No. 21-296

In the
Supreme Court of the United States

AMN SERVICES, LLC,
Petitioner,

v.

VERNA CLARKE & LAURA WITTMAN, 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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The Fair Labor Standards Act promises employers that they can reimburse their employees' reasonable business-related travel expenses without increasing their employees' "regular rate" of pay and triggering massive overtime liability. The applicable regulations provide further clarity and confirm that traveling workers do not need to document every expense, receipt-by-receipt, but can receive a reasonable allowance for traveling expenses. Those same regulations assure employers that allowances keyed to the federal government's location-specific allowances are per se reasonable. Petitioner AMN complied with every statutory requirement and capped its travel allowances at the federal rates to come within the regulatory safe harbor. But none of that was good enough for the Ninth Circuit. Instead, the Ninth Circuit adopted a "functional approach" in which minor details like adjustments for workers who voluntarily opted out of their contractually required shifts—and thus were not traveling for their employer's benefit—and how *other workers* were paid mattered far more than the statutory prerequisites and the clear regulatory guidance.

Respondents dispute very little of this. They fully embrace the Ninth Circuit's employer-specific functional approach and convert it into their principal argument against certiorari. In their view, since the Ninth Circuit's functional approach correctly turns on employer-specific minutiae, the decision below implicates only AMN's practices and thus does not merit this Court's attention. But the entire staffing industry, the Chamber of Commerce, and numerous

other *amici* strongly disagree. The reason is obvious: The Ninth Circuit converts a foundational question on which clarity is at an absolute premium (and on which the statute and regulations provided needed clarity) into a muddle. Under the Ninth Circuit's test, minor adjustments to expense allowances made to some employees in the few weeks that they do not work enough can convert the travel-expense allowances of the entire workforce in every week into additional wages that trigger massive overtime liability. That makes no sense, and there is no easy path for compliance, as both the FLSA and the tax code require adjustments for employees who are not traveling for their employers' benefit. Worse still, the Ninth Circuit's amorphous functional test will become the *de facto* nationwide rule in the nationwide collective actions that are already being brought in large number in the Ninth Circuit and nowhere else. That is an untenable situation that only an FLSA plaintiffs' lawyer could love. The decision below eliminates the clarity provided by the statutory and regulatory text on a calculation that every employer with employees who travel must make as the first step in complying with the FLSA. Certiorari is needed to restore clarity on a question that cannot remain muddled.

I. The Decision Below Is Profoundly Wrong.

Calculating an employee's "regular rate" is a foundational step for the countless employers covered by the FLSA. Those employers need clear guidance to understand their statutory obligations and to avoid massive, surprise liability years later. Most employers have employees who travel, and thus having clear guidance on whether reimbursed travel

expenses or standard per-day or per-week allowances for such expenses must be included in employees' regular rate is imperative. Fortunately, the FLSA provides clear guidance: An employer may exclude from the regular rate "reasonable payments for traveling expenses" incurred "in the furtherance of [the] employer's interests." 29 U.S.C. §207(e)(2). On-point regulations emphasize that §207(e)(2)'s exclusion "is applicable" when "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," and clarify that travel-expense allowances, as opposed to receipt-by-receipt reimbursement, are permissible if they "reasonably approximat[e] the expense[s] incurred." 29 C.F.R. §778.217(a); *id.* §778.217(b)(3). Finally, the regulations provide a safe harbor deeming such allowances "per se reasonable" if they do not exceed federal reimbursement guidelines. *Id.* §778.217(c)(2).

There can be no serious question that AMN's travel-expense allowances satisfy these straightforward statutory and regulatory requirements to a T. They cover traveling clinicians' meal, lodging, and incidental expenses while on lengthy assignments far from home—and thus are plainly "payments for traveling expenses." They are pegged to federal-government allowances—and thus come within the regulatory safe harbor as "per se reasonable." And they are prorated if an employee declines to work contractually required shifts—thus reinforcing that reimbursements are only for expenses actually incurred "in the furtherance of [the] employer's interests" or "on [the] employer's behalf."

Ignoring AMN's satisfaction of those clear requirements and rendering the regulatory safe harbor illusory, the Ninth Circuit opted for an atextual, functional approach that barely cited, much less relied on, the *relevant* statutory and regulatory language and instead looked to a "combination of factors," including minor details, inapposite provisions, and expressly non-binding agency guidance. Pet.App.19. Respondents' attempt to defend that approach is wholly unpersuasive. Respondents make little effort to reconcile the decision below with the clear statutory and regulatory text. BIO.25-26. They affirmatively concede that AMN's travel-expense allowances are "reasonable" and paid "for traveling expenses" incurred "in the furtherance of [AMN's] interests." 29 U.S.C. §207(e)(2). That AMN's payments indisputably check all those boxes should have been the beginning and the end of this case, as it was on summary judgment in the district court.

Respondents endorse the Ninth Circuit's focus on the minutiae of how AMN adjusts the allowances when employees miss a shift (or a week), but that loses the forest for the trees and ignores the requirements of both the FLSA and the tax code. Most traveling clinicians in most weeks work all their scheduled shifts and receive the full amount of the travel allowances keyed to the federal reimbursement guidelines without any need for adjustments. Yet under the Ninth Circuit's approach, *all* of those statutory- and regulatory-compliant travel allowances are converted into wages based on the treatment of some workers who in some weeks miss some shifts. That tail-wagging-the-dog approach makes little sense

and is certainly not compelled by the FLSA, which actually requires very nearly the opposite. The reason AMN and countless other employers reduce travel-expense allowances when employees take a shift or week off is that doing so ensures that clinicians are reimbursed only for expenses incurred *on the employer's behalf*, which the relevant portion of §207(e)(2)—largely ignored by the Ninth Circuit—*requires*. As the district court put it, "reducing payments for time not worked … make[s] the payments better at reflecting expenses incurred for the benefit of the employer." Pet.App.26. Indeed, respondents never dispute that AMN's prorating policy is intended to—and does—align reimbursements to expenses incurred in AMN's interests.

The prorating adjustments also align AMN's travel-expense allowances with the requirements of the tax code, which limits "accountable" plans that do not increase workers' taxable income to those that reimburse only for "business expenses." 26 C.F.R. §1.62-2(d)(1); *see* Pet.8-9, 26-27. Respondents deem it "speculati[ve]" that the IRS will treat those non-prorated expense allowances as taxable. BIO.28. But what is truly "speculative" is that employees could get a massive unexpected increase in their FLSA "regular rate" without having their taxable income increase, especially when the requirements of the tax code and FLSA dovetail almost *in haec verba*. The applicable tax law is unambiguous: to "meet[] the requirements of [26 U.S.C.] §62(c)" and enjoy tax-exempt status, a reimbursement must satisfy, *inter alia*, the "business connection" requirement—which requires that the expense actually be "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). That language closely mirrors the "in furtherance of [the] employer's interest" language of the FLSA. 29 U.S.C. §207(e)(2). Respondents do not attempt to grapple with any of this, instead citing an Eighth Circuit decision involving judicial estoppel and a smattering of equally irrelevant district court decisions.

The other details the Ninth Circuit and respondents point to similarly provide no basis for converting reasonable travel-expense reimbursements into wages. The fact that AMN provides allowances for local clinicians (who are not parties to this litigation) is irrelevant for the simple reason that AMN has *always* included those payments to *non-traveling* clinicians in *both* their regular rate *and* their taxable income. Regardless, as the district court emphasized, "what other employees may or may not be paid does not change the underlying fact" that "traveling employees are receiving per diem payments that reasonably approximate travel costs incurred for the benefit of the employer." Pet.App.29; *see also Berry v. Excel Grp., Inc.*, 288 F.3d 252, 254 (5th Cir. 2002) (rejecting same argument). Similarly, the fact that traveling clinicians who voluntarily work extra shifts can "bank" that shift and not have their travel allowance reduced if they miss a subsequent shift, BIO.22, is a commonsense adjustment that fully aligns with the statute, Pet.28, and certainly does not convert into unreported wages all travel-expense allowances for typical weeks in which employees worked their scheduled shifts and received unadjusted and per se reasonable travel allowances.

The Ninth Circuit's totality-of-the-circumstances approach allowed it to downplay the relevant statutory and regulatory text in favor of DOL's expressly non-authoritative Field Operation Handbook ("FOH"). Pet.22-24. Respondents insist at length that the Ninth Circuit's treatment of the FOH was permissible under *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019), and *Skidmore v. Swift & Co.*, 323 U.S. 135 (1944), because the Ninth Circuit did not afford the FOH "controlling weight." BIO.14-15. Respondents are wrong several times over. First, the expressly non-authoritative nature of the FOH should have precluded deference even under *Skidmore*. After all, courts owe deference to DOL's stated view that the FOH, unlike its on-point regulation, is non-authoritative. Moreover, "a *Skidmore*-type analysis" must start with the regulation and "independently examin[e]" it before "concluding that the agency interpretation [is] sound." *Kisor*, 139 S.Ct. 2429 (Gorsuch, J., concurring in the judgment). Judge Berzon's opinion for the Ninth Circuit did no such thing; it paid almost no attention to the relevant regulatory text before blockquoting the FOH, citing several pre-*Kisor* circuit court decisions that improperly relied on the FOH, and declaring that the FOH "support[ed]" the panel's decision. Pet.App.14-15. This is not the first time the Ninth Circuit has placed more weight on an inapposite handbook than on the FLSA's text. *See Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134, 1142 (2018) ("*Encino II*") (rejecting Ninth Circuit's reliance on a different DOL

handbook). This repeated error should not stand uncorrected.[1]

In the end, respondents have little choice but to embrace the Ninth Circuit's functional, "combination of factors" approach, because it forms the basis for their only real argument against certiorari. Respondents contend that the Ninth Circuit's focus on the minutiae of AMN's handling of travel-expense reimbursements means the decision impacts only AMN. Half a dozen *amicus* briefs beg to differ, because nothing about AMN's reimbursement practices is idiosyncratic. But to the extent respondents are correct that, under the Ninth Circuit's test, every regular-rate determination is employer-specific and no employer can be assured that it has correctly calculated its employees' regular rate until the Ninth Circuit has considered the totality of the circumstances and passed judgment, that only underscores that the Ninth Circuit is wrong and certiorari is necessary.

II. The Decision Below Will Have Serious Adverse Consequences And Warrants Review In This Case.

The decision below is already upending longstanding industry practices by replacing clear statutory and regulatory language with a

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[1] Respondents blame AMN for the Ninth Circuit's misguided focus on the FOH, asserting that the FOH was "relied on below by AMN but not by Respondents." BIO.3; *see also* BIO.16-17, 26. That distorts the record. As the district court explained: "*Plaintiffs* rely heavily on the [FOH] in support of their position." Pet.App.26 (emphasis added). In the Ninth Circuit, AMN did no more than argue that respondents' FOH reliance was misplaced.

"combination of factors" approach to a high-stakes question affecting almost every employer in the country. Determining an employee's "regular rate" is a critical exercise that employers must be able to perform with certainty. For the countless employers that provide travel-expense allowances, that is no longer possible. And the problem is neither limited to the Ninth Circuit nor likely to benefit from further percolation. Because the FLSA provides for nationwide collective actions, it would be borderline malpractice for members of the FLSA plaintiffs' bar to file similar suits anywhere but the Ninth Circuit. The numbers bear this out, as *dozens* of FLSA challenges to per diem policies have been filed within the Ninth Circuit in recent years.[2] These suits—and the *in*

[2] *See generally*, Chamber.Br.19-20 n.4-5 (collecting cases); *see also, e.g.*, *Junkersfeld v. Per Diem Staffing Sys., Inc.*, 2019 WL 3842067 (N.D. Cal. Aug. 15, 2019); *Dittman v. Med. Sol., L.L.C.*, 2019 WL 4302752 (E.D. Cal. Sept. 11, 2019); *Hubbard v. RCM Techs. (USA), Inc.*, 2021 WL 5016058 (N.D. Cal. Oct. 28, 2021); *Askar v. Health Providers Choice, Inc.*, 2021 WL 4846955 (N.D. Cal. Oct. 18, 2021); *Dalchau v. Fastaff, LLC*, 2018 WL 1709925 (N.D. Cal. Apr. 9, 2018); *Clay v. Prolink Staffing Servs., LLC*, No. 5:19-cv-01697 (C.D. Cal. Nov. 23, 2020); *Benson v. Maxim Healthcare Servs., Inc.*, 2018 WL 11361062 (E.D. Cal. Aug. 23, 2018); *Byers v. Emerald Health Servs. Local LLC*, BC682787 (Cal. Super. Ct. Nov. 8, 2017); *Byers v. United Staffing Sols. Inc.*, BC675912 (Cal. Super. Ct. Nov. 14, 2017); *Cobbs v. MGA Travel Cal., Inc.*, No. 30-2019-01099034-CU-OE-CXC (Cal. Super. Ct. Sept. 20, 2019); *Horn v. Rise Med. Staffing, LLC*, No. 2:17-cv-01967 (E.D. Cal. Nov. 6, 2020); *Junkersfeld v. Flexcare LLC*, No. 2:17-cv-02063 (E.D. Cal. Oct. 17, 2018); *Junkersfeld v. Med. Staffing Sols. Inc.*, No. 1:19-cv-00236 (E.D. Cal. Aug. 19, 2021); *Pruitt v. Trustaff Travel Nurses*, No. CIVMSC17-01930 (Cal. Super. Ct. Mar. 21, 2019); *Lykens v. Aya Healthcare Services, Inc.*, No. RG18926616 (Cal. Super. Ct. Oct. 30, 2018); *Haeterling v. Healthcare Pros., Inc.*, No. 30-2017-00946838-CU-OE-CXC

terrorem settlements they produce—will only multiply if the decision below is left standing.

Respondents' attempt to downplay the stakes and treat this as an AMN-specific ruling rings especially hollow in light of the experiences of AMN's many *amici*, who are already dealing with the fallout from the decision below. The American Staffing Association explains that the decision "is already disrupting the staffing industry," with "staffing companies around the country ... re-evaluating their policies, uncertain whether their existing payment arrangements leave them vulnerable to FLSA exposure." ASA.Br.13. The effect on the healthcare industry, already overwhelmed with the pandemic, is particularly profound. The National Association of Travel Healthcare Organizations emphasizes that the "legal exposure for healthcare staffing companies that wish to provide per diems to their employees," makes it "even more difficult" for traveling healthcare workers "to carry out their essential work." NATHO.Br.9. The Ninth Circuit's decision "upend[s] the traveling healthcare staffing model at a time when the industry" has never been more important and "is already pushed to the brink." HR.Policy.Ass'n.Br.5. Simply put, the decision below increases costs for nurses at the precise moment when they are most needed and healthcare costs are already rising.

(Cal. Super. Ct. Nov. 2, 2020); *Call v. Travel Nurse Across Am., LLC*, No. 2:18-cv-03027 (E.D. Cal. Sept. 23, 2019); *Bowers v. Prolink Staffing Servs., LLC*, No. 21STCV22188 (Cal. Super. Ct. Aug. 16, 2021); *Harvitt v. Jackson Therapy Partners LLC*, No. CIVMSC19-02080 (Cal. Super. Ct. Dec. 20, 2019).

The Ninth Circuit's decision to transform a longstanding industry practice into a font of FLSA liability is especially problematic because there is no easy path for complying with the Ninth Circuit's decision. It puts employers and employees alike "in an impossible position." Chamber.Br.22; *see id.* 18-22. Respondents are noticeably silent on what an employer is supposed to do when traveling employees fail to perform contractually required work. Under the Ninth Circuit's decision, the employer has no good options—and neither do its employees. To try to avoid FLSA liability, employers can forgo prorating travel-expense allowances; but that approach risks paying *non-business* expenses, and thus transforming *all* travel-expense allowances into taxable income, which would mean a net *decrease* in take-home pay for most workers as their increased tax liability would overshadow any increase in overtime compensation. Alternatively, employers could abandon travel-expense allowances altogether and require employees to account for expenses receipt-by-receipt. But while that would clearly burden employees and employers alike, it still would not provide a clear answer about how to handle expenses incurred during periods when shifts are missed. As AMN's *amici* attest, either option will hamper the staffing industry—especially in the healthcare sector—at a time when the nation can ill afford it.

Neither Congress nor the DOL put employers and employees in this untenable position. Instead, they gave clear guidance that a reasonable allowance for travel expenses keyed to federal levels is neither part of an employee's "regular rate" nor part of her taxable income. The regulations ensure that employers

cannot use overly generous travel allowances to disguise income, but provide a safe harbor when employers like AMN cap their allowances at federal-government rates. The notion that the details of how employers deal with missed shifts can convert otherwise compliant travel allowances into wages contradicts the entire scheme as well as common sense.

Finally, there is no dispute that this case is an ideal vehicle, as the question presented is the only issue left in the case and is dispositive. And this Court frequently intervenes when, as here, an erroneous lower-court decision allows a novel theory of FLSA liability to create a risk of significant liability for employers who have done nothing more than follow longstanding industry practice. *See, e.g.*, *Encino II*, 138 S.Ct. at 1138; *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2124 (2016); *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 31 (2014); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 153 (2012). Unlike those cases, which involved exemptions limited to specific industries or specialized employees, the question presented here implicates the FLSA "regular rate," a foundational issue of paramount importance to employers and employees in every industry. Certiorari is therefore imperative.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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