No. 21-296

In The Supreme Court of the United States

AMN SERVICES, LLC,

Petitioner,

v.

VERNA MAXWELL CLARKE and LAURA WITTMANN, 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

BRIEF OF TRAVELTAX LLC AND JOSEPH C. SMITH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae TravelTax LLC and Joseph C. Smith are uniquely positioned to highlight for the Court the profoundly negative real-world impacts the Ninth Circuit's decision will have on traveling healthcare providers, or "travelers."

Mr. Smith is a former traveling respiratory therapist with undergraduate degrees in Respiratory Therapy and Accounting and a graduate degree in Taxation. As a traveler in the early 1990's, he prepared tax returns for several other travelers. He began to appreciate and develop an expertise in the unique taxation issues faced by people who work in multiple states and who rely on per-diem reimbursements to cover travel expenses, such as meals and lodging, when working away from home.

Mr. Smith built TravelTax into a company serving more than 3000 traveling employees in the United States and Canada. TravelTax advises these individuals, including many traveling healthcare workers, on the complicated tax issues travelers face. Its services include advising travelers on the taxation requirements for per-diem reimbursements they receive in connection with their work as travelers.

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[1] Rule 37 Statement: All parties were given timely notice and provided written consent to the filing of this brief. No party or party's counsel authored this brief in whole or in part. No person other than *amici*, their members, or their counsel contributed money to fund its preparation or submission.

Since 2003, Mr. Smith has been a federally-licensed enrolled agent, giving him the ability to represent his clients before the Internal Revenue Service ("IRS") and state taxing authorities.[2] Mr. Smith regularly writes about tax issues, including issues related to per-diem policies, in various healthcare-travel publications that are widely read by travelers and industry professionals.[3] Since 2016, Mr. Smith has co-authored several iterations of *Highway Hypodermics: Travel Nursing*, a biannual publication. *See*, *e.g.*,

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[2] "Enrolled agent status is the highest credential the IRS awards." Internal Rev. Serv., https://www.irs.gov/tax-professionals/enrolled-agents/enrolled-agent-information (last visited Oct. 13, 2021).

[3] *See*, *e.g.*, Joseph C. Smith, *10 Most Asked Tax Questions of Travel Nurses*, The Gypsy Nurse, Feb. 16, 2019, https://www.thegypsynurse.com/blog/10-asked-tax-questions-travel-nurses/; Joseph C. Smith, *Another Tax Year Upon Us: Tax Tips for Travel Nurses*, The Gypsy Nurse, Dec. 16, 2019, https://www.thegypsynurse.com/blog/another-tax-year-upon-us-tax-tips-for-travel-nurses/; Joseph C. Smith, *What are Per Diems?*, The Gypsy Nurse, Oct. 21, 2015, https://www.thegypsynurse.com/blog/what-are-per diems/; Joseph C. Smith, *How to Do Your Travel Nurse Taxes in 2020: An Interview with Joseph Smith, Founder of TravelTax*, TotalMed Blog, March 29, 2020, https://totalmed.com/2020/03/29/travel-nurse-taxes-2020-an-interview-with-joseph-smith-founder-of-traveltax/; Joseph C. Smith, *I'm Taking a Crisis Contract—How Does That Affect my Taxes*, TravelTax, April 7, 2020, https://traveltax.wordpress.com/2020/04/07/im-taking-a-crisis-contract-how-does-that-affect-my-taxes/; Joseph C. Smith, *It took 8 years, but the IRS finally updated the Per Diem Rules!*, TravelTax, Nov. 26, 2019, https://traveltax.wordpress.com/2019/11/26/it-took-8-years-but-the-irs-finally-updated-the-per diem-rules/; Joseph C. Smith, *Tax Compliance Issues During Pandemic—12 Month rule*, TravelTax, Jan. 8, 2021, https://traveltax.wordpress.com/2021/01/08/tax-compliance-issues-during-pandemic-12-month-rule/.

Epstein Larue, Joseph C. Smith & Aaron Highfill, *Highway Hypodermics: Travel Nursing 2019* (2018). TravelTax maintains and frequently updates its own blog dedicated to traveler industry issues. Mr. Smith and TravelTax are also cofounders of an annual convention attended by nearly 1,500 healthcare travelers.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision has serious real-world consequences for travelers that put in jeopardy the entire travel-provider model.[4] For decades, this model has been a shock-absorber within this country's healthcare system by funneling staff to geographic areas in need. The COVID-19 pandemic has magnified its shock-absorbing effect as travelers have provided crucial support to permanent hospital staff in hard-hit areas.

Most travelers cannot afford to maintain their home residences and pay for living expenses while they work away from home for weeks or months at a time. Staffing companies thus provide per-diem reimbursements to travelers for these expenses under what the IRS calls "accountable plans." Amounts paid to employees under accountable plans are not taxable income if: (1) the expenses reimbursed have a business purpose, (2) are substantiated, and (3) the employees must return any payments exceeding their expenses.

[4] The Ninth Circuit's opinion is reported at 987 F.3d 848 and reproduced at Petitioner's App.1–20.

Through various IRS rulings and procedures, travelers generally find it easy to meet these requirements, and thus per-diem reimbursements typically are not taxed.

To meet the business-purpose requirement, staffing companies commonly reduce per-diem reimbursements to travelers when travelers miss a shift. This reduction is to acknowledge that a portion of the traveler's living expenses for the relevant period were personal to the traveler rather than for a business purpose.

The Ninth Circuit cited these reductions as evidence that per-diem reimbursements are "wages" under the Fair Labor Standards Act ("FLSA"). In doing so, the Ninth Circuit's decision creates a conundrum for travelers: On the one hand, if such payments are "wages" rather than reimbursements, they are taxable. On the other hand, if staffing companies choose *not* to make such pro-rata reductions in per-diem payments, and instead pay per diems to travelers regardless of shifts worked, then they risk that the IRS will find an insufficient business purpose because the traveler would receive an entire week's worth of per diems regardless of shifts worked. Compounding the problem, under the Income Tax Regulations[5] accountable plans are "all or nothing": if one reimbursement paid to a traveler does not meet the accountable plan criteria, then the traveler loses tax-exempt status for *all* the reimbursements paid under that plan. Thus, by

[5] This brief refers to the Income Tax Regulations, 26 C.F.R. §§1.01–1.552-1, as the "Regulations."

jeopardizing staffing companies' ability to make such pro-rata reductions for missed shifts, the Ninth Circuit's decision jeopardizes tax-free treatment for *all* per-diem reimbursements paid to travelers.

If the law treats per diems as wages, the economic reality for most travelers will change dramatically. Most travelers will end up taking home *less* money if per-diem reimbursements are taxable income. Some travelers could be pushed into higher tax brackets. These financial consequences will disincentivize clinicians from mobilizing to critical staffing areas because they will not be completely reimbursed for their duplicated living expenses—a disincentive that can only have negative repercussions to the healthcare industry by worsening the staffing shortage and increasing costs.

Though the Respondents' purported goal is to benefit travelers by boosting the regular rate under the FLSA, the net effect will harm travelers as a whole. Because the Ninth Circuit's decision ignores these real-world impacts, *amici* urge this Court to hear this case on the merits.

ARGUMENT

I. Travelers Fill a Critical Role Within the Healthcare System.

For decades, hospitals and other healthcare facilities have struggled to obtain adequate staffing levels.

The nursing and physician shortage is well documented. Alexandra Robbins, *We Need More Nurses*, N.Y. Times, May 28, 2015;[6] Am. Ass'n of Colleges of Nursing, *Fact Sheet: Nursing Shortage*;[7] Lisa M. Haddad, Pavan Annamaraju & Tammy J. Toney-Butler, *Nursing Shortage*, Nat'l Center for Biotechnology Information, Dec. 14, 2020;[8] U.S. Bureau of Labor Statistics, *Occupational Outlook Handbook—Registered Nurses*;[9] Ass'n of Am. Med. Colleges, *The Complexities of Physician Supply and Demand: Projections from 2018 to 2033*, June 2020. In the hospital setting, demand fluctuates rapidly and often unexpectedly based on the number of patients admitted and served. Permanent-staff illness, maternity and other medical leaves, seasonal illness, natural disasters, local unrest, outbreaks of violence, the localized spread of contagions, and even seasonal travel frequently cause fluctuations in staffing needs. Likewise, staffing needs within hospitals fluctuate as the facility reacts to the ebb and flow within its various departments. Travelers are the primary way that our healthcare system reacts to these fluctuations, and these workers offer hospitals flexibility they cannot achieve otherwise.

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[6] *Available at* https://www.nytimes.com/2015/05/28/opinion/we-need-more-nurses.html.

[7] *Available at* https://www.aacnnursing.org/news-information/fact-sheets/nursing-shortage (last visited Oct. 5, 2021).

[8] *Available at* https://www.ncbi.nlm.nih.gov/books/NBK493175/.

[9] *Available at* https://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-6.

While the United States faces a nationwide shortage in the best of times, the COVID-19 pandemic has underscored the staffing shortage as nurses, physicians, and ancillary staff have been stretched to, and in many cases beyond, the breaking point. Jenny Gross, *Hundreds of Miles from Home, Nurses Fight Coronavirus on New York's Front Lines*, N.Y. Times, April 28, 2020;[10] Lianna M. McLernon, *COVID-related nursing shortages hit hospitals nationwide*, Univ. of Minn. Center for Infectious Disease Research & Policy, Nov. 30, 2020;[11] Heiwen Xu, Orna Intrator & John Bowblis, *Shortages of Staff in Nursing Homes During the COVID-19 Pandemic: What are the Driving Factors*, 21(10) J. Am. Med. Dir. Ass'n 1371, 1372 & 1376 (2020). Simply put, there are not enough nurses, physicians, therapists, and support staff to meet the demand placed on the system even during times of relative calm, and much less so in the event of local, regional, or national emergencies. Sue Turale & Apiradee Natsupawat, *Clinician Mental Health, Nursing Shortages and the COVID-19 Pandemic: Crises within crises*, 68 Int'l Nursing Rev. 12, 12–14 (2021). This trend continues. *Hospitals Face a Shortage of Nurses as COVID Cases Soar*, npr.org, Aug. 10, 2021;[12] Rebecca Wolfson, *California Faces Short-Term Nursing Shortage from*

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[10] *Available at* https://www.nytimes.com/2020/04/28/nyregion/nurses-coronavirus.html.

[11] *Available at* https://www.cidrap.umn.edu/news-perspective/2020/11/covid-related-nursing-shortages-hit-hospitals-nationwide.

[12] *Available at* https://www.npr.org/2021/08/10/1026577164/hospitals-face-a-shortage-of-nurses-as-covid-cases-soar.

COVID-19 Retirements, Univ. Calif., S.F., Sept. 6, 2021.[13]

Against that backdrop, the healthcare staffing industry has evolved over decades as a reservoir of available healthcare providers. It now serves as a critical relief valve that mobilizes large numbers of skilled healthcare workers. *See*, *e.g.*, Hannah Sampson, *Travel nurses typically see the country. During the last year, many saw the worst of the pandemic.*, Wash. Post., March 8, 2021;[14] Julie Bosman, *As Hospitals Fill, Travel Nurses Race to Virus Hotspots*, N.Y. Times, Dec. 2, 2020;[15] CBS News, *Overwhelmed hospitals rush to hire travel nurses: "We're getting hit pretty hard,"* Dec. 29, 2020.[16] Travelers balance the available staff across the country by making qualified individuals available in areas where the demand for care is higher, or the supply of clinicians is lower, in an astonishingly short time.

The capability of the industry, and of the nurses and other healthcare professionals it employs, has never been more on display than during the current COVID-19 pandemic, which saw record numbers of clinicians mobilized across the country. Those travelers

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[13] *Available at* https://www.ucsf.edu/news/2021/09/421366/california-faces-short-term-nursing-shortage-covid-19-retirements.

[14] *Available at* https://www.washingtonpost.com/travel/2021/03/08/travel-nurse-covid-pandemic/.

[15] *Available at* https://www.nytimes.com/2020/12/02/us/covid-travel-nurses.html.

[16] *Available at* https://www.cbsnews.com/news/overwhelmed-hospitals-hire-travel-nurses/.

have lessened the grave impact of the pandemic on the healthcare system by quickly and efficiently moving to locations with the most critical need. Thus, now more than ever before, travelers fill a vital role in our country.

II. Tax-Exempt Per-Diem Reimbursements Are Crucial to the Travel Healthcare Industry.

Temporary staffing agencies typically provide travelers with per-diem reimbursements to offset their housing and meal expenses while they are on assignment away from home. These reimbursements generally are not taxable because staffing companies pay them in accordance with IRS rules and regulations regarding "accountable plans." Importantly, and as explained below, the mechanics of how staffing companies pay per diems are crucial to travelers' willingness to participate in the travel healthcare industry.

A. Travelers typically receive per-diem payments that are not taxable as income because they are amounts paid under an arrangement the IRS refers to as an "accountable plan."

Travelers generally receive per-diem reimbursements from staffing agencies for their housing and meal expenses.[17] These per diems (also called

[17] Staffing companies typically pay per diems to travelers based on the federal government's locality-based Continental

"stipends," "allowances," or "subsidies") offset the significant cost for temporary lodging, meals, and in some cases travel while the clinician is on assignment. Without these per-diem reimbursements, travelers would need to pay not only their own rent or mortgage and other fixed expenses at home, but also personally cover the cost of their lodging and meals while traveling for work. Without these reimbursements, most clinicians who work as travelers could not afford to do so.

Generally, reimbursements that employees receive for business-related travel expenses are tax-exempt, provided certain criteria are met. 26 U.S.C. §62(a)(2)(A) (stating that "'adjusted gross income' means, in the case of an individual, gross income minus . . . deductions . . . which consist of expenses paid or incurred by the taxpayer, in connection with the performance of him of services as an employee, under a *reimbursement or other expense allowance arrangement* with his employer" (emphasis added)). The Regulations more specifically provide that if a reimbursement arrangement satisfies certain criteria, then "all amounts paid under the arrangement are treated as paid under" what the Regulations call "an *'accountable plan*.'" 26 C.F.R. §1.62-2(c)(2)(i) (emphasis added). The Regulations are clear that:

> *Amounts treated as paid under an accountable plan are excluded from the employee's gross income*, are not reported as wages or

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United States ("CONUS") rates set by the General Services Administration for federal-government travelers.

> other compensation on the employee's Form W-2, and are exempt from the withholding and payment of employment taxes (Federal Insurance Contributions Act (FICA), Federal Unemployment Tax Act (FUTA), Railroad Retirement Tax Act (RRTA), Railroad Unemployment Repayment Tax (RURT), and income tax.)

Id. §1.62-2(c)(4) (emphasis added).

According to the Regulations, there are three basic requirements for an arrangement to qualify as an accountable plan. 26 C.F.R. §1.62-2(c)(2) (if an arrangement satisfies the requirements of §1.62-2(d), (e), and (f), "all amounts paid under the arrangement are treated as paid under an 'accountable plan'"). First, the arrangement must provide reimbursement payments only for expenses that have a business connection. *Id.* §1.62-2(d)(1). Second, those expenses must be properly substantiated. *Id.* §1.62-2(e)(1). Third, the arrangement must require the employee to return reimbursement payments if they exceed the employee's expenses. *Id.* §1.62-2(f)(1). Per-diem payments to traveling nurses generally satisfy each of these three exceptions.

Business Connection. Payments under an accountable plan have a business connection when they are made "only for business expenses that are allowable as deductions by [26 U.S.C. §161 *et seq.*], and . . . 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). Allowed deductions

for business expenses include "traveling expenses . . . including amounts expended for meals and lodging . . . while away from home in the pursuit of a trade or business." 26 U.S.C. §162(a)(2). Per diems paid by staffing agencies to travelers for their expenses when they are traveling on assignment generally have the requisite "business connection," because the traveler is away from home to fulfill the employer's assignment. To ensure that per-diem payments to travelers have a business connection, most staffing companies' policies reduce (or do not pay) a portion of the traveler's per-diem reimbursement when a traveler calls off a shift and therefore is not engaged in the employer's business.

Substantiation. The Regulations generally require employees to keep and submit detailed records of their incurred expenses to document the nature of the expense. 26 C.F.R. §1.62-2(e)(1) (substantiation requirement). Recognizing the extreme record-keeping burden this documentation may impose, particularly for employees away on assignment for weeks or even months, the IRS allows reimbursements to be made by per-diem payments without substantiation. For those employees reimbursed for "expenses using a per diem . . . , [the employee] can generally use the allowance as proof for the amount of [their] expenses." Internal Rev. Serv., Publication 463, Travel, Gift, and Car Expenses, Adequate Accounting (2020). Thus, the IRS does not require employees reimbursed with a reasonable per diem to account for each individual expense incurred to satisfy the requirements of an accountable

plan. *See* 26 C.F.R. §1.62-2(f)(2); Rev. Proc. 2019-48, 2019-51 I.R.B. 1394–95.

Per-diem reimbursements paid to travelers typically satisfy these criteria because most staffing companies pay per diems based on the federal government's locality-based CONUS rates. The General Services Administration sets the CONUS rates to provide "fair and equitable" daily allowances "for lodging (excluding taxes), meals and incidental expenses" "based upon contractor-provided average daily rate (ADR) data." U.S. Gen. Servs. Admin., Frequently Asked Questions, Per Diem.[18] The IRS requires employees receiving per diems to simply provide their employer with information sufficient to prove the dates, place, and business purpose of their expenses. *See* Rev. Proc. 2019-48, 2019-51 I.R.B. 1398; Internal Rev. Serv., Publication 463, Travel, Gift, and Car Expenses, Adequate Accounting (2020) (Accountable Plans, Example 1). The IRS regards the *amount of per-diem payments to the traveler*—made based on the traveler's limited substantiation to their employer—*as equivalent to the traveler having fully substantiated the amount of expenses they incurred while traveling*. Rev. Proc. 2019-48, 2019-51 I.R.B. 1394–95. The laws governing accountable plans thus create a system in which travelers may legally receive tax-exempt reimbursements from their employer for their traveling expenses without keeping detailed records of those expenses.

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[18] *Available at* https://www.gsa.gov/travel/plan-book/per diem-rates/frequently-asked-questions-per diem.

Return Excess Payments. Finally, per-diem expense arrangements between staffing companies and travelers typically satisfy the requirement that employees return reimbursement payments that exceed their expenses. Again, the rules governing accountable plans recognize that it may be unduly burdensome for employees to carefully track their expenses when traveling. Thus, in certain circumstances, the IRS treats arrangements providing per-diem allowances as satisfying the requirement of returning amounts that exceed expenses, regardless of whether the payments exceed the employee's actual expenses.

Specifically, for employees that receive per-diem reimbursements for "substantiated travel days"—i.e., travel days that the employee has substantiated to their employer by accounting for the date, place, *and business purpose* of their expenses—the employee need not return the portion of their per-diem allowance that exceeds the deemed substantiated amount for those days, *if* the employer's plan provides a per-diem allowance at a rate reasonably calculated not to exceed the amount of the employee's expenses or anticipated expenses,[19] *and* provided that the employee must return any portion of the allowance that relates to "unsubstantiated travel days." Rev. Proc. 2019-48, 2019-51 I.R.B. 1394–95 ("If a payor pays a per diem allowance in lieu of reimbursing actual lodging, meal, and incidental expenses incurred or reasonably anticipated to

[19] Of course, staffing agencies generally satisfy this requirement by using the federal government's published CONUS rate to set the per-diem reimbursement rate.

be incurred by an employee for travel away from home, the amount of the expenses that is deemed substantiated for each calendar day is equal to the lesser of the per diem allowance for that day or the amount computed at the federal per diem rate. . . ."), 1397 ("A receipt for lodging expenses is not required in determining the amount of expenses deemed substantiated at the federal per diem rate (including lodging, meal, and incidental expenses in one rate) under section 4.01"), 1398 (describing accounting and substantiation requirements, and providing examples); *see also* Internal Rev. Serv., Publication 463, Travel, Gift, and Car Expenses, Adequate Accounting (2020) (Accountable Plans, Example 1). This rule simplifies the reimbursement process for travelers, as it excuses travelers from carefully tracking, documenting, submitting, and potentially refunding reimbursement payments for every single expense they incur while traveling away from home for weeks or months at a time.

In short, if the employee can account to the employer for the elements of time, place, *and business purpose* of the travel, then the employee has no obligation to keep detailed records, and there is no amount for the employee to return to the employer. However, the Regulations specify that the employer's per-diem plan must *require* the employee to return portions of the per diem for days where the employee cannot establish the requisite business purpose. Simply put, when the traveler misses a shift for a non-business reason, then the Regulations require the employee to "return any portion of the allowance that relates to

'unsubstantiated travel days.'" Rev. Proc. 2019-48, 2019-51 I.R.B. 1394–95.

B. Tax-exempt per-diem payments to travelers are critical to travelers and thus to the traveling healthcare industry.

The tax-exempt payments travelers receive under accountable plans provide a strong incentive for clinicians to work as travelers for at least two related reasons. First, the streamlined process for receiving these reimbursements as per diems, which does not require travelers to track and account to their employer or the IRS for each cost incurred during a potentially lengthy trip away from home, makes it logistically feasible for clinicians to work as travelers. This is particularly true when one considers that many travelers work multiple assignments per year for multiple facilities—often in different states.

Second, these per-diem payments' exempt status helps to ensure that travelers are fully reimbursed for their reasonable expenses while traveling for work. If these amounts were taxed, travelers would not receive full reimbursement for their meal and lodging expenses. A specific example helps illustrate this point. The General Services Administration's published daily per-diem rate for Los Angeles for 2021 is $182 per day for lodging. U.S. Gen. Servs. Admin., FY 2021 Per Diem Rates for Los Angeles, California. If a clinician spent $182 on lodging per night in Los Angeles for 30 days, the traveler would spend $5,460 on lodging for the

month. The accountable plan rules allow the traveler to realize the full $5,460 reimbursement for that expenditure because that amount is not taxed. If the IRS taxed that reimbursement, for example at 25%, the traveler's reimbursement is effectively $4,095. Thus, as the result of that taxation, the traveler remains out-of-pocket $1,365 on her lodging costs for the month. This does not include the Social Security, Medicare, and state tax assessments on the same amounts.

Thus, per-diem reimbursements make it financially and logistically feasible for clinicians to work away from their tax homes. Indeed, from their experience serving travelers, *amici* are confident that most travelers will not and cannot afford to pay potentially thousands of dollars out-of-pocket each year for their meals and lodging while on the road. Likewise, *amici* believe most travelers will not be willing to undertake the tremendous hurdle of tracking every single expense they incur for meals, travel, and lodging while they are away from home—sometimes for multiple assignments, for multiple employers, per year. Under these circumstances, many clinicians will simply choose not to travel.

III. The Ninth Circuit's Decision Jeopardizes the IRS's Treatment of Per-Diem Reimbursement Payments as Exempt.

The Ninth Circuit's decision that per-diem payments to travelers are "wages" under the FLSA jeopardizes the IRS's treatment of those payments as

exempt under the accountable plan rules. This is true regardless of whether staffing companies continue to follow the current model of tethering per-diem payments to shifts the traveler actually works *or* choose to change their reimbursement plans to provide per-diem payments to travelers regardless of whether the traveler calls off their shifts, in response to the Ninth Circuit's ruling. As explained below, if the Ninth Circuit's decision stands, the IRS may now find that the accountable plan requirements are not satisfied *under either scenario*.

A. If per-diem payments remain "wages" under the FLSA, the IRS may treat those payments as taxable income.

The Ninth Circuit's decision explicitly holds that "the record establishes that the contested benefits functioned as compensation for work *rather than as reimbursement for expenses incurred*." App.3 (emphasis added). This decision poses a significant hurdle for travelers who treat their per-diem reimbursement payments as exempt payments under an accountable plan, given that a critical requirement for doing so is that the payments must be "advances, allowances (including per diem allowances, allowances only for meals and incidental expenses, and mileage allowances), or *reimbursements only for business expenses*. . . ." 26 C.F.R. §1.62-2(d)(1) (emphasis added). In short, if staffing companies continue to pay per diems under arrangements that reduce travelers' per diems by the number of shifts missed, the IRS may determine under the Ninth

Circuit's decision that those per-diem allowances are *not* "reimbursements for business expenses," but instead are "compensation for work" and thus are taxable wages.

B. If staffing companies pay per diems regardless of whether travelers work their assigned shifts, the IRS may find those payments are not made under an "accountable plan."

Under the accountable plan rules, payments that reimburse expenses are exempt from tax only if they have a "business connection"—that is, they "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). Without a business connection, the Regulations require the reimbursement to be treated as wages subject to withholding and payment of employment taxes. *Id.* §1.62-2(h)(2)(ii). "If a reimbursement arrangement pays an amount to the employee regardless of whether the expenses will meet the business connection requirement, then '*all amounts paid under the arrangement are treated as paid under a nonaccountable plan.*'" *Shotgun Delivery, Inc. v. United States*, 269 F.3d 969, 972 (9th Cir. 2001) (emphasis added) (quoting 26 C.F.R. §1.62-2(d)(3)); *see also* 26 C.F.R. §1.62-2(c)(3). Moreover, the Regulations specify that staffing agencies' per-diem plans must require employees to "return any portion of the allowance that relates to 'unsubstantiated travel days.'" Rev. Proc. 2019-48, 2019-51 I.R.B. 1394–95.

Thus, as explained above, most staffing companies' policies currently reduce (or do not pay) a portion of the traveler's per-diem reimbursement when a traveler calls off a shift and therefore is not engaged in the employer's business. This portion of AMN's policy is at the core of the Ninth Circuit's determination that these reimbursements are wages under the FLSA. App.5, 10–11, 17, 19–20. Indeed, the Ninth Circuit determined that "the tie of the per diem deductions to shifts not worked regardless of the reason for not working" was an important indicator "that the payments functioned as compensation for hours worked." App.19–20.

This conclusion fails to account for the reality that, under the Internal Revenue Code and the Regulations, if the per-diem reimbursements do not vary with time worked then it is difficult to conclude that those reimbursements have the requisite business connection. Thus, staffing companies' policies of reducing per diems when a traveler calls off shifts protect ***the traveler*** by directly connecting the work performed by the traveler with the amount of per diem the traveler receives, thereby creating a clear business connection between the reimbursement and the traveler's "performance of services as an employee of the employer." 26 C.F.R. §1.62-2(d)(1). In addition, these policies benefit ***travelers***, as they prevent the IRS from characterizing *all* of a traveler's per diems as paid under a non-accountable plan, which would render *all* per diems received by the employee taxable income. 26 C.F.R. §1.62-2(c)(3); *Shotgun Delivery*, 269 F.3d at 974

("IRS regulations specifically state that if *any* reimbursements fail this business connection test, the entire scheme is invalidated. . . ." (emphasis in original)).

IV. The Ninth Circuit's Decision Will Financially Harm Travelers.

A. The Ninth Circuit's decision will cause most travelers to take home less money.

On its face, the Ninth Circuit's decision may seem to afford travelers a benefit: higher overtime rates. But it is a Pyrrhic victory if the IRS determines that per diems are taxable compensation. While each of *amici's* clients' situations will differ, in most cases the increased tax liability from adding per diems to their taxable income will negate all overtime gains, and then some. Thus, the perverse and unintended consequence of the Ninth Circuit's ruling will be that the vast majority of travelers ***will take home less money*** than they do currently.

To illustrate this point, *amici* have modeled the following scenario: A traveling nurse works three twelve-hour shifts at a hospital in Los Angeles, California at an hourly rate of $30 per hour. The General Services Administration's published *daily* per-diem rate for Los Angeles for 2021 is $182 per day for lodging and $66 per day for meals and incidentals for a total of $248 per day. U.S. Gen. Servs. Admin., FY 2021 Per Diem Rates for Los Angeles, California. California looks to the FLSA to determine what constitutes the "regular rate of pay" for overtime purposes. *See*, *e.g.*,

Advanced-Tech Sec. Servs., Inc. v. Superior Court, 163 Cal. App. 4th 700, 707 (2008); Cal. Division of Labor Standards Enforcement, DLSE Enforcement Policies and Interpretations Manual, §49.1.2 (2019) ("In not defining the term 'regular rate of pay', [California's] Industrial Welfare Commission has manifested its intent to adopt the definition of 'regular rate of pay' set out in the [FLSA]."). In California, employees must be paid overtime at a rate of one-and-a-half times their regular rate for all hours worked in excess of eight per day. Cal. Lab. Code §510(a).

Thus, for three twelve-hour shifts, the nurse would work a total of thirty-six hours, with twelve of those hours at the rate of one-and-a-half times the regular rate. If per diems are treated as exempt reimbursements, and assuming a 25% tax rate, the traveling nurse in this example would receive approximately $2,681.00 in regular and overtime wages and per diems each week after tax. If per diems are treated as taxable wages, however, the nurse would receive approximately $2,464.00 after tax. This model does not account for the fact that treating per diems as taxable wages could, in many if not most cases, push the traveler into a higher tax bracket, or the fact that those reimbursements would also be subject to payroll, disability, and unemployment levies.

For many travelers covered by the Ninth Circuit's decision, the difference may be even greater. For example, this difference would be very significant for travelers in states outside California where overtime only applies for hours worked beyond forty per week. *See*,

e.g., Haw. Rev. Stat. §387-3(a) (employee must be paid overtime at 1.5 times the employee's regular rate when employee works more than 40 hours per week); Mont. Code Ann. §39-3-405 (same); Nev. Rev. Stat. §608.018(2) (employees that earn 1.5 times the minimum wage shall be paid overtime at 1.5 times the employee's regular wage when employee works more than 40 hours per week). In these states, fewer hours would be overtime than in California, and thus the traveler's overall wages would be less. This difference would likewise be significant for many nurses in California who work under an alternative workweek schedule and thus receive overtime wages only for hours worked beyond ten or twelve per shift. *See*, *e.g.*, Cal. Indus. Welfare Comm'n Order No. 5-2001, §3(B) (Alternative Workweek Schedules); *see also* Cal. Lab. Code §511(a), (b).

Importantly, this consequence to travelers exists regardless of whether staffing companies continue to reduce per diems on a pro-rata basis (thus risking that the IRS will deem those payments taxable income under the Ninth Circuit's decision) *or* staffing companies no longer make such a reduction in an attempt to comply with the Ninth Circuit's decision (thus risking that the IRS will deem those payments not made under an accountable plan). Under either scenario, the reimbursements are likely taxable as income to the traveler.[20] *Amici* believe that even though it is not certain the IRS will take this approach and deem per-diem payments

[20] Notably, as the result of the 2017 Tax Cuts and Jobs Act, travelers cannot deduct unreimbursed expenses from their individual tax returns as itemized deductions.

to be taxable income, the mere *threat* that the IRS will do so is enough to deter clinicians from traveling.

B. The Ninth Circuit's decision may impose burdensome record-keeping requirements on travelers.

In addition to potential tax consequences, the Ninth Circuit's decision may impose burdensome record-keeping requirements on travelers. As explained above, the per-diem reimbursement method streamlines the substantiation requirements for travelers' expenses under regulations and procedures established by the IRS. *See* 26 C.F.R. §1.62-2(f)(2); Rev. Proc. 2019-48, 2019-51 I.R.B. 1394–95. The Ninth Circuit's decision jeopardizes this system because staffing agencies may begin reimbursing travelers only for costs substantiated by receipts. For employees that travel a few days at a time, this change may be annoying but not particularly burdensome. For travelers on lengthy assignments, however, substantiating their daily expenses would be an onerous task with many opportunities for mistakes and omissions. From their experience serving travelers, *amici* believe that this burdensome record-keeping requirement will deter many clinicians from traveling—particularly when those reimbursements are at risk of being taxed.

V. Treating Per-Diem Payments as Wages Will Have Significant Negative Consequences to the Healthcare System.

The dramatic shift in per-diem taxation caused by the Ninth Circuit's decision poses a dire threat to the travel-provider industry at every level—clinicians, hospitals, and staffing agencies—and consequently the entire healthcare system.[21] Clinicians may choose not to mobilize because the financial and logistical benefits afforded to them by accountable plans are no longer available or are at significant risk. The consequences of increased taxes and the significant risk of being placed into a higher tax bracket will dissuade some, if not many, providers not to mobilize. Indeed, the risk that the IRS could determine what have historically been tax-exempt reimbursements are now taxable without substantiating documentation will compel travelers to keep detailed records, thereby negating a central feature of accountable plans. Still others, when faced with the record-keeping burden and increased tax risk, will simply choose not to travel.

These issues are magnified if the Ninth Circuit's decision stands because different rules will govern in different Circuits. Travelers commonly work in

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[21] Although this brief focuses on the impacts to traveling clinicians, there are travelers in many other industries that will be similarly impacted by the Ninth Circuit's decision. Employees in the airline industry, trucking industry, and construction industry frequently travel for work—as the IRS itself recognizes. *See*, *e.g.*, 26 C.F.R. §1.62-2(j) (Example 2, addressing airline payments to traveling employees).

multiple states across the country within a year. Thus, travelers would face uncertainty about whether they may rely on accountable plans when traveling, and inconsistency in tax treatment between assignments. This uncertainty will likely cause less flexibility among travelers and will thereby reduce the traveling-clinician system's ability to respond efficiently to supply and demand across the country. The impact of the Ninth Circuit's ruling will be felt especially strongly within the Ninth Circuit as travelers will naturally prioritize assignments in areas where they will not face the negative effects.

Fewer clinicians willing to travel—and fewer still willing to travel to states within the Ninth Circuit—will exacerbate the existing healthcare staffing crisis. To access the fewer available travelers, hospitals will have to pay more, which in turn will mean higher costs to those hospitals that can afford the increases, and ever-deeper shortages to the ever-growing number of hospitals that cannot. And if a staffing agency must pay overtime on per diems, the staffing agency will have no choice but to pass the additional expense through to the healthcare facilities as higher bill rates. For hospitals already under budget pressure, higher bill rates can only come from increases in healthcare costs. In turn, those costs will ripple and magnify through the system, ultimately impacting those the system is intended to serve—patients.

CONCLUSION

The real-world impact of the Ninth Circuit's decision will financially harm travelers and, in turn, will harm the entire healthcare industry. To permit the Court to consider these critical implications, *amici curiae* urge the Court to grant the Petition for Writ of Certiorari.

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Respectfully submitted,

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