even concluded that, if the decision is not addressed by this Court, they may be unable to continue serving clients in the footprint of the Ninth Circuit. Patient care will suffer as a result.

Traveling healthcare professionals likewise will be immediately harmed. The Ninth Circuit’s decision appears to favor reimbursement arrangements that require traveling employees to substantiate each expense with a receipt—a daunting task for employees that work long shifts and are on the road for months. And traveling healthcare professionals face the risk of back taxes if the IRS decides, as the Ninth Circuit held, that their employer erroneously treated the per diems as non-taxable reimbursements.

The decision will substantially increase the cost of addressing labor shortages and hiring critical traveling healthcare professionals—including registered nurses, licensed practical nurses, certified nursing assistants, technicians, and allied professionals—in the middle of a pandemic, and for many years to come.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

CHRISTOPHER F. DRONEY

Counsel of Record

JOSEPH T. NAWROCKI

DAY PITNEY LLP

242 Trumbull Street

Hartford, CT 06103

(860) 275-0100

cdroney@daypitney.com

Counsel for Amicus Curiae

SEPTEMBER 28, 2021