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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in determining that payments characterized by the employer as "per diem" expense payments were not reimbursements "for expenses" under a provision of the Fair Labor Standards Act, 29 U.S.C. § 207(e)(2), the court of appeals erred in considering how the payments function in fact—just as other courts do.

PARTIES TO THE PROCEEDING AND RELATED CASES

The parties to the proceeding in this Court are listed in the petition for writ of certiorari.

The following proceedings are directly related to this case:

- *Clarke v. AMN Services, LLC*, No. 2:16-cv-04132-DSF-KS (C.D. Cal.). Judgment entered on July 8, 2019.
- *Clarke v. AMN Services, LLC*, No. 19-55784 (9th Cir.). Judgment entered on February 8, 2021. Rehearing en banc denied on May 7, 2021.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Regulations

Other Authorities

INTRODUCTION

This case does not involve a dispute over whether a per diem that genuinely covers travel expenses incurred for the benefit of the employer is excluded from an employee's "regular rate" of pay for purposes of the Fair Labor Standards Act (FLSA). Petitioner, respondents, and the court below all agree that such a per diem is properly excluded.

This case does not involve a dispute over whether a particular per diem is a reasonable amount to cover travel expenses. Neither respondents nor the court below questioned the amount of the payments denominated as per diems.

This case also does not involve a dispute over whether to afford deference to an agency's view of its own regulation. The court below did not defer to the agency's view on any matter, much less give that view the "controlling weight" at issue in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

Devoting many pages to these issues, the petition works to obscure the actual dispute: whether the payments that petitioner AMN Services, LLC (AMN) denominates a weekly "per diem" for traveling employees are in fact payments for traveling expenses under the FLSA, 29 U.S.C. § 207(e)(2), or whether the payments are instead part of the regular rate paid for work. On this question, AMN does not claim a conflict among the circuits, nor could it: The court of appeals took the same fact-specific approach to determining an employee's regular rate of pay used by every other court—and by this Court in *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 464 (1948).

Instead, as the petition eventually reveals, Pet. 24–30, the parties' dispute is about the application of settled law to the facts of this case. Such disputes "rarely" warrant this Court's review. *See* S. Ct. R. 10. And the careful consideration of the facts by a diverse panel of judges, as reflected in the unanimous opinion below, shows that this case is not one of those rare exceptions.

The petition should be denied.

STATEMENT

Fair Labor Standards Act

The FLSA requires employers to pay overtime to non-exempt employees who work more than forty hours in one week. 29 U.S.C. § 207(a)(1). The overtime rate is calculated based upon an employee's "regular rate," which includes "all remuneration for employment paid to, or on behalf of, the employee." *Id.* § 207(e). The FLSA excludes from the regular rate, however, several specific categories of payments, including "reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interest and properly reimbursable by the employer," as well as "other similar payments to an employee which are not made as compensation for his hours of employment." *Id.* § 207(e)(2).

The Department of Labor (DOL) has issued an interpretative regulation addressing each of the excludable categories. As to reimbursement of expenses such as travel expenses, the applicable regulation states:

> Where an employee incurs expenses on his employer's behalf or where he is required to

> expend sums by reason of action taken for the convenience of his employer, section 7(e)(2) is applicable to reimbursement for such expenses. Payments made by the employer to cover such expenses are not included in the employee's regular rate (if the amount of the reimbursement reasonably approximates the expenses incurred). Such payment is not compensation for services rendered by the employees during any hours worked in the workweek.

29 C.F.R. § 778.217(a) (2020).

In addition, DOL has addressed the "other similar payments" category. In so doing, DOL explained that the payments in the specific categories are excluded "because they are not made as compensation for hours of work." 29 C.F.R. § 778.224(a) (2020). Describing the exclusion for "other similar payments," DOL stated that "payments to an employee [that] are not made as compensation for his hours of employment" are payments that "do not depend on hours worked, services rendered, job performance, or other criteria that depend on the quality or quantity of the employee's work." *Id.*

A DOL Field Operation Handbook (relied on below by AMN but not by respondents) sets forth a similar view:

> If the amount of per diem … is based upon and thus varies with the number of hours worked per day or week, such payments are a part of the regular rate. … [But] this does not preclude an employer from making proportionate payments for that part of a day that the employee is required to be away from home on the employer's business. For example, if an employee

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

Pet. App. 15 (quoting Handbook § 32d05a(c) (2020)).[1]

Factual background

AMN is a staffing company that employs healthcare clinicians, including nurses and technicians. AMN hires clinicians for short-term assignments, generally thirteen weeks, at facilities throughout the United States. Pet. App. 3–4. It assigns most, but not all, clinicians to facilities more than 50 miles from their homes. *Id.* at 6. Clinicians typically work three 12-hour shifts per week. *Id.* at 4.

In addition to an hourly wage, AMN pays every clinician a so-called "per diem" consisting of a meals and incidentals stipend, as well as a lodging allowance for clinicians who do not live in company-provided housing. *Id.* The amount of the per diem is included in the clinician's weekly paycheck and constitutes part of the pay package for all clinicians. *Id.*; ER149–50 & 160.[2] AMN pays the per diems to all clinicians—regardless of whether they are assigned to work in their hometown or across the country. Pet. App. 6.

AMN does not require clinicians to document their expenses to receive per diem benefits. *Id.* at 4. Nonetheless, although the per diems do not depend on

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[1] The Handbook is available at https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-32.

[2] "ER" refers to the excerpts of record filed in the court of appeals.

whether travel expenses are actually incurred, receipt of the per diem payments is not automatic. Rather, the amount of the per diem earned each week is not, as the name suggests, based on the number of *days* an employee is incurring expenses for AMN's benefit. Rather, as with the hourly wage, it is based on, and fluctuates exclusively with, the number of hours worked. *Id.* at 5–6; ER151–53 & 158–60. AMN determines the amount of per diems earned based on the hours reported on the employees' weekly timesheets—the same timesheets used to calculate hourly wages. ER152.

For each assignment, clinicians are required to work a specified number of hours per week. A clinician who satisfies the minimum hours requirement earns the maximum value of per diem benefits, which approximates seven days' worth of meal and incidental and lodging expenses. Pet. App. 4–5; ER152. When a clinician does not satisfy the minimum hours requirement, AMN reduces the per diems in proportion to the shortfall. Pet App. 5–6; ER153.

More specifically, from the outset of the period relevant here through the end of 2014, AMN deducted $18 from weekly benefits for each hour that a clinician fell below the minimum requirement. Pet. App. 5; ER153–54. Since 2014, AMN has grouped the minimum required hours into minimum required shifts of a specific duration that, in the aggregate, amount to the minimum required weekly hours. Pet. App. 5. Now, if a clinician works fewer than the weekly hours requirement, the company prorates the per diems "based on the proportionate number of shifts a clinician did not work." ER155–56. For example, if the employee works three 8-hour shifts, AMN reduces her per diem by one-third because, although she worked

three days as required—and in fact incurred whatever travel expenses were necessary for her to be working away from home on those days—her total hours are one-third less than if she worked three 12-hour shifts. Pet. App. 5; ER156.

There are two exceptions to AMN's practice of tying per diem payments to shifts completed. First, if the hospital cancels a shift that a clinician was prepared to work, AMN does not reduce the per diem. Second, a clinician can "bank" hours in weeks in which he or she exceeds the minimum required shifts and use those banked hours to offset later deficiencies. Pet. App. 5–6. For example, if a clinician works six extra hours one week, she can work six fewer hours some other week, without suffering a reduction in per diem pay. Per diems are adjusted for all other time missed, including time missed due to illness. *Id*. at 6.

AMN applies this approach to both local and traveling clinicians. That is, it pays the same per diem benefits to both, and it ties the per diem payments for both groups to shifts worked. Tellingly, however, AMN classifies the per diem benefits as "wages" for local clinicians and as "expense reimbursements" for clinicians working more than 50 miles from home. Pet. App. 6; ER160–61 & 164. As a result, for local clinicians, the per diem payment is included in the calculation of overtime, Pet. App. 6; ER164, whereas for traveling clinicians, those payments are excluded for purposes of calculating overtime, Pet. App. 4; ER164. Clinicians performing identical work thus receive different overtime rates depending on the distance of their assignment from their homes.

Procedural background

Respondents Verna Clarke and Laura Wittmann are nurses who worked for AMN from January to April 2016, and from December 2014 to March 2015, respectively, in locations more than 50 miles from their homes. Pet. App. 6. Both received per diem payments that, per AMN's policy, were excluded from the calculation of their regular rate. As a result, their overtime pay was lower than it would have been had the payments been included in the calculation.

In 2016, respondents filed suit under the FLSA and state law challenging, among other things, AMN's exclusion of the per diem payments from the "regular rate" when calculating overtime on travel assignments. They alleged that the per diems should have been included in the regular rate for purposes of calculating overtime because they were based on and varied with the number of hours worked, as opposed to the amount of expenses incurred. As AMN conceded below (AMN App. Br. 8 n.5), it bears the burden of demonstrating that the per diem benefits constitute excludable payments for expenses under section 207(e)(2).

Respondents successfully moved to certify California-wide classes on the state-law claims and for conditional certification of a nationwide FLSA collective action. *Clarke v. AMN Services, LLC*, 2017 WL 6942755 (C.D. Cal. Oct. 12, 2017). On the parties' cross-motions for summary judgment, however, the district court granted summary judgment in favor of AMN as to the FLSA and state-law overtime claims. Pet. App. 7. According to the district court, "[b]y reducing the payments for time not worked," AMN was simply "erring on the side of not paying employees

for work-related expenses, rather than compensating them for personal expenses." *Id.* at 26.

The court of appeals reversed in a unanimous decision of Judges Baldock, Berzon, and Collins.[3] After reviewing the facts concerning AMN's payment of per diems and the relevant statutory provisions, the court considered case law from the Ninth Circuit and other circuits to see how courts have assessed whether payments are excludable from the regular rate of pay under section 207(e)(2). As the court explained, both *Local 246 Utility Workers Union of America v. Southern California Edison Co.*, 83 F.3d 292 (9th Cir. 1996), and *Flores v. City of San Gabriel*, 824 F.3d 890 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2117 (2017), concluded that "a payment's *function* controls whether the payment is excludable from the regular rate under § 207(e)(2)." Pet. App. 10.

When considering per diem payments in particular, the court explained that "the function test requires a case-specific inquiry based on the particular formula used for determining the amount of the per diem." *Id.*

> Along with the monetary relationship between payment and hours, other relevant—but certainly not dispositive—considerations include whether the payments are made regardless of whether any costs are actually incurred, and whether the employer requires any attestation that costs were incurred by the employee.

Id. at 10–11. Citing Fifth Circuit precedent, *Gagnon v. United Technisource, Inc.*, 607 F.3d 1036, 1041 (5th

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[3] Judge Baldock, of the U.S. Court of Appeals for the Tenth Circuit, was sitting by designation.

Cir. 2010), the court also noted that, "[i]n some cases, the amount of the per diem payment relative to the regular rate of pay may be relevant to whether the purported per diem functions as compensation or reimbursement." Pet. App. 11. The court noted as well that "whether the payments are tethered specifically to days or periods away from home or instead are paid without regard to whether the employer [sic] is away from home" may also be a pertinent consideration. *Id*.

Looking to the case law in other circuits, the court found that "[e]very circuit to consider whether a payment scheme is excludable from the FLSA's regular rate as reimbursement for work-related expenses has assessed how the payments function, taking into account factors similar to those we have indicated." *Id*.

After explaining its test and having confirmed that other circuits take the same approach, the court noted that DOL's interpretations of the FLSA exclusions "also support assessing how payments operate to determine if they are properly excluded from the FLSA's regular rate of pay." *Id*. at 14. Turning first to DOL's 2020 regulation, the court quoted language showing that, according to DOL, the exclusions encompass payments that "do not depend on the hours worked, services rendered … or other criteria that depend on the quantity" of the employee's work. *Id*. at 14–15 (quoting 29 C.F.R. § 778.224(a)). As to the Handbook, the court quoted three sentences, noted AMN's argument that the second sentence supported its position that per diems could "include partial payments for time away from home," *id*. at 15, and explained why AMN was wrong: "[T]he second sentence permits an adjustment if the employee returns home or to the employer's place of business; it does not sanction an adjustment based on time

worked while the employee is away from home on the employer's business." *Id.* The court's entire discussion of the Handbook is three sentences. *See id.* (concluding that "both parts of the guidance are consistent in focusing on the substance or function of payments as payments for expenses incurred while away from home rather than on their form or label").

Importantly, before turning to the facts of this case, the court of appeals addressed respondents' suggestion that the court adopt a per se rule that per diem payments that vary with the amount of work performed are part of the regular rate. *Id.* The court agreed that whether "a payment varies with hours worked is a relevant factor in that determination, often a particularly relevant one." *Id.* at 16. But reiterating that "determining whether a per diem must be included in the regular rate of pay is a case-specific inquiry that turns on [how] the payments function," the court declined to adopt a per se test. *Id.*

Next, the court of appeals applied the payment-function test to AMN's payment structure to ascertain whether AMN's per diem payments function as reimbursements or as wages. The court concluded that "[s]everal features of AMN's per diem payments make evident that they function as remuneration for hours worked rather than as reimbursement for expenses." *Id.* First, the court noted that "AMN's pro rata deductions from its per diem payments are unconnected to whether the employee remains away from home incurring expenses for AMN's benefit." *Id.* at 17. Rather, "the deductions connect the amount paid to the hours worked while still away from home, thereby functioning as work compensation rather than expense reimbursement." *Id.*

Second, under AMN's policy, "clinicians are able to offset missed or incomplete shifts with hours they have 'banked' on days or weeks in which they worked more than the minimum required hours." *Id*. The court found "no plausible connection between working extra hours one week and incurring greater expenses the next." *Id*. Rather, "[t]he only reason to consider 'banked hours' in calculating a weekly per diem payment is to compensate employees for total hours worked, rather than for reasonable expenses incurred on days spent away from home for work." *Id*.

This feature of AMN's approach directly undermined the district court's conclusion, the court of appeals explained: The district court had held that AMN properly prorates the weekly per diem payment when an employee misses a shift to avoid reimbursing her for "personal expenses," because it thought that a clinician does not incur expenses for the benefit of AMN when she is not working. "But neither the district court nor AMN explain how 'banked hours' accumulated on days for which a clinician was already paid a per diem can transform a subsequent day that would have been considered 'personal' into a day for which AMN should reimburse expenses." *Id*. at 18.

Finally, "and perhaps most tellingly," the court pointed to the fact that AMN pays local clinicians, who do not travel away from home, the same per diem payments as if they did travel. AMN had explained that the per diems for local employees were provided as an incentive for good work attendance. *Id*. As the court noted, this explanation "applies equally to traveling clinicians, and confirms that the payments do function as compensation." *Id*. at 19. And "[t]hat both local and traveling clinicians receive per diems also supports Plaintiffs' assertion that these payments

are expected as part of a clinician's pay package and so function as supplemental wages." *Id*. (citing *Baouch v. Werner Enterprises, Inc*., 908 F.3d 1107, 1117 (8th Cir. 2018)).

Because all these facts concerning AMN's per diem payments "together indicated that the payments functioned as compensation for hours worked," the court held that AMN had failed to carry its burden of demonstrating that its per diems were properly excluded under section 207(e)(2) from the regular rate of pay. *Id*. at 19–20.

AMN petitioned for panel rehearing or rehearing en banc of the panel's unanimous decision. The petition was denied, with no judge calling for a vote. *Id*. at 21–22.

REASONS FOR DENYING THE WRIT

The petition begins by explaining that per diem payments "for travel expenses … incurred by an employee in the furtherance of his employer's interests," 29 U.S.C. § 207(e)(2), are properly excluded from the regular rate of pay. Pet. 18–20. Neither respondents nor the decision below disagrees with AMN on this point. And because they do not disagree, AMN is wrong to fault the decision below for giving "short shrift" to the statutory and regulatory text that sets forth that point.[4]

[4] No reasonable reading of the decision below supports amicus NATHO's statement (at 17) that "[t]he Ninth Circuit faults AMN for providing its employees, who travel far from their homes for many weeks at a time while incurring lodging, meal, and other incidental expenses, with reasonable per diems based on federal CONUS rates."

The question in this case is not whether per diems paid for travel expenses incurred for the benefit of the employer should be excluded from the regular rate. The question is whether *AMN*'s per diem payments qualify for that exclusion or whether, instead, they operate as wages. *See* Pet. App. 2–3. Although AMN asserts that the payments "plainly" meet the requirements for exclusion from the regular rate, Pet. 19, when the petition eventually turns to addressing the decision below and the facts of this case, *id*. at 24, it makes clear that the issue in this case is particular to the facts, not a legal issue appropriate for this Court's review. *See* S. Ct. R. 10.

Moreover, while this Court does not sit to review such fact-specific determinations, the decision below is correct. The particular features of AMN's practices show that the payments that it denominated as per diems for travel expenses are not in fact payments "for expenses" as required by section 207(e)(2) and, therefore, are properly included in the regular rate of pay. To reach this conclusion, the court below looked to the facts before it, just as every other court does in assessing whether payments were properly excluded under the FLSA, including this Court in *Bay Ridge*.

For these reasons, as well as the conceded absence of a conflict among the circuits on any pertinent legal question, the petition should be denied.

I. The decision below is consistent with the decisions of other federal courts and this Court.

In concluding that AMN's per diems did not qualify under section 207(e)(2) for exclusion from the regular rate of pay, the Ninth Circuit applied a longstanding test that looks to how the payments function.

Tellingly, the petition does not suggest that this approach conflicts with decisions of other federal courts of appeals. There is no conflict. "Every circuit to consider whether a payment scheme is excludable from the FLSA's regular rate as reimbursement for work-related expenses has assessed how the payments function, taking into account factors similar to those" identified in the court's opinion. Pet. App. 11.

A. The decision below is fully consistent with *Kisor* and *Skidmore*.

Unable to identify any pertinent disagreement among the courts of appeals, AMN argues that the court below erred by finding "support" for a payment-function test in the Field Operations Handbook of the Department of Labor. Pet. 16. AMN contends that the court's three-sentence discussion of the Handbook "violates" the decision in *Kisor*, which addressed the circumstances in which a court should defer to an agency's interpretation of its own regulation. *Kisor*'s holding and the principles underlying it are not implicated here.

Kisor addresses the doctrine that a court, when interpreting an ambiguous regulation, "should defer to the agency's construction of its own regulation"—a doctrine that the Court generally refers to as *Auer* deference. 139 S. Ct. at 2411 (referring to *Auer v. Robbins*, 519 U.S. 452 (1997)). When such deference is afforded, the agency's views are given "controlling weight." *Id.* at 2416 (majority); *id.* at 2428 (Gorsuch, J., dissenting). In *Kisor*, the Court discussed at length the doctrine's history, including its origins in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and its justification, and it explained when such deference is appropriate. In so doing, the Court made clear that

it was addressing when to (and when not to) *defer* to the agency's views; it was not addressing mere consideration of the agency's views. Thus, the Court distinguished the situation where, although deference is not called for, the agency's view "has the 'power to persuade.'" *Id.* at 2414 (plurality opinion, quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 135, 140 (1944))); *see id.* at 2424 (Roberts, C.J., concurring in part).

Likewise, the dissenting Justices, arguing that *Auer* should be overruled, did not advocate against *consideration* of an agency's views—a position that even the petitioner had not suggested. *See* Brief of Petitioner at 43, *Kisor v. Wilkie*, No. 18-15 (U.S. Jan. 24, 2019) (arguing against deference but stating that "courts should take due account of an agency's views"). Rather, the dissenting Justices explained that courts initially "connected *Seminole Rock* more closely with the deference framework … under *Skidmore*" and generally engaged in a *Skidmore*-type analysis, accepting the agency's interpretation "only after independently examining the regulation and concluding that the agency interpretation was sound." *Kisor*, 139 S. Ct. at 2429 (Gorsuch, J., dissenting) (internal quotation marks and citation omitted). And they cited approvingly to a court decision that read *Seminole Rock* to require "respectful consideration" of the agency's views. *Id.*; *see id.* at 2443 (stating that "*Skidmore* and the traditional approach it embodied" explained that "courts should of course afford respectful consideration to the expert agency's views"); *id.* at 2447 ("Overruling *Auer* would have taken us directly back to *Skidmore*, liberating courts to decide cases based on their independent judgment and 'follow [the] agency's

[view] only to the extent it is persuasive.'" (quoting *Gonzales v. Oregon*, 546 U.S. 243, 269 (2006))).

Here, the court of appeals did not defer to the Handbook—indeed, AMN does not even say that it did—and its opinion is fully consistent with *Kisor*. The decision below first reviews the Ninth Circuit's case law adopting a payment-function test; it then discusses case law showing that "[e]very circuit to consider whether a payment scheme is excludable from the FLSA's regular rate as reimbursement for work-related expenses has assessed how the payments function, taking into account factors similar to those we have indicated." Pet. App. 11. "Finally," after explaining the test and that other circuit courts take a similar approach, the opinion turns to the agency's regulation and, after that, to the Handbook. Pet. App. 14.

Moreover, the opinion addresses the Handbook because *AMN's* brief argued that the Handbook supported its position and that the court should adopt its reading of the Handbook. The court's discussion of the Handbook is three sentences: The first states AMN's argument that the second sentence of the Handbook supports its position, and the second explains why AMN's reading of the Handbook is wrong. The court then concludes: "So both parts of the guidance are consistent in focusing on the substance or function of payments for expenses incurred while away from home rather than on their form or label." *Id*. at 15. Explaining that *AMN's* reliance on the agency's Handbook is misplaced and that the Handbook is consistent with the court's test and the agency's interpretive regulation hardly amounts to giving the Handbook "controlling weight."

Even while invoking the Handbook to support its argument, AMN also argued below that judicial consideration of an agency's position under *Skidmore* is subject to the same requirements as deference under *Kisor*, including that the agency's position be its "official position." AMN App. Br. 54, 56. That argument finds no support in any of the *Kisor* opinions. As the Chief Justice stated: "That is not to say that *Auer* deference is just the same as the power of persuasion discussed in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); there is a difference between holding that a court ought to be persuaded by an agency's interpretation and holding that it should defer to that interpretation under certain conditions." 129 S. Ct. at 2424 (Roberts, C.J., concurring in part).

Importantly, *Skidmore* itself arose under the FLSA. In *Kisor*, no member of the Court questioned *Skidmore*'s statement that "the rulings, interpretations and opinions of [DOL] under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. In noting that DOL's interpretations "*also support* assessing how payments operate to determine if they are properly excluded from the FLSA's regular rate of pay," Pet. App. 14 (emphasis added), the court of appeals did no more than follow the Court's long-standing and uncontroversial direction.

In short, the court below did not defer to the Handbook. AMN's carefully worded petition does not really argue otherwise. This case does not implicate, much less violate, *Kisor*.

B. The court of appeals decisions cited below are fully consistent with *Kisor* and *Skidmore*.

For the same reason, AMN is wrong to assert that the court of appeals erred in finding that its case-specific approach "comports with out-of-circuit law" because that case law "relied on [the Handbook] in a way that *Kisor* no longer permits." Pet. 23 (citing three cases). Like the decision below, the three cited cases treat the Handbook consistently with *Kisor*'s holding and the views expressed by all nine Justices in that case: Each of the decisions cites *Skidmore*, not *Auer*, and expressly does *not* give the Handbook controlling weight.

In *Gagnon v. United Technisource, Inc.*, 607 F.3d 1036 (5th Cir. 2010), the totality of the court's discussion of the Handbook is contained in a footnote, stating in its entirety:

> Although the Handbook does not bind our analysis, we can and do consider its persuasive effect. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("[T]he rulings, interpretations and opinions of the [agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.").

607 F.3d at 1041 n.6.

The next case, *Newman v. Advanced Tech. Innovation Corp.*, 749 F.3d 33 (1st Cir. 2014), expressly agrees with *Gagnon* that *Skidmore* is the appropriate level of consideration of the Handbook:

> The Department of Labor Wage and Hour Division's Field Operations Handbook ("Handbook") contains further guidance, which we treat as persuasive authority. *See Gagnon v. United Technisource, Inc.*, 607 F.3d 1036, 1041 n.6 (5th Cir. 2010) ("Although the Handbook does not bind our analysis, we can and do consider its persuasive effect." (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

749 F.3d at 37.

Likewise, the most recent of the three cases, *Baouch v. Werner Enterprises, Inc.*, 908 F.3d 1107 (8th Cir. 2018), *cert. denied*, 140 S. Ct. 122 (2019), looks to *Skidmore* when discussing the Handbook:

> The DOL Handbook contains guidance in our inquiry. We treat the DOL Handbook as persuasive authority. "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference," *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), but are entitled to respect under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), based on their persuasiveness, *Christensen*, 529 U.S. at 587.

Id. at 1117. Consistent with this Court's case law before and after *Kisor*, the decision concludes that "the provisions in the DOL Handbook are not dispositive but we do find them persuasive." *Id.*

AMN also cites one case, *Sharp v. CGG Land (U.S.), Inc.*, 840 F.3d 1211 (10th Cir. 2016), in which the court held that the employer's payments for the cost of food while employees were working away from

home were properly excluded from the regular rate. AMN suggests that this result was attributable to that court's not having cited the Handbook. *See* Pet. 23. AMN, however, points to nothing in the relevant passage of the Handbook that would have affected *Sharp*'s holding had *Sharp* considered it, and points to nothing to suggest that the courts that have considered the Handbook would have reached a result in conflict with *Sharp* on the facts there. Moreover, *Sharp* expressly addresses both *Newman* and *Gagnon*, suggesting no disagreement and distinguishing them on the facts, as cases in which "the courts disallowed employers from excluding per diem payments from employees' regular rates when the per diem payments depended on the number of hours worked." *Sharp*, 840 F.3d at 1215–16. Here too, the court below disallowed excluding per diem payments from employees' regular rates when, among several other relevant facts, the per diem payments depended on the number of hours worked.[5]

II. The court of appeals' case-specific inquiry broke no new ground and reached the correct result.

A. AMN states that "[w]hether an employee's 'regular rate' includes reimbursements for traveling expenses is a threshold question that is foundational for every employer's overtime obligations under the FLSA." Pet. 30. Again, that "threshold question" is not at issue.

What is at issue is the much narrower question whether AMN properly characterizes certain pay-

[5] In addition, consistent with the decision below, and with *Baouch*, *Newman*, *Gagnon*, and *Skidmore*, *Sharp* considers and gives "weight" to a DOL opinion letter. 840 F.3d at 1215.

ments to traveling employees as reimbursement for travel expenses. Eventually turning to this question, AMN's petition attempts to relitigate the facts. *See* Pet. 24–29. While this fact-specific dispute does not warrant the Court's attention in any event, *see* S. Ct. R. 10, the dispute is particularly unworthy of review because the unanimous decision below is correct.

Among the various facts supporting the determination that the payments are not actually reimbursement of expenses but instead function as wages for hours worked, the per diem payments were tied, at the start of the relevant time period, to the number of hours worked: AMN deducted $18 from the weekly per diem for each hour of work missed. Pet. App. 5. Later, AMN revised its system to tie the per diem to the number of shifts worked, while calculating the number of shifts worked based in part on total hours worked. *Id.*[6] AMN makes the deductions regardless of the reason why the clinician missed a shift or hours of a shift, including if the clinician was ill (and receiving paid sick leave), unless the hospital cancelled the shift, and, for traveling clinicians, regardless of whether the clinician remained at the work location. *Id.* at 5–6, 17.

In addition, as the court stated, "that local clinicians receive the same per diems they would if they were traveling even though they do not incur the

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[6] For example, under the shift-based system, AMN pays a traveling clinician a full per diem if she works 12-hour shifts on three days in one week but cuts the per diem by one-third if she works 8-hour shifts on three days in one week. *See* Pet. App. 5. Although both clinicians have worked away from home on three days, and although the living expenses of each remain the same, AMN reduces the per diem because the total hours worked by the latter employee is the equivalent of two 12-hour shifts. *Id.*

same expenses … is an exceedingly strong indication that the per diem payments made to both groups of clinicians function as compensation for labor." *Id*. at 19.

Another important indication that the payments actually function as wages is AMN's treatment of "banked hours." AMN allows an employee to "bank" extra hours worked one week to avoid a reduced per diem in another week in which she works fewer hours—regardless of the reason she worked fewer hours. As the court stated, "there is no plausible connection between working extra hours one week and incurring greater expenses the next." *Id*. at 17.

> In sum, a combination of factors—the tie of the per diem deductions to shifts not worked regardless of the reason for not working; the "banking hours" system; the default payment of per diem on a weekly basis, including for days not worked away from home, without regard to whether any expenses were actually incurred on a given day; and the payment of per diem in the same amount, but as acknowledged wages, to local clinicians who do not travel—together indicate that the payments functioned as compensation for hours worked.

Id. at 20.

AMN contends that the court's approach is "hopelessly amorphous" and "flatly wrong." Pet. 24. But its rhetoric should not obscure that the court's decision did not break new ground. Rather, the court's fact-specific approach follows longstanding case law from this Court and courts around the country, looking to the particular "words of and practices under the contract" to determine "the regular rate for each

individual." *Bay Ridge*, 334 U.S. at 464. "As the regular rate of pay cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee, it must be drawn from what happens under the employment contract." *Id.*[7]

Courts follow the approach of considering the totality of facts and circumstances in other FLSA contexts as well. For example, *Skidmore*, assessing whether waiting time should have been counted as working time, emphasized that "[e]ach [FLSA] case

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[7] *See, e.g., Rule v. S. Indus. Mech. Maint. Co.*, No. 16-CV-01408, 2020 WL 1126179, at *8 (W.D. La. Mar. 6, 2020) (following Fifth Circuit case law and holding, "based on the facts and circumstances unique to this case, what [the employer] labeled as per diems were not 'reasonable payments for traveling expenses' that could be excluded from the regular rate of pay"); *Lynch v. City of New York*, 291 F. Supp. 3d 537, 551 (S.D.N.Y. 2018) (stating that "since the payments were based upon hours and not actual expenses, and since neither requests for reimbursement nor receipts are required, that the payments should be included in the calculation of the regular rate under the FLSA"); *Perry v. City of New York*, No. 13-CV-1015, 2018 WL 1474401, at *10 (S.D.N.Y. Mar. 26, 2018) (finding that meal allowance reimbursements were not for expenses incurred, and therefore not properly excluded, where they were "clearly tied to the number of hours worked" and the employees "were not required to provide meal receipts"); *Acosta v. Mountain Masonry, Inc.*, No. 1:16CV00042, 2018 WL 259773, at *4 (W.D. Va. Jan. 2, 2018) (looking to "all of the evidence" to determine whether "so-called per diem payments" were travel reimbursements or compensation, where the payments were "something of a hybrid, possessing elements of both a true travel reimbursement and compensation for work performed"); *Hanson v. Camin Cargo Control, Inc.,* No. H-13-0027, 2015 WL 1737394, at *5 (S.D. Tex. Apr. 16, 2015) (finding meal allowance to be part of the regular rate where it was "based only on hours and not actual expenses" and "was automatic, and neither receipts nor requests for reimbursement were necessary").

must stand on its own facts." 323 U.S. at 140. The Court elaborated:

> Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. [citation omitted] This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they [m]ay show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself. Living quarters may in some situations be furnished as a facility of the task and in another as a part of its compensation.

323 U.S. at 136–37; *see also Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) ("Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.")

As the First Circuit has explained, "[t]he goal is to pierce the labels that parties affix to the payments and instead look to the realities of the method of payment." *Newman*, 749 F.3d at 39. AMN fails to articulate an alternative approach, apparently taking the position that the employer's characterization of payments as reimbursement for travel expenses should be dispositive. This Court has already rejected that position. *See Bay Ridge*, 334 U.S. at 464 (stating that "the regular rate of pay cannot be left to a declaration by the

parties"); *Walling v. Youngerman-Reynolds Hardwood Co.,* 325 U.S. 419, 424–25 (1945) (stating that the regular rate "is not an arbitrary label chosen by the parties; it is an actual fact").

B. AMN also faults the unanimous panel decision for giving "short shrift" to the relevant statutory and regulatory text, Pet. 20, while "focusing" on the regulation addressing the FLSA's "other similar payments" clause, *id*. at 21. To be sure, the statutory and regulatory text define excludable expense reimbursements: "payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of the employer's interests." 29 U.S.C. § 207(e)(2); *see* 29 C.F.R. § 778.217(a) (stating that § 207(e)(2) "is applicable to reimbursement for such expenses"). Neither, however, answers the question posed in this case: whether AMN's per diem payments satisfy that definition or whether, instead, the payments operate as wages.

To answer that question, the court applied a functional test—supported by case law in several circuits, rejected by no circuits, and consistent with DOL interpretations of the statute—to assess whether the payments operate as payments "for expenses." And it reached a result strongly supported by the statutory text: Payments that bear no relationship to how long an employee had to be away from home incurring travel expenses but instead reflect the number of hours in the shifts she worked while away from home (or even at home) are not "payments for traveling expenses, or other expenses." AMN does not explain how the decisionmaking process would have benefited, or its result would have differed, if the court had stared harder at the generally stated statutory

and regulatory text that poses, but does not answer, the question in this case.

Furthermore, AMN's assertion that the decision "focus[ed]" on the FLSA's "other similar payments" clause is absurd. The opinion cites the clause once, when quoting section 207(e)(2) in full. And it cites the DOL regulation addressing that clause only twice. It cites the regulation once in describing the *Flores* case—a case not cited in the petition but that, below, AMN argued the court was "obliged to follow." AMN App. Br. 43; *see id.* at iv (table of authorities listing *Flores* as "*passim*"). The opinion cites the regulation a second time in a single sentence quoting the regulation for the point that it "supports" a functional test by explaining that excludable payments "do not depend on the hours worked, services rendered … or other criteria that depend on the quality or quantity of the employee's work." Pet. App. 14–15 (quoting 29 C.F.R. § 778.224(a)). Notably, AMN does not state that DOL's view as stated in this regulation is irrelevant.

Finally, AMN faults the opinion for quoting the paragraph of the DOL Handbook that specifically addresses traveling expenses, instead of sticking to the statute and regulations. *See* Pet. 22–23. AMN fails to mention, however, that the reason the Court addressed the Handbook was that *AMN relied on it*. *See* Pet. App. 15; AMN App. Br. 9–10; *cf.* Clarke App. Br. (not citing the Handbook).

C. Also flatly incorrect is AMN's assertion that the court's decision "upsets longstanding practices" by "*requiring* an employer to include per-diem allowances in an employee's 'regular rate' if it makes adjustments when an employee works less than a normal workweek." Pet. 33 (emphasis added). In fact,

respondents suggested such a per se rule, *see* Pet. App. 15, and the court of appeals expressly *declined* to adopt it: "We therefore need not determine whether per diem payments that vary with hours worked must *always* be included in the FLSA's regular rate." *Id.* at 16.

AMN likewise errs in suggesting that the decision below is in tension with the requirements of the Internal Revenue Code. *See* Pet. 16, 33. Indeed, its brief discussion on this point shows no more than that the FLSA and the Internal Revenue Code are consistent. *See id.* at 34. Neither bars an employer from reimbursing housing and meal expenses incurred on the days when employees, although away from home on a work assignment, are not working. In fact, it is undisputed that "AMN *already* pays clinicians a per diem for days they are not working for AMN." Pet. App. 16; *see* AMN App. Br. 1, 3 n.1 (stating that AMN pays per diems for 7 days per week, although clinicians are generally required to work shifts only 3 days per week).

That fact also belies the suggestion of amicus NATHO that "AMN prorated its employees' per diems for shifts missed" because "an employee may take a 'personal side trip' or even work a shift for a competitor, and if that happens a reduction in the weekly per diem amount must be made in order to maintain an accountable plan with that employee under IRS rules." NATHO Amicus Br. 12.[8] No evidence in the

[8] The IRS has given as an example of a "personal side trip" a stop to visit relatives in Mobile when on the way home to Atlanta from a business trip in New Orleans. *See* IRS, Publication 463, Travel, Gift, and Car Expenses, Adequate Accounting at 6 (2020), https://www.irs.gov/pub/irs-pdf/p463.pdf.

record supports NATHO's suggestion that AMN's approach addresses clinicians making "personal side trips" or working "shift[s] for a competitor." To the contrary, the record shows that AMN makes deductions regardless of the reason why work is missed, and regardless of whether the missed hours affected the number of days an employee had to be away from home because of her work for AMN. *See* Pet. App. 5–6. Moreover, NATHO's proposed rationale for AMN's system runs counter to AMN's treatment of "banked hours," under which a clinician may avoid a deduction in the per diem payment for a week in which she works fewer hours (for any reason, including a personal side trip) by working extra hours in another week. *See id*. at 5, 17. And that AMN likewise reduces the per diems paid to *non-traveling* local clinicians when they miss work, even though AMN agrees that those per diems are *not* expense reimbursements, *id*. at 19; ER510-11 & 581–82, confirms that the purpose of the reductions is not to avoid reimbursing personal expenses.

In sum, the decision to adopt a system in which, for example, an employee who must be away from home for a week to work three 8-hour shifts receives less in per diem payments than an employee who works three 12-hour shifts (either on the road or at home) is not driven by the demands of the Internal Revenue Code. And speculation that this outcome "jeopardizes the IRS's treatment of [per diem] payments as exempt under the accountable plan rules," TravelTax Amicus Br. 17–18, is unfounded. A payment's status under the FLSA is not determinative of its tax treatment. As the Eighth Circuit has explained:

> The IRS regulations governing accountable plans are not identical to the DOL regulations

> governing the calculation of employees' regular rates for minimum wage purposes. There are legal differences and, in the case of a regular rate calculation, many additional factors at play. The two findings are not coextensive and thus a finding in one does not negate or direct a finding in the other.

Baouch, 908 F.3d at 1113. Other courts to address the issue have reached the same conclusion.[9]

Finally, AMN's concern about the effect of this case on the staffing industry and healthcare professionals is unwarranted. Consistent with other circuits, the court of appeals here applied a functional test to determine whether the payments at issue operated as wages or reimbursements. Application of that test is a "case-specific inquiry," Pet. App. 10, and the outcome here was thus determined by the "details of how the AMN per diem payments operate," *id*. at 4. AMN

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[9] *See Gilbertson v. City of Sheboygan*, 165 F. Supp. 3d 742, 745, 751 (E.D. Wis. 2016) (holding that Health Reimbursement Arrangement "reimbursement payments should have been included in the plaintiffs' regular rate" notwithstanding that an "HRA program allows an employer to make non-taxable payments of otherwise allowable health costs on behalf of an employee"); *Houston Police Officers' Union v. City of Houston Police Dep't*, C.A. No. H-00-2184, 2001 U.S. Dist. LEXIS 26260, *17 (S.D. Tex. Sept. 26, 2001), *aff'd*, 330 F.3d 298 (5th Cir. 2003) ("[T]he Court finds no statutory provision, regulation, or letter ruling that ties an allowance's tax treatment to the issue of regular rate calculation."); *Madison v. Res. for Human Dev., Inc.,* 39 F. Supp. 2d 542, 551 (E.D. Pa. 1999) ("There is nothing inconsistent in telling employers that if they structure their benefit programs" in a certain way they "are not included in their employees' gross income," but "are included in the regular rate calculation of the FLSA."), *vacated on other grounds*, 233 F.3d 175 (3d Cir. 2000).

chose a system under which its per diem payments—paid to local as well as traveling workers and tied to the number of hours worked, including through its system for "banking hours"—did not in fact function to reimburse for expenses. AMN's decision to adopt such a system does not prevent other companies from treating per diems as reimbursements for travel expenses or other expenses incurred on the employer's behalf, where the per diems do not function as compensation. *See Skidmore*, 323 U.S. at 140 (stating that, when assessing FLSA compliance, "[e]ach case must stand on its own facts").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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