No. 21-296

# In the Supreme Court of the United States

AMN SERVICES, LLC,

*Petitioner*,

*v.*

VERNA CLARKE, ET AL.,

*Respondents*.

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

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PETITIONER


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## CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce for the United States of America is a not-for-profit, tax-exempt organization. It does not have a parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

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## INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The decision below raises several issues of concern to the Chamber's members. First, many of those members are subject to the Fair Labor Standards Act (FLSA) and are directly affected by the methods that courts use to calculate employees' regular rate of pay. The Ninth Circuit's unduly restrictive approach to the FLSA's exclusion of traveling-expense reimbursements threatens significant overtime liability for Chamber members who depend on a traveling workforce. In addition, the Chamber's members have a strong interest

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[1] In accordance with Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties received timely notice of amicus's intent to file this brief, and the parties have consented in writing to the filing of this brief.

in how courts weigh federal agencies' nonbinding statements about statutory and regulatory requirements—not just in the wage-and-hour context but across a wide range of subject areas. Regulated parties are ill served when courts, like the Ninth Circuit below, undermine the predictability and clarity of statutory and regulatory requirements based on stray comments in nonauthoritative administrative documents. The Chamber thus has a strong interest in this Court's review and reversal of the Ninth Circuit's flawed approach.

## INTRODUCTION AND SUMMARY OF ARGUMENT

To calculate an employee's regular rate of pay, which is in turn the basis for overtime premiums, the FLSA excludes "reasonable payments for traveling expenses, or other expenses, incurred by [the] employee in the furtherance of his employer's interests and properly reimbursable by the employer." 29 U.S.C. 207(e)(2). This provision, by its plain terms, asks three questions: Were the payments for traveling or other expenses that the employee incurred while furthering the employer's interests? Were the payments reasonable in amount? And were the expenses properly reimbursable? If the answer to all three questions is yes, the payments are not considered wages and can be excluded from the regular rate.

Here, however, the Ninth Circuit ruled that certain per diem payments were not excluded under this provision. A per diem is a daily allowance for lodging, meals, and other incidental expenses, and the per diems here

were set below the amounts that the General Services Administration (GSA) establishes for federal travel within the lower 48 continental United States ("CONUS" amounts).[2] Even so, the Ninth Circuit counted petitioner's per diems as wages because it asked an altogether different question: Were the payments "functioning as compensation rather than reimbursement"? Pet. App. 10. The court decided that under a "function analysis," certain facts about petitioner's payment practices collectively implied that the disputed per diems should count as wages. *Id.* at 11; see also *id.* at 16-20. But the Court never claimed that its focus on function, and a few of petitioner's per diem practices, flows from the language of the FLSA's traveling-expense exclusion. On the contrary, it relied on Ninth Circuit precedent construing *different* statutory language and a handful of cases that applied *nonbinding* U.S. Department of Labor guidance and judicial intuitions about the FLSA's purposes.

The Court should grant review and reverse. The Ninth Circuit's displacement of the statutory text through a vague and atextual framework oversteps courts' proper role and denies parties' right to rely on the laws that Congress has enacted. See Pet. App. 10-

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[2] U.S. Gen. Servs. Admin., *Frequently Asked Questions, Per Diem* (Aug. 12, 2021), https://www.gsa.gov/travel/plan-book/per-diem-rates/frequently-asked-questions-per-diem; see also *Black's Law Dictionary* 1372 (11th ed. 2019) (defining "per diem," in relevant part, as "[a] monetary daily allowance, usu. to cover expenses; specif., an amount of money that a worker is allowed to spend daily while on the job, esp. on a business trip").

11. It also conflicts with an on-point Department of Labor regulation. 29 C.F.R. 778.217. Yet the Ninth Circuit gave more weight to its reading of the agency's admittedly nonauthoritative guidance than to the agency's duly promulgated regulations.

This doubly flawed approach calls out for swift correction. By departing from statute and regulation, the decision creates uncertainty, threatens employers with significant unanticipated overtime liabilities, and guarantees much future litigation over the nuances of different travel-reimbursement practices.

After all, it did not matter to the court's ruling that petitioner's per diem payments satisfied all three requirements imposed by the statutory text. The payments were made because respondents and similarly situated coworkers incurred travel expenses to further petitioner's business, the payments were reasonable in amount, and they covered properly reimbursable expenses.

What mattered to the Ninth Circuit, instead, were assorted details of petitioner's per diem practices that the Ninth Circuit chose to single out for criticism—like the fact that traveling employees who miss work receive reduced per diems and the fact that nontraveling employees receive per diems as part of their regular wages. Pet. App. 16-20. But unlike the court below, the statute and regulations do not evaluate whether an employer should have paid *greater* per diems to some traveling employees who missed work. They do not ask whether the employer should have paid *less* compensation to some nontraveling employees who are not parties to the

litigation. The Ninth Circuit found such details to be "central to this case." *Id.* at 4. But nothing in the statute or regulation warns employers that such details make a difference. The FLSA does not obligate employers to fully reimburse all traveling expenses or prohibit employers from raising the wages of employees who incur no traveling expenses. And in the next case, who knows what *other* details will prove decisive?

Because of its murkiness and lack of foundation, the Ninth Circuit's approach is sure to foster a whole cottage industry of per diem litigation. Litigants and judges will spill much ink debating the true metaphysical "function" of different per diem arrangements. The harm will be felt, and is already being felt, across many industries—not just healthcare. And the harm will not be limited to employers. It will also hurt employees. Employers may forgo nontaxable per diem benefits that employees would otherwise enjoy rather than deal with the threat of potential overtime litigation and liability. The Court should end the confusion here and enforce the letter of the law.

## ARGUMENT

### I. The Court should grant review because the Ninth Circuit's decision rewrites clear statutory and regulatory text.

Petitioner invokes the FLSA exclusion for "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 that employee's regular rate of pay. 29 U.S.C. 207(e)(2). By regulation, the Department of Labor has long recognized that this exclusion encompasses "[t]he actual or reasonably approximate amount expended by an employee, who is traveling 'over the road' on his employer's business, for transportation (whether by private car or common carrier) and living expenses away from home, other travel expenses, such as taxicab fares, incurred while traveling on the employer's business." 29 C.F.R. 778.217(b). And the Department even underscored that the GSA's CONUS rates for federal travelers are "per se reasonable, and not disproportionately large." 29 C.F.R. 778.217(c)(2). As petitioner explains (Pet. 18-20), the per diems that it paid to respondents and their traveling coworkers readily satisfy the plain language of these provisions.

But the Ninth Circuit brushed past this statutory and regulatory text in favor of an approach that asks how the payments "function." Pet. App. 9. It rooted that framework not in the statutory or regulatory text, but two other sources: Ninth Circuit precedent interpreting a different clause in Section 207(e)(2), and cases that follow the Department of Labor's nonbinding Field Operations Handbook and the FLSA's purported "animating concern." Pet. App. 12 (quoting *Newman* v. *Advanced Tech. Inc.*, 749 F.3d 33, 39 (1st Cir. 2014)); see also Pet. App. 9-16.

The Court should grant certiorari to make clear that glosses on different statutory provisions, nonauthoritative sub-regulatory guidance, and abstract legislative purpose cannot displace statutory and regulatory text.

### A. The Ninth Circuit erroneously focused on the statute's catchall clause.

"Statutory interpretation * * * begins with the text." *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016). The Ninth Circuit's statutory interpretation did not. Rather than dive into "the specific statutory language in dispute," *Murphy* v. *Smith*, 138 S. Ct. 784, 787 (2018), it immediately turned to two earlier Ninth Circuit cases interpreting *different* language in Section 207(e)(2). See Pet. App. 9.

The specific language in dispute is sandwiched between two other clauses. The first clause excludes payments for temporary nonworking periods (like vacation, holiday, or illness). 29 U.S.C. 207(e)(2). Next, the key language here excludes reasonable payments for properly reimbursable travel expenses. *Ibid.* Finally, a third clause excludes "other similar payments to an employee which are not made as compensation for his hours of employment." *Ibid.* In two earlier cases, the Ninth Circuit construed the third category for "other similar payments" by analyzing the "function" or "character" of the relevant payment. *Loc. 246 Util. Workers Union of Am.* v. *S. Cal. Edison Co.*, 83 F.3d 292, 295 (9th Cir. 1996); *Flores* v. *City of San Gabriel*, 824 F.3d 890, 899 (9th Cir. 2016).

The court below admitted that *Local 246* and *Flores* both addressed the "other similar payments" category, not the traveling-expenses category. Pet. App. 10. But without explanation, it declared that their "conclusion that a payment's *function* controls" applies here too. *Ibid.*

As petitioner explains (Pet. 20-21), this *ipse dixit* is untenable. The "other similar payments" clause is a residual or catchall provision. As such, its generalized description cannot trump the more specific language that precedes it. The Ninth Circuit's contrary assumption violates multiple canons of statutory construction:

*The General/Specific Canon.* To start, granting priority to the "other similar payments" clause violates the "commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted). This canon reflects the commonsense thought that "the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence." Antonin Scalia & Bryan A. Garner, *Reading Law* 183 (2012) (Scalia & Garner). And the canon applies not just when "a general permission or prohibition is contradicted by a specific prohibition or permission," but also when "a general authorization and a more limited, specific authorization exist side-by-side." *RadLAX*, 566 U.S. at 645. In such a case, the general language "must be taken to affect only such cases * * * as are not within the provisions of the particular" language. *Id.* at 646 (citation omitted); see also *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 589 n.6 (1980) ("[T]he general language of the catchall phrase, 'any other final action,' must obviously give way to specific express provisions in the Act."). It was error, then, to apply the standard for the general "other similar payments" clause to resolve this dispute over travel expenses.

*The Surplusage Canon.* Relatedly, giving primacy to the general provision improperly makes the specific one superfluous. See *RadLAX*, 566 U.S. at 645. On the Ninth Circuit's reading, Section 207(e)(2) should have had one clause rather than three, excluding "payments to an employee which are not made as compensation for his hours of employment." If the "function" test for the "other similar payments" clause is also the test for the more specific clauses, the latter serve no purpose. But "[a]s this Court has noted time and time again, the Court is 'obliged to give effect, if possible, to every word Congress used.'" *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 632 (2018) (citation omitted); see also Scalia & Garner 176 ("If a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision * * * and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred."). Here, one gives effect to all Congress's words by confining the "other similar payments" test to that category alone.

*The* Ejusdem Generis *Canon.* Another canon yields the same conclusion from another direction. "The *ejusdem generis* canon applies when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics." Scalia & Garner 199. The specific language appropriately "limits" the scope of the catchall "to ensure that a general word will not render specific words meaningless." *CSX Transp., Inc.* v. *Ala. Dep't of Rev.*, 562 U.S. 277, 295 (2011) (citation omitted). There is no authority for applying the canon in reverse—allowing the catchall to override the specific language. On the

contrary, doing that would create precisely the superfluity problem that *ejusdem generis* aims to avoid.

Under these settled principles, courts considering the first two Section 207(e)(2) categories should not ask whether the payments are "made as compensation for * * * hours of employment." For the first two statutory categories, that is the answer, not the question. If payments fit within either of the first two excluded categories, the statute tells us that they are not compensation for hours of employment.

And unsurprisingly, that is how the Department of Labor regulations understand the statute. A payment that meets the traveling-expense requirements is, by that very fact, "not compensation for services rendered by the employees during any hours worked in the workweek." 29 C.F.R. 778.217(a). The same conclusion follows for payments that fit within the first statutory category. See 29 C.F.R. 778.218(a), 778.219(a). Rather than look to these regulations, however, the Ninth Circuit turned to a regulation that interprets the "other similar payments" clause. Pet. App. 14 (citing 29 C.F.R. 779.224). That regulation, like the clause it interprets, is not pertinent here. The regulations in fact confirm that the Department of Labor does not read Section 207(e)(2) the way that the Ninth Circuit does. The agency instead recognizes that two specific statutory clauses identify distinct categories of payment that Congress judges not to be compensation for work. The Ninth Circuit erred by not giving effect to Congress's judgment.

### B. The Ninth Circuit improperly relied on the Department of Labor's Field Operations Handbook and on supposed legislative purposes.

The court of appeals claimed additional support for its "function" analysis in rulings from three other circuits and the Department of Labor's Field Operation Handbook. Pet. App. 11-16. But they do not provide valid support for the Ninth Circuit's approach.

As petitioner explains (Pet. 22-23), the Ninth Circuit's cited cases root their holdings in the Field Operations Handbook, which criticizes calculating per diem payments based on the number of hours worked. Two of the three cases offer no real explanation besides the Handbook for following that atextual principle. See *Gagnon* v. *United Technisource, Inc.*, 607 F.3d 1036, 1041 & n.6 (5th Cir. 2010) (citing the Handbook for the claim that "[t]he Department of Labor has recognized that when, as here, the amount of per diem varies with the amount of hours worked, the per diem payments are part of the regular rate in their entirety"); *Baouch* v. *Werner Enters., Inc.*, 908 F.3d 1107, 1117 (8th Cir. 2018) (citing the Handbook to support that "it is the method of calculating the per diem—the measuring unit used—that informs a determination regarding whether or not the Payment is treated as a wage included in the regular rate").

The one case that devotes more attention to the statute and regulations does not provide a persuasive justification, either. In *Newman*, the First Circuit veered off course thinking that FLSA exclusions should

"be interpreted narrowly against the employer." 749 F.3d at 36 (citation omitted). But this Court subsequently rejected this way of thinking because it rests "on the flawed premise that the FLSA pursues its remedial purpose at all costs." *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1142 (2018) (cleaned up). Without overt textual cues to the contrary, all provisions in the FLSA deserve a "fair reading" rather than a narrow one. *Ibid.*[3]

The First Circuit also appealed to the "animating concern of the FLSA statutes, regulations, and DOL Handbook." *Newman*, 749 F.3d at 39. But this approach likewise violates basic norms of interpretation. Courts should not presume "that whatever might appear to further the statute's primary objective must be the law." *Encino Motorcars*, 138 S. Ct. at 1142 (quoting *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017)). They should presume "that the legislature says what it means and means what it says." *Henson*, 137 S. Ct. at 1725 (cleaned up).

All these courts, like the Ninth Circuit below, err by citing the Department's Handbook as though it were a legal authority that can affect the meaning of the statute and regulations. This Court recently made clear, however, that only an "agency's 'authoritative' or 'official position'" deserves a court's deference. *Kisor* v. *Wilkie*,

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[3] The Ninth Circuit paid lip service to the Court's instruction in *Encino Motorcars*. Pet. App. 8. But faithful adherence to *Encino Motorcars* would have led the court to view *Newman*'s analysis more skeptically. Instead, the Ninth Circuit repeatedly cited *Newman* as support for its approach. *Id.* at 8, 11-12, 16.

139 S. Ct. 2400, 2416 (2019) (citation omitted). Deference is not proper when an agency has itself "disclaimed the use of regulatory guides as authoritative." *Id.* at 2417 (quoting *Exelon Generation Co.* v. *Local 15, IBEW*, 676 F.3d 566, 577 (7th Cir. 2012)). That aptly describes the Handbook. According to the Department, the Handbook guides the agency's "investigators and staff" but is not "a device for establishing interpretative policy." Wage & Hour Div., U.S. Dep't of Labor, *Field Operations Handbook* (Aug. 31, 2017), https://www.dol.gov/agencies/whd/field-operations-handbook. Because the Department "itself has disclaimed" using the Handbook as a source of "authoritative or binding interpretations of its own rules," courts should not defer to its provisions. *Exelon Generation*, 676 F.3d at 577.

Courts should be extremely reluctant to defer to administrative materials that the agency developed outside the procedures of notice-and-comment rulemaking. See *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 587 (2000) ("[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law[,] do not warrant *Chevron*-style deference."). Those procedures embody Congress's "judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 316 (1979). When the legislative and rulemaking processes work well, they give stakeholders a chance to weigh in with their own experiences,

information, and arguments, improving the ultimate result and promoting regulated parties' compliance with the regulatory requirements. These procedures also reinforce the "fundamental principle in our legal system * * * that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Courts defeat these objectives when they give weight to policies that administrative agencies develop outside an open and transparent regulatory process. It is even worse when those policies are not even meant to be authoritative statements of the agency's legal interpretation. And worse still when those policies have no basis in the applicable statutory or regulatory text.

Employers and employees benefit when laws are clear and predictable. Courts should resist any temptation to let informal, nonauthoritative agency views override statute and regulation.

### C. The Ninth Circuit fixed on random details that are irrelevant under the statute and regulation.

All that is bad enough, but the Ninth Circuit's decision did not simply stop with the Handbook's idea that per diem amounts should not be based on the number of hours worked. That is because not even the Handbook adheres to such a simplistic approach. Everyone agrees that there is nothing inherently wrong about reducing a traveling-expense reimbursement if the employee's nonperformance of work means that the employee is not incurring reimbursable travel expenses "in the furtherance of his employer's interests." 29 U.S.C. 207(e)(2).

As petitioner describes (Pet. 25-27), this practice can align the FLSA with applicable federal tax law.

Because of this wrinkle, the Ninth Circuit understood it could not categorically condemn all per diem reductions when employees miss shifts. So it flyspecked petitioner's per diem practices through a totality-of-the-circumstances lens and concluded that, in "combination," several details made the per diems problematic. Pet. App. 19.

But the details that the court highlighted do not place these per diems outside the statutory exclusion. Consider, first, the Ninth Circuit's observation that petitioner may pay a full week's worth of per diems even when traveling clinicians work three twelve-hour shifts. Pet. App. 16. The Ninth Circuit acknowledged, however, that this practice is "justifiable because the clinicians are scheduled to work away from home for a prolonged period" and thus continue to incur travel expenses throughout the week. *Id.* at 16-17. Still, even though this part of petitioner's practices was justifiable, the Ninth Circuit transformed it into an obligation that petitioner also pay traveling clinicians for nonworking days if they have good enough reasons for missing work. *Id.* at 17. Being "too ill to work" was a good reason, and so the Ninth Circuit decided that sick days should not jeopardize any part of the clinician's weekly per diem. *Ibid.* That may be a good policy, and an employer could reasonably distinguish between traveling employees who miss work because of illness and those who miss work because of personal preference. But the FLSA's

traveling-expenses exclusion does not *require* that distinction. It does not forbid treating payments to Employee A as reimbursement for travel expenses just because the employer has reduced payments to Employee B. The exclusion confines reimbursement to employees who incur traveling expenses; it does not penalize employers who under-reimburse such expenses.

The Ninth Circuit next expressed dissatisfaction because petitioner did *not* reduce per diem payments to employees who missed work in one week but had worked more than the required amount in another week. Pet. App. 17. Here too, though, the Ninth Circuit's reasoning finds no support in the statutory or regulatory language. If the employees are still incurring travel expenses in the employer's interest, if the amount is reasonable, and if the expenses are properly reimbursable, the payments are still excluded from the regular rate of pay. 29 U.S.C. 207(e)(2). In any event, the Ninth Circuit erred in thinking that the only reason an employer would have this "banking" system would be to compensate employees for total hours worked. Pet. App. 17. Employers could easily conclude that a degree of scheduling flexibility is best for business and best for employees.

Finally, the Ninth Circuit found it significant and "perhaps most telling[]" that petitioner pays per diems as regular wages to employees who live near work and thus do not incur traveling expenses. Pet. App. 18. But again, it is impossible to find textual support for the idea that payments to nontravelers affect whether the payments to travelers satisfy the statutory criteria. For the

traveling employees, the per diems are still reasonable in amount and still pay for traveling expenses that are incurred for the employer's benefit and properly reimbursable. Any payments to other employees are irrelevant.

In fact, another court of appeals has rejected this very argument. See *Berry* v. *Excel Grp., Inc.*, 288 F.3d 252, 253-254 (5th Cir. 2002). The plaintiff there insisted that per diems were not excludable reimbursements because the employer "offered the same per diem to all electricians, no matter where they lived." *Id.* at 253. In other words, and as here, some employees receiving per diems did not incur travel expenses. Even so, the Fifth Circuit recognized that those employees' payments could not change the fact that the "per diem paid to [the plaintiff] was reasonable and appropriate" under "the language of the FLSA itself and the related regulations." *Id.* at 254. The Ninth Circuit's approach here conflicts with the Fifth Circuit's approach in *Berry*. Such inter-circuit disagreement heightens the need for this Court's review.

The Ninth Circuit's willingness to stray from the statutory and regulatory text will cause much mischief. Under the court's decision, other employers (and employees) are left to guess at the particular features of their expense-reimbursement arrangements that might sway a future court in one direction or another. One point of contention is likely to be whether employees must submit paperwork attesting to their expenses, which the Ninth Circuit listed as another important consideration. Pet. App. 11. But that too is a requirement

that lacks support in the statutory and regulatory scheme. After all, the whole reason for using per diem allowances is that they are "reasonably approximate" amounts of what an employee would spend while traveling, 29 C.F.R. 778.217(b)(3), and obviate the need for documentation. And the Department of Labor presumably treats the federal government's CONUS rates as "per se reasonable" for similar reasons. 29 C.F.R. 778.217(c)(2). Requiring receipts or other attestation defeats the point of these arrangements.

In the end, the Ninth Circuit's "function" framework functions an awful lot like an "I know it when I see it" test. For those who must operate and live within the FLSA's framework, such a test is no test at all. Employers large and small will be left with uncertainty over whether their practices comply with the law or leave them open to litigation and liability. Employers, like everyone else, must be able to depend on the plain terms of the governing statutes and regulations.

## II. The Court should grant review because the Ninth Circuit's decision threatens unwarranted litigation and liability across many industries.

The effects of the Ninth Circuit's flawed approach will not be confined to this case or industry. Petitioner and amicus National Association of Travel Healthcare Organizations detail how the decision below upends common practices in the healthcare industry, which extensively depends on the services of traveling professionals. And there has indeed been a wave of overtime

litigation over per diem practices within the healthcare industry.[4]

But the healthcare industry will not be the only industry harmed by the Ninth Circuit's ruling. Countless businesses depend on the ability to recruit nonpermanent workers from other geographic areas. The construction-related fields, for example, have long recruited skilled talent to work for defined periods at particular jobsites, and unsurprisingly they have faced their own overtime litigation based on per diem practices.[5]

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[4] See, *e.g.*, *Madison* v. *Onestaff Med. Ltd. Liab. Co.*, No. 20-cv-1384, 2021 WL 3674736 (E.D. Cal. Aug. 19, 2021); *Hubbard* v. *RCM Techs. (USA), Inc.*, No. 19-cv-6363, 2020 WL 6149694 (N.D. Cal. Oct. 20, 2020); *Howell* v. *Advantage RN, LLC*, No. 17-cv-883, 2020 WL 5847565 (S.D. Cal. Oct. 1, 2020); *Musgrove* v. *Jackson Nurse Pros., LLC*, No. 17-cv-6565, 2020 WL 6804510 (C.D. Cal. Sept. 27, 2020); *Carlino* v. *CHG Med. Staffing, Inc.*, 460 F. Supp. 3d 959, 961 (E.D. Cal. 2020); *Schwendeman* v. *Health Carousel, LLC*, No. 18-cv-7641, 2019 WL 6173163 (N.D. Cal. Nov. 20, 2019); *Dittman* v. *Med. Sol., L.L.C.*, No. 17-cv-1851, 2019 WL 4302752, at *1 (E.D. Cal. Sept. 11, 2019); *Howell* v. *Advantage RN, LLC*, 401 F. Supp. 3d 1078, 1081 (S.D. Cal. 2019); *Benson* v. *Maxim Healthcare Servs., Inc.*, No. 17-cv-771, 2018 WL 5829312 (E.D. Cal. Nov. 7, 2018); *Dalchau* v. *Fastaff, LLC*, No. 17-cv-1584, 2018 WL 1709925, at *12 (N.D. Cal. Apr. 9, 2018).

[5] See, *e.g.*, *Stone* v. *Troy Constr., LLC*, 935 F.3d 141 (3d Cir. 2019); *Berry*, 288 F.3d 252; *Hobbs* v. *Petroplex Pipe & Constr., Inc.*, 360 F. Supp. 3d 571 (W.D. Tex. 2019), *aff'd*, 946 F.3d 824 (5th Cir. 2020); *Ruiz* v. *Masse Contracting, Inc.*, No. 18-cv-5721, 2019 WL 2451628 (E.D. La. June 12, 2019); *Atkins* v. *Primoris Serv. Corp.*, No. 17-cv-454, 2017 WL 4697517 (W.D. La. Oct. 19, 2017), *report & recommendation adopted*, 2018 WL 11239722 (W.D. La. Mar. 21, 2018); *Rule* v. *S. Indus. Mech. Maint. Co., L.L.C.*, No. 16-cv-1408,

Similar litigation has also targeted employers who recruited traveling engineers, *Newman*, 749 F.3d 33, airplane painters, *Gagnon*, 607 F.3d 1036, and seismic-mapping specialists, *Sharp* v. *CGG Land (U.S.) Inc.*, 840 F.3d 1211 (10th Cir. 2016).

This trend of relying on nonlocal talent shows no sign of reversing course. On the contrary, skilled workers are increasingly scarce in the current labor market. The construction industry, as just one example, "lost one million workers" at the start of the pandemic and "has yet to win back a fifth of the workers who left or were laid off."[6] This industry alone must "hire more than 430,000 workers this year to meet demand."[7] And it must hire "1 million more over the next two years"—all at a time when more skilled workers are leaving the market than entering it.[8] Other industries that depend

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2017 WL 944217 (W.D. La. Mar. 6, 2017), *report & recommendation adopted*, 2017 WL 1483342 (W.D. La. Apr. 24, 2017).

[6] Heather Schlitz, *The Construction Industry's Labor Shortage Forced One Business Owner to Raise Hourly Wages to $25 and Pay $250 Bonuses for Working at Least 30 Days*, Business Insider (July 8, 2021, 3:32 PM), https://www.businessinsider.com/construction-labor-shortage-raises-wages-and-benefits-2021-7.

[7] *Ibid.*; see also Associated Builders & Contractors, *The Construction Industry Needs to Hire an Additional 430,000 Craft Professionals in 2021*, ABC.org (Mar. 23, 2021, 4:25 PM), https://www.abc.org/News-Media/News-Releases/entryid/18636/abc-the-construction-industry-needs-to-hire-an-additional-430-000-craft-professionals-in-2021.

[8] Vanessa Yurkevich, *America Desperately Needs 1 Million More Construction Workers*, CNN Business (July 11, 2021, 6:36

on skilled labor face similar problems. There is a "broad consensus" right now "that some sectors of the economy—technology, health care and tech-adjacent businesses such as insurance—face a genuine dearth of qualified talent."[9]

In this environment especially, per diems and similar reimbursements for traveling expenses are increasingly important recruitment tools. Companies simply cannot count on being able to find skilled labor within the same state.[10] But consultants advise such companies

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PM ET), https://www.cnn.com/2021/07/08/economy/construction-worker-shortage/index.html.

[9] Levi Pulkkinen, *Facing Skilled Worker Shortage, U.S. Companies Try to Train Their Own New Labor Pools*, PBS News Hour (July 1, 2021, 5:58 PM EDT), https://www.pbs.org/newshour/education/facing-skilled-worker-shortage-u-s-companies-try-to-train-their-own-new-labor-pools; see also *U.S. Skilled Trades Labor Shortage Heightens as In-Demand Jobs Remain Unfilled the Longest*, Business Wire (Mar. 18, 2021, 6:00 AM EDT), https://www.businesswire.com/news/home/20210318005265/en/U.S.-Skilled-Trades-Labor-Shortage-Heightens-as-In-Demand-Jobs-Remain-Unfilled-the-Longest ("[T]he number of skilled trade jobs in the U.S. is far outpacing the supply of qualified workers to fill them.").

[10] South Bay Constr., *The California Labor Shortage Explained*, SBCI.com, https://www.sbci.com/the-california-labor-shortage-explained (noting that even before the pandemic, construction "companies have been bringing in workers from out-of-state to meet demand.").

that being "willing to pay workers a per diem to travel from home" can help them attract that needed talent.[11]

For such businesses, the Ninth Circuit's decision comes at the worst time and puts them in an impossible position. Even amid industry-wide labor shortages, there is no reasonable way to make a cost-benefit determination about whether to resort to per diems and traveling-worker recruitment without a confident prediction about whether doing so increases those workers' regular rate of pay for overtime purposes or opens the employer to overtime litigation. Employers who want to comply with the FLSA and compete for out-of-state talent simply must guess at the level of legal risk that comes with their recruitment strategy. And the Ninth Circuit's malleable and ungrounded multifactor standard gives prediction-makers little cause for confidence.

Facing this predicament, some employers will choose simply to eliminate per diems or treat them as taxable wages to avoid legal risk. That result is not good for anyone, as it limits employers' ability to fill vacancies and limits employees' ability to receive nontaxable benefits to cover temporary relocation expenses. See Pet. 3, 34.

This Court should end this harmful uncertainty now. It should reaffirm the primacy of the legal texts enacted into law through bicameralism and presentment and regulations duly promulgated through notice

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[11] See, *e.g.*, Matt Rascon & Shelby Hintze, *A Deeper Look at "Where Are the Workers?,"* KSL TV (Oct. 8, 2021, 1:35 PM), https://ksltv.com/474096/ksl-a-deeper-look-at-where-are-the-workers/.

and comment. The Ninth Circuit strayed from the governing legal texts here, and this Court should grant review and reverse.

## CONCLUSION

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

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