No. 21-296

In the Supreme Court of the United States

AMN SERVICES, LLC,

Petitioner,

v.

VERNA CLARKE ET AL.,

Respondents.

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

AMICUS CURIAE BRIEF OF HR POLICY ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The HR Policy Association is a public policy advocacy organization that represents the chief human resource officers of more than 390 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than ten million employees in the United States, nearly nine percent of the private sector workforce. Since its founding, one of the HR Policy Association's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace.

The HR Policy Association offers a unique insight into the business operations affected by the Ninth Circuit's opinion in *Clarke v. AMN Services*. Human resources departments are the critical link between an organization's management and its employees. They provide important human resource capital to achieve employers' business objectives. Not only do our members oversee hiring processes and regulatory compliance, they also consult with top executives regarding their organizations' strategic planning and growth.

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[1] No counsel for a party authored any part of this brief, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. All parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's Opinion in *Clarke v. AMN Services* not only improperly interprets the Fair Labor Standards Act, but also needlessly intrudes upon well-established employment and regulatory practices in the healthcare staffing industry. By untethering FLSA regulations from the Internal Revenue Code, the Ninth Circuit has sown confusion, forced costly changes in business operations, and virtually guaranteed that employers will face liability for providing a valuable benefit to their employees. This decision forces businesses to choose between complying with one regulatory scheme or the other, which is a dangerous policy in any industry. But the implications here are far more grave, when access to healthcare for critically underserved regions is at stake. Healthcare staffing companies will be forced to bear higher operational costs that will impair their ability to compete for highly-skilled traveling healthcare workers in the national marketplace. The Ninth Circuit not only committed legal error, but was also oblivious to the significant strain its decision places on a healthcare delivery system that is already reeling from the COVID-19 pandemic. The HR Policy Association submits this brief in support of the petition for writ of *certiorari* and urges this Court to restore certainty and stability to the healthcare staffing industry and correct the circuit court's legal error.

BACKGROUND

For years, the healthcare industry has suffered from a critical nursing shortage. Lisa M. Haddad *et*

al., *Nursing Shortage*, NIH Books (last updated Dec. 14, 2020).[2] With an aging population and a modest amount of trainees in the pipeline, the number of open nursing positions across the United States could reach nearly two million in the next five years. U.S. Bureau of Labor Statistics, *Employment Projections*.[3] Last month, the American Nurses Association asked the Secretary of the Department of Health and Human Services to declare the nursing shortage a national crisis, warning that it will have "long-term repercussions for the profession, the entire health care delivery system, and ultimately, on the health of the nation." Letter from Dr. Ernest Grant to Hon. Xavier Becerra, Secretary, Dep't Health & Human Servs., Sept. 1, 2021.[4]

The COVID-19 pandemic has only exacerbated the nursing shortage. It has created a surge in demand for medical care across the country as different regions have experienced crippling rates of infection. Joshua D. Gottlieb & Avi Zenilman, *When Nurses Travel: Labor Supply Elasticity During COVID-19 Surges*, at 5 (U. Chicago, Becker Friedman Inst. Working Paper No. 2020-166, Nov. 2020) (*Gottlieb*).[5] As a result, hospitals have been unable to find enough nurses to care for their COVID-19 patients as well as those patients requiring other serious medical care. *Id.*

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[2] https://www.ncbi.nlm.nih.gov/books/NBK493175/
[3] https://data.bls.gov/projections/occupationProj
[4] https://www.nursingworld.org/~4a49e2/globalassets/rss-assets/analettertohhs_staffingconcerns_final-2021-09-01.pdf
[5] https://bfi.uchicago.edu/wp-content/uploads/2020/11/BFI_WP_2020166.pdf

When hospitals experience a short-term nursing shortage, they rely on replacement staff obtained through temporary healthcare staffing companies like AMN Services. Gottlieb, *supra*, at 5. Hospitals outsource recruiting, licensing, and human resources functions to these staffing companies. Healthcare workers are generally considered employees of the staffing company, which serves as a clearinghouse to match these licensed professionals with hospitals' needs. The agencies also provide insurance and benefits for these professionals. *Id.* at 5-6.

Healthcare workers occasionally work locally, but many travel to different locations across the country. A recent University of Chicago study showed that a national staffing market offers an innovative and effective response to accommodate surges in demand anywhere in the country. Gottlieb, *supra*, at 6. When demand increases in a specific region, traveling nurses temporarily relocate to mitigate the local staffing shortage. *Id.* As different regions experience spikes in COVID-19 infection rates, traveling nurses traverse the nation to fill those crucial roles. *Id.*

Traveling nurses are in high demand and short supply, particularly in these COVID-19 hotspots. Hailey Mensik, *Travel nurse demand outpacing supply, with hospitals paying steep rates*, HealthcareDive (Nov. 20, 2020).[6] At the height of the pandemic's first wave, job postings for traveling nurse positions tripled from their usual rate, and increased even faster in locations hard hit by COVID-19, like

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[6] https://www.healthcaredive.com/news/travel-nurse-demand-outpacing-supply-COVID-winter/589491/

New York, which saw an eightfold increase in the number of postings. Joshua Gottlieb, *Covid-19 surges drive up demand–and pay–for nurses willing to travel*, ProMarket (Dec. 15, 2020) (*ProMarket*).[7]

"When the pandemic increases demand for travel nursing, the market responds by raising wages." ProMarket, *supra*. Nurses can afford to be selective with the assignments they choose and the conditions they demand. Wages are largely driven by location in terms of their distance from home and the severity of the outbreak in the area. *Id.* Some assignments pay up to $7,000 per week in wages alone. Mensik, *supra*. In addition to paying market-driven wages, it has become industry standard to pay traveling healthcare workers a per diem for travel and lodging expenses. ProMarket, *supra.*

ARGUMENT

The Ninth Circuit's decision in *Clarke* threatens to upend the traveling healthcare staffing model at a time when the industry is already pushed to the brink. Staffing agencies have capitalized on advances in innovation and an increasingly mobile workforce to solve a persistent need in the healthcare industry. And they do that through the skill and sacrifice of healthcare professionals willing to uproot their own lives for months at a time to care for the critically ill. At a minimum, this bargain requires staffing companies to reimburse workers for their travel expenses while on assignment, in addition to paying

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[7] https://promarket.org/2020/12/15/covid-19-pandemic-demand-pay-nurses-supply-travel/

an attractive wage. IRS regulations have long classified these expense payments as reimbursements and not compensation; therefore, they are not taxable. Historically, FLSA regulations relied on that classification and also treated travel reimbursements as exempt from an employee's "regular rate" for purposes of calculating overtime.

The Ninth Circuit's decision in *Clarke* unilaterally decoupled those regulatory schemes, holding that reimbursement payments should be treated as compensation to be included in the regular rate. But it failed to recognize that its decision is in direct conflict with IRS regulations, leaving staffing companies to figure out how to comply with their obligations under each regulatory scheme. There are no good options. Staffing companies will bear higher operational costs and face vexatious litigation, hindering their ability to provide much needed assistance to the nation's hospitals and long-term care facilities.

I. The Ninth Circuit's Decision Creates a Conflict Between Employer Obligations Under the Internal Revenue Code and the FLSA.

The Ninth Circuit's decision creates an insurmountable conflict between the treatment of travel expenses under tax law and employment law, exposing employers to uncertainty and risk of liability. Under Section 62 of the IRC, employees' travel expenses are excluded from their taxable income if the expenses are reimbursed under the employer's accountable plan. 26 U.S.C. §62(a)(2)(A); 26 C.F.R. §1.62-2(c)(2), (4). Among other things,

expenses reimbursed under an accountable plan must have a business connection and the costs must be substantiated. *Id.*

Expenses incurred by the employee "in connection with the performance of services as an employee of the employer" have a "business connection." 26 C.F.R. §1.62-2(c)(4), (d)(1). However, if an employee is reimbursed *regardless* of whether the expense is business related, then *all* amounts paid under that arrangement are treated as taxable income paid from a nonaccountable plan. 26 C.F.R. §1.62-2(c)(5), (d)(3)(i).

Claimed expenses also must be substantiated with sufficient information to support the amount, time, place, and business purpose of incurring the cost. 26 U.S.C. §274(d); 26 C.F.R. §1.62-2(e). In lieu of processing itemized expense receipts, an employer can pay a per diem allowance for travel expenses. 26 C.F.R. §1.62-5(g). The per diem rate may be "computed on a basis similar to that used in computing the employee's wages or compensation (e.g., the number of hours worked, miles traveled)," so long as it is "specifically identified as a per diem allowance" or such allowances "are commonly used in the industry" in which the employee works. 26 C.F.R. §1.62-2(d)(3)(ii).

Until *Clarke*, the nontaxable travel expense reimbursement formula under the IRC also satisfied FLSA regulations for determining an employee's "regular rate" used to calculate any overtime payments owed to an employee who works more than forty hours per week. 29 U.S.C. §207(a). The "regular

rate" includes "all remuneration for employment," but expressly excludes "reasonable payments for traveling expenses" incurred by an employee "in the furtherance of his employer's interests and properly reimbursable by the employer." 29 U.S.C. §207(e)(2). The expenses may be actual or a "reasonably approximate amount of the expenses," so long as the approximation is calibrated to the Federal Travel Regulation System per diem rate. 29 C.F.R. §778.217(c)(1), (2). The FLSA regulations cite directly to the IRC per diem regulations in defining this exemption. 29 C.F.R. §778.217(c)(1), (2); 26 C.F.R. §1.274-5(g).

But the Ninth Circuit's decision uncoupled these statutory schemes, and in doing so, made it highly impractical, if not impossible, for employers to comply with both. IRC regulations require that expenses must be incurred "in connection with the performance of services as an employee of the employer" to remain exempt from taxation. AMN's policy of reducing an employee's per diem when he or she failed to work a contractually-obligated shift satisfies that regulation. The policy simply considered that because an employee was not at work, the day's expenses could not have had a "business connection."

Under the Ninth Circuit's strained logic, the policy "connect[ed] the amount paid to the hours worked… thereby functioning as work compensation rather than expense reimbursement." (App-17). As a result, those payments must be included in the "regular rate" calculation under the FLSA. But this conclusion is directly contradicted by IRS regulations. Per diems may be "computed on a basis similar to that used in

computing the employee's wages or compensation (e.g., the number of hours worked, miles traveled)," so long as it is "specifically identified as a per diem allowance" or such allowances "are commonly used in the industry" in which the employee works, both of which are undoubtedly true in this case. 26 C.F.R. §1.62-2(d)(3)(ii). From a common sense perspective, it is hard to conceive of an alternative method to determine whether an employee incurred expenses in connection with his employment without considering that the employee did not show up for work that day.

Given the structural parity between the FLSA and the IRC, travel expenses cannot logically be treated as compensation under the FLSA and a nontaxable expense under the IRC. But the Ninth Circuit has stranded employers and left them to figure how they can satisfy their obligations under both regulatory schemes. If they continue to prorate per diems for unexcused work absences, they are certain to face lawsuits for wage violations under the FLSA and other regulatory penalties for undercalculating the employee's regular rate. If they instead pay per diems that were not incurred "in connection with the performance of services as an employee" to comply with *Clarke*, then they can no longer exclude *any* per diem payments from an employee's taxable income. As Petitioner notes, the Ninth Circuit had little to say about how its decision can be reconciled with prevailing IRS regulations. Pet. 27. This Court should grant *certiorari* to address this glaring conflict and restore predictability to staffing companies' business operations.

II. Staffing Companies' Ability to Provide Crucial Manpower to the Healthcare Delivery System Will Be Significantly Impeded.

The ability to offer traveling healthcare workers the benefit of nontaxable reimbursement for travel and lodging expenses is a critical and rational component of the healthcare staffing model. Staffing agencies are not required to reimburse travel expenses, but do so to attract and retain highly skilled workers willing to temporarily relocate to underserved areas. Indeed, it has become an industry standard to offer this benefit, and a necessary part of every staffing company's wage and benefit package. Not only does it properly reflect the value of the workers' skill, it also stabilizes an industry that has long faced crippling worker shortages.

The additional costs of complying with *Clarke* will prevent staffing companies from remaining competitive in the national marketplace. Without the ability to proportionally reduce per diems when an employee fails to report for a scheduled shift, employers can no longer treat per diem payments as nontaxable benefits. Under *Clarke*, employers who continue to pay the full amount of the per diems do so "regardless of whether the employee incurs…business expenses," making *all* per diems reportable as taxable income. 26 C.F.R. 1.62-2(d)(3)(i). With per diems amounting to thousands of dollars over the course of a single thirteen-week assignment, employees will be responsible for a sizable tax liability that they would not otherwise have incurred. Given the demand for healthcare workers nationwide, there is no incentive for them to work the same demanding assignments for

considerably less pay. Offsetting this tax liability with a wage increase for thousands of employees is a non-starter: it would needlessly add millions of dollars to employers' labor costs annually, which would likely be passed on to consumers and the federal government.

The only way these employers could continue to offer tax-free reimbursements for travel expenses is to require employees to submit itemized expense reports with receipts for each and every expense to justify its business purpose. But reverting to that process is impractical and prohibitively expensive, for employers and employees alike. Travel healthcare workers are on assignment for months at a time in physically and psychologically stressful settings. Requiring these workers to spend their downtime on the drudgery of collecting receipts—for every meal, every tip, every hotel stay, every gallon of gas—and preparing meticulously detailed expense reports to justify the business purpose adds unpaid administrative duties to their already burdensome load. Employees also would lose the freedom to spend their per diems according to their personal preferences—reducing meal costs here to upgrade their living space there.

For the employers' part, they would need to hire a dedicated team of workers to review, verify, and process these itemized reimbursements for thousands of employees and pay them in a timely manner. This is precisely the type of inefficiency the per diem payment system was designed to solve. Some staffing companies would bear these steep operational costs while their competitors may not, making it impossible for them to compete fairly in the national market for traveling healthcare professionals. For all of this

costly and unnecessary paper-pushing, it is patient care that ultimately suffers most. On behalf of all of its members, the HR Policy Association urges this Court to intervene and restore balance and reason to the healthcare staffing industry.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2021