No. 19-55784

(Before Bobby R. Baldock, Marsha S. Berzon, and Daniel P. Collins;
Decision issued February 8, 2021)

In the United States Court of Appeals for the Ninth Circuit

VERNA MAXWELL CLARKE and LAURA WITTMANN,
individuals on behalf of themselves and others similarly situated,
Plaintiffs and Appellants,

vs.

AMN SERVICES, LLC,
Defendant and Appellee.

BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF TRAVEL
HEALTHCARE ORGANIZATIONS
IN SUPPORT OF
APPELLEE AMN SERVICES, LLC'S
PETITION FOR REHEARING OR REHEARING *EN BANC*

On Appeal from a Judgment of the United States District Court
for the Central District of California
2:16-cv-04132-DSF, Honorable Dale S. Fischer, District Judge Presiding

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae National Association of Travel Healthcare Organizations states that it is not a subsidiary of any corporation, and no publicly held corporation owns 10% or more of its stock.

DATED: March 17, 2021 DAY PITNEY LLP

/s Christopher F. Droney
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INTEREST OF AMICUS CURIAE

The National Association of Travel Healthcare Organizations ("NATHO") is a non-profit association of travel healthcare organizations, founded in 2008 to promote ethical business practices in the travel healthcare industry, setting a standard for conduct that is aligned among member agencies on behalf of travel healthcare candidates and clients. NATHO members are held to a strict code of ethics that protects healthcare providers and healthcare professionals from unscrupulous business practices.

The organization primarily serves to:

- Educate the healthcare industry on the benefits of travel healthcare staffing;
- Establish a set of service standards among travel healthcare companies;
- Share resources among member organizations;
- Offer a formal dispute resolution process through an arbitration committee; and
- Aid all members in cultivating market growth.

NATHO serves as amicus curiae to inform the Court of the wide-ranging, adverse consequences that its decision, unless reconsidered, will have on the traveling healthcare industry, traveling healthcare professionals, and patient care.

STATEMENT OF COMPLIANCE WITH RULES 29(A)(2) & (A)(4)(E) OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND CIRCUIT RULE 29-3

This amicus brief is submitted pursuant to Rule 29 of the Federal Rules of Appellate Procedure ("FRAP").

In compliance with FRAP Rule 29(a)(2) and Circuit Rule 29-3, NATHO sought and obtained the consent of all parties to the filing of this brief.

In compliance with FRAP Rule 29(a)(4)(E)(i)–(iii), no party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.[1]

[1] AMN is a member of NATHO, but AMN did not participate in NATHO's decision to file this brief.

SUMMARY OF ARGUMENT

Hospital and clinic needs fluctuate constantly, and our country relies on large numbers of traveling professionals to address healthcare labor shortages. Those professionals follow "snowbirds" in the winter, treat the influx of patients during flu season, ameliorate regional labor shortages, fill in when permanent staff take maternity or FMLA leave, assist with the opening of new hospitals, and—this past year—race between COVID "hotspots." When it is impractical for the professionals to return home during their extended assignments, they need to receive from their employers reasonable per diem payments for traveling expenses in addition to their hourly pay. This panel's decision, however, jeopardizes those payments by making it exceedingly difficult for traveling healthcare organizations to design per diem programs that comply with both the Fair Labor Standards Act ("FLSA") and the IRS's accountable plan regulations.

The problem is this: IRS accountable plan regulations require that employers paying non-taxable per diems limit the per diems to business expenses incurred by the employee. That, in turn, constrains an employer's ability to provide per diems when the employee misses work shifts at an assigned hospital or clinic. Yet the panel's decision creates doubt about when (and even if) the FLSA Section 207(e)(2) regular rate exception permits employers to prorate weekly per diems. As a result, employers now face increased legal exposure under the FLSA and state analogs for

the very same per diem program features put in place to ensure compliance with IRS accountable plan regulations.

The increased legal exposure will not only raise the costs of traveling healthcare, it will make it impractical for these employers and healthcare professionals to serve hospitals and clinics in states such as California, which impose substantial penalties beyond the FLSA for wage miscalculation. The consequences for patient care will be direct, substantial, and adverse.

For these reasons, and the discussion that follows, NATHO respectfully asks the panel to reconsider its decision or this court to permit *en banc* review.

BACKGROUND

A. The Traveling Healthcare Industry Is Critical to the Nation's Healthcare System

Even in ordinary times, patients across the country rely on traveling healthcare professionals—including registered nurses, licensed practical nurses, certified nursing assistants, technicians, and allied professionals—to provide essential acute and post-acute healthcare services. Some regions are unable to permanently train or attract enough healthcare professionals to meet patient needs, and thus require traveling professionals to address persistent labor shortages. *See* Lisa M. Haddad *et al.*, *Nursing Shortage*, NIH BOOKS (last updated Dec. 14, 2020) ("Nursing shortage amounts can vary greatly depending on the region of the country as well. Higher shortages are seen in different areas depending on the specialty of nursing. Some

areas have real deficits when looking at critical care nurses, labor and delivery, and other specialties.").[2] Other regions need traveling healthcare professionals on a seasonal basis. For instance, demand for healthcare professionals fluctuates annually in Florida, Arizona, and Texas, as many retirees relocate in the winter. And hospitals, clinics, outpatient care centers, and skilled nursing facilities routinely look to traveling healthcare professionals to address temporary labor shortages that arise in the normal course of providing care to their patients—such as when staff take maternity or FMLA leave. This is particularly true during "regular" flu season, when demand for short-term labor typically increases 25–50%.

Of course, unexpected circumstances can make the need for traveling healthcare professionals more acute, as the COVID pandemic has shown us. "As the coronavirus has spiked across the country, … travel nurses, who work on temporary contracts for higher fees and move from city to city, have become more urgently needed than ever." Julie Bosman, *As Hospitals Fill, Travel Nurses Race to Virus Hot Spots*, N.Y. TIMES (Dec. 2, 2020).[3] Yet, despite the industry's best efforts, "[m]ore than 1,000 hospitals across the United States [remain] 'critically' short on staff, according to numbers released [in November 2020] by the Department of Health and

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

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

Human Services." Sean McMinn & Selena Simmons-Duffin, *1,000 U.S. Hospitals Are 'Critically' Short on Staff – More Expect to Be Soon*, NPR.ORG (Nov. 20, 2020);[4] *see also* Christi M. Grimm, *Hospital Experiences Responding to the COVID-19 Pandemic: Results of a National Pulse Survey March 23–27, 2020*, HHS.GOV (Apr. 2020).[5]

The nation's reliance on traveling healthcare professionals will likely grow in coming years, even after the worst of the pandemic has subsided. Before COVID, the National Institutes of Health warned of a looming "nursing shortage," as Baby Boomers retire and the population ages. *See* Haddad *et al.*, *supra*, n.2. Indeed, the Bureau of Labor Statistics projects that, between 2019 and 2029, the number of nurse practitioner positions will increase by 52.4% and the number of unfilled job openings for registered nurses will exceed 1.75 million. U.S. Bureau of Labor Statistics, *Employment Projections*.[6] The pandemic has accelerated these trends, as the overwhelming demands of caring for COVID patients has led many to leave the profession. *See, e.g.*, Theresa Brown, *Covid-19 Is 'Probably Going to End My*

[4] *Available at* https://www.npr.org/sections/health-shots/2020/11/20/937152062/1-000-u-s-hospitals-are-short-on-staff-and-more-expect-to-be-soon.

[5] *Available at* https://oig.hhs.gov/oei/reports/oei-06-20-00300.pdf.

[6] *Available at* https://data.bls.gov/projections/occupationProj.

Career', N.Y. TIMES (Feb. 25, 2021);[7] Scottie Andrew, *Traumatized and Tired, Nurses Are Quitting Due to the Pandemic*, CNN.COM (Feb. 25, 2021).[8] Because the supply of and demand for credentialed medical professionals will remain unevenly distributed across the country, traveling health care professionals will continue to be an indispensable part of the nation's healthcare system.

B. Traveling Healthcare Work Requires That Medical Professionals Receive Per Diem Expense Payments

To carry out their critical mission, traveling healthcare organizations must be able to provide per diem expense reimbursement to their employees, who typically travel far from their homes for many weeks and even months at a time. As the *New York Times* describes:

> The nurses parachute into cities like New York, Phoenix, Los Angeles and Green Bay for weeks or months at a time, quickly learning the ways of a new hospital and trying to earn the trust of the existing staff.
>
> At the end of their shifts, they return to their temporary homes: hotels, Airbnb apartments or rented houses. Their families and friends are sometimes thousands of miles away, available only through phone calls or FaceTime.

[7] *Available at* https://www.nytimes.com/2021/02/25/opinion/nursing-crisis-coronavirus.html.

[8] *Available at* https://www.cnn.com/2021/02/25/us/nurses-quit-hospitals-covid-pandemic-trnd/index.html.

Bosman, *supra*, n.3. Healthcare professionals' rent and mortgage payments back home do not stop just because they are on assignment and staying temporarily at another residence time zones away. They thus expect, and are eligible, to be reimbursed for the additional housing, meal, and travel expenses they incur in furtherance of their employers' interests.

Traveling healthcare organizations seek to reimburse those travel costs by providing per diem payments to the clinicians. These per diems are based on federal CONUS rates set by the General Services Administration to provide "fair and equitable" daily allowances "for lodging (excluding taxes), meals and incidental expenses" "based upon contractor-provided average daily rate (ADR) data." Gen. Servs. Admin., *Frequently Asked Questions, Per Diem*, GSA.GOV.[9] Per diems allow employers to reimburse reasonable business-related living expenses incurred on days spent away from home for work without the substantial burden—to employer and employee alike—of itemizing and substantiating each individual expenditure, an even greater than usual burden here because of the extended periods of time healthcare professionals are away. *See* Internal Rev. Serv., *Publication 463, Travel, Gift, and Car Expenses*, Adequate Accounting, IRS.GOV (2019) ("*IRS Pub. 463*")

[9] *Available at* https://www.gsa.gov/travel/plan-book/per-diem-rates/frequently-asked-questions-per-diem#4.

(stating that a per diem can "satisf[y] the adequate accounting requirement").[10] Without a reasonable per diem system, traveling healthcare organizations and professionals will find it exceedingly difficult to carry out their essential work.

ARGUMENT

The panel's decision creates additional and substantial uncertainty in an already complicated legal landscape. To provide employees with non-taxable per diems, traveling healthcare organizations must comply with both IRS accountable plan regulations and the FLSA. Even before the panel's decision, neither body of law provided employers with complete guidance for designing per diem programs, making efforts to provide employees with per diems challenging. The panel decision, however, significantly exacerbates the problem by creating potential legal exposure under the FLSA for those features of per diem programs specifically adopted to comply with IRS regulations. Unless the panel decision is reconsidered, traveling healthcare organizations will find it exceedingly difficult to provide their traveling employees with a means of efficiently reimbursing their travel expenses.

A. IRS Regulations Limit How Employers Can Structure Per Diems

Under IRS regulations, an employer can provide an employee with non-taxable per diems only for "business expenses … that are paid or incurred by the employee in connection with the performance of services as an employee of the

[10] *Available at* https://www.irs.gov/publications/p463.

employer." 26 C.F.R. § 1.62-2(d)(1). Expense reimbursements that lack a business connection (*e.g.*, expenses an employee incurs for personal reasons or business expenses an employee incurs in furtherance of a different employer's business interests), do not qualify as non-taxable accountable plan reimbursements. Instead, they constitute taxable "wages and are subject to withholding and payment of employment taxes when paid." *Id.* § 1.62-2(h)(2)(ii). An employer must assess its arrangement "on an employee-by-employee basis." *Id.* § 162-2(i).

If an IRS review or audit reveals that the employer's accountable plan improperly reimbursed an employee's expenses on a non-taxable basis, then "*all* amounts paid under the arrangement are treated as paid under a nonaccountable plan," and thus taxable income.[11] *Id.* § 1.62-2(d)(3)(i) (emphasis added). In that case, the IRS can change the plan's tax treatment not just prospectively, but retroactively. As a result, the healthcare professional *herself* could face substantial bills for back taxes.

Despite these implications, the IRS provides employers with little specific guidance on how to design a legally compliant accountable plan for per diems.

[11] The Tax Cuts and Jobs Act of 2017 eliminated itemized deductions for amounts paid under a nonaccountable plan, except for a few limited classes of employees not relevant here. *See IRS Pub. 463*, Nonaccountable Plans. Accordingly, amounts paid to traveling healthcare professionals under a nonaccountable plan are not tax deductible.

Publication 463 instructs that employers must "reasonably limit[] payments of [an employee's] expenses to those that are ordinary and necessary in the conduct of the trade or business." *IRS Pub. 463*, Per Diem and Car Allowances. Publication 463 further states that "personal side trip[s]" cannot be reimbursed on a non-taxable basis. *Id.*, Travel in the United States. And IRS accountable plan regulations prohibit employers from paying non-taxable per diems when the underlying expenses lack a "business connection" to the reimbursing employer. *See* 26 C.F.R. § 1.62-2(d)(1) (limiting payment of per diems on a non-taxable basis under the accountable plan rules "only for business expenses … that are paid or incurred by the employee in connection with the performance of services as an employee of the [paying] employer"). But beyond such general guidelines, employers are left without clear direction on how to determine when an employee has incurred personal expenses on an extended assignment, or how to calculate time and expenses not incurred on the employer's behalf.

In the face of this lack of specific guidance, traveling healthcare organizations such as AMN crafted reasonable rules to ensure that employees do not receive per diems on a non-taxable basis for expenses lacking a "business connection." AMN prorated its employees' per diems for shifts missed, recognizing that 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 submits that AMN's program was a reasonable effort to comply with this requirement.

But even if AMN's practices should be adjusted in some way, those adjustments must not conflict with IRS rules. IRS regulations require employers paying per diems under an accountable plan to ensure that they do not reimburse expenses without a proper business connection on a non-taxable basis. To comply, traveling healthcare organizations must be able to implement some procedure for adjusting per diems when an employee misses work. Otherwise, the industry's ability to pay per diems on a tax efficient basis will be in jeopardy.

B. The Panel's Decision Creates Potential FLSA Liability for Procedures Adopted to Comply with IRS Regulations

The panel faults AMN for precisely those aspects of the program that were adopted to comply with IRS accountable plan regulations. Unless reconsidered, traveling healthcare organizations face potential exposure under the FLSA if they continue to reimburse, on a non-taxable basis, business expenses incurred by employees.

As an initial matter, the panel holds that, under FLSA Section 207(e)(2), the per diems functioned as wages because AMN "connect[ed] the amount paid to the hours worked while still away from home." Slip op. at 18. The panel states that, instead, the program should have focused on "whether the employee remains away from home incurring expenses for AMN's benefit." *Id.* But it is unclear how an

employer of professionals who travel substantial distances from home for extended periods of time can ensure that an employee is "incurring expenses for [the employer's] benefit" *without* accounting for the scheduled shifts the employee fails to work for the assigned hospital or health care provider.

Nor do IRS regulations permit employers to provide non-taxable per diems for all expenses an employee incurs away from home on a business trip. Rather, the regulations require that employers limit non-taxable per diems to "business expenses … that 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). That, in turn, requires that an employer determine whether a per diem, if paid, would be reimbursing other expenses, such as a "personal side trip." *IRS Pub. 463*, Travel in the United States. Yet the panel's decision appears to cast doubt on whether so limiting per diems requires treating them as part of the "regular rate" under the FLSA.

Further compounding this problem, the decision creates uncertainty regarding whether employers may pay weekly per diems when an employee cannot return home on days off. The decision appears to sanction such per diem arrangements, stating: "Reimbursing traveling clinicians for seven days of expenses even though most clinicians only work three days a week is justifiable because the clinicians are scheduled to work away from home for a prolonged period." Slip op. at 17. But the

decision also concludes that the per diems functioned as compensation in part because they were provided "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." *Id.* at 20 (emphasis added).[12] It is unclear how an employer providing per diems should reconcile these two statements in practice, other than by requiring employees on extended assignment to substantiate business expenses with receipts. Yet doing so would not only be exceedingly complicated for the employer and clinician; it would impose the extensive paperwork burden on employees that the IRS designed the per diem approach using CONUS rates to minimize.

In sum, the panel's application of FLSA Section 207(e)(2) makes it exceedingly difficult for traveling healthcare organizations to comply with IRS regulations without potentially exposing themselves to substantial liability under the FLSA.

C. The Panel's Decision Will Adversely Affect Patients and Traveling Healthcare Professionals

The panel's decision will have consequences reaching far beyond the parties and class members. Since the decision was issued last month, many NATHO members have invested considerable resources reassessing their per diem benefit

[12] This statement, in particular, appears to overlook the unique nature of traveling healthcare professional work. Unlike many workers who receive per diems, traveling healthcare professionals typically cannot return home between shifts.

programs in light of the panel's decision to ensure compliance with IRS regulations and minimize liability under the FLSA and similar state statutes. A number of NATHO members have even concluded that, if the decision is not reconsidered, they may be unable to continue serving California health care provider clients. Because California Labor Code Section 510(a) provides overtime for "[a]ny work in excess of eight hours," the potential exposure for being found to violate the FLSA and its California analog is simply too great.

The decision will at the very least substantially increase the cost of addressing labor shortages and hiring critical traveling healthcare professionals—including registered nurses, licensed practical nurses, certified nursing assistants, technicians, and allied professionals—in the middle of a terrible pandemic.

CONCLUSION

For the foregoing reasons, amicus NATHO respectfully supports AMN's motion for rehearing or *en banc* review.

Respectfully submitted,

DATED: March 17, 2021

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Certificate of Compliance for Briefs

9th Cir. Case Number: 19-55784

I am the lead appellate attorney for amicus curiae National Association of Travel Healthcare Organizations.

This brief contains 3,035 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this amicus brief and complies with the word limit of Fed. R. App. P. 29(a)(5).

Signature: /s Christopher F. Droney **Date**: March 17, 2021