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

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

Counsel for Amicus Curiae

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INTEREST OF THE *AMICUS CURIAE* [1]

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The Atlantic Legal Foundation is filing an amicus brief in this Fair Labor Standards Act case because proper judicial interpretation and application of federal statutes and regulations, especially those that affect a broad spectrum of U.S. industries and businesses, is essential to the rule of law and civil

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[1] Petitioner's and Respondents' counsel of record were provided timely notice in accordance with Supreme Court Rule 37.2(a), and have consented to the filing of this brief. In accordance with Supreme Court Rule 37.6, *amicus curiae* Atlantic Legal Foundation certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

justice. As the Foundation discussed in the merits-stage amicus brief that it filed in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), interpretation of federal agency regulations should be primarily the province of the courts. For this reason, and as the Court emphasized in *Kisor*, judicial deference to an agency's interpretation of its own regulations is limited to circumstances where a regulation is "genuinely ambiguous," and even then, "depends on a range of considerations." *Id.* at 2408. Where, as here, a duly promulgated federal regulation is *unambiguous*, it is improper for a court to modify the regulation's plain meaning by relying upon an internal agency handbook. Affording any degree of judicial deference to an agency staff manual that not only rewrites the agency's own unambiguous regulation, but also expressly disclaims its use as interpretative authority, conflicts with the demanding criteria that the Court has established in *Kisor* for "*Auer* deference." Such a handbook does not even merit "*Skidmore* deference."

SUMMARY OF ARGUMENT

The Fair Labor Standards Act (FLSA) issue in this case is whether business travel-related per-diem allowances are excluded from the "regular rate" of pay for overtime calculation purposes if such payments are proportionately reduced for employees who decline to work all of their contractually required shifts. An *unambiguous* DOL regulation, 29 C.F.R. § 778.217 (Reimbursement for expenses), which implements an *unambiguous* FLSA statutory provision, 29 U.S.C. § 207(e)(2) ("Regular rate" defined), answers this question affirmatively.

Holding to the contrary, the Ninth Circuit relied in part on a single sentence in an extensive Department of Labor (DOL), Wage & Hour Division, Field Operations Handbook. App. 15. The court's opinion, issued almost two years after *Kisor*, makes no mention of that game-changing decision concerning the criteria for judicial deference to agency interpretations of agency regulations under *Auer v. Robbins*, 519 U.S. 452 (1997).

Nor does the court's opinion contain anything resembling the rigorous, multi-part analysis that *Kisor* requires before a court can afford deference to an agency interpretation of an agency regulation. *See* 139 S. Ct. at 2415-18. In his concurring opinion, Chief Justice Roberts summarized "the prerequisites for, and limitations on, *Auer* deference" established by the *Kisor* majority:

> The underlying regulation must be genuinely ambiguous; the agency's interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise.

Id. at 2424 (Roberts, C.J., concurring in part). *Kisor*'s criteria make it clear that *Auer* deference does not apply here. The specific regulation at issue, 29 C.F.R. § 778.217(b)(3), is unambiguous, and the DOL Handbook's putative interpretation of that regulation is both unreasonable and unauthoritative.

Along the same lines, the Ninth Circuit's opinion makes no effort to explain why the Handbook even should be afforded non-binding *Skidmore* deference, i.e., why it should be given any weight at all. *Skidmore* "deference," a commonly used misnomer, means that an agency interpretation merely "is eligible to claim respect according to its persuasiveness." *United States v. Mead*, 533 U.S. 218, 221 (2001) (discussing *Skidmore v. Swift Co.*, 323 U.S. 134 (1944)). *Skidmore* "reaffirmed the traditional rule that an agency's interpretation of the law is 'not controlling upon the courts' and is entitled only to a weight proportional to 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *Kisor*, 139 S. Ct. at 2427 (Gorsuch, J., concurring in the judgment) (quoting *Skidmore*, 323 U.S. at 140). As is the case here, an agency interpretation of an agency regulation cannot be persuasive if it is unauthoritative and conflicts with the plain meaning of the regulation that it purports to interpret.

ARGUMENT

The Court Should Grant Review Because the Ninth Circuit's Reliance On a Departmental Handbook's Unauthoritative Interpretation of an Unambiguous Regulation Conflicts With This Court's Judicial Deference Precedent

Under the FLSA, 29 U.S.C. § 201 *et seq.*, employees who work more than 40 hours per week must be paid overtime "at a rate not less than one and one-half

times the regular rate at which he is employed." *Id.* § 207(a)(1). The statute expressly excludes from the definition of "regular rate," however, "reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests." *Id.* § 207(e)(2). More specifically, DOL's implementing regulation states in pertinent part that reimbursement for the "reasonably approximate amount expended by an employee who is traveling 'over the road' on his employer's business, for transportation . . . and living expenses away from home, [and] other travel expenses . . . incurred while traveling on the employer's business" will "*not be regarded as part of the employee's regular rate*." 29 C.F.R. § 778.217(b)(3) (emphasis added). This clearly worded regulation plainly means that reasonable per-diem payments intended to cover an employee's business-related travel expenses are not included in his or her regular rate of pay for purposes of calculating overtime.

Petitioner AMN Services, a healthcare staffing company, reduces the per-diem payment for any of its traveling nurses or other clinicians who do not work all of the shifts required by their employment contracts. *See* Pet. at 8. The district court saw "no reason why this per diem reduction practice should alter the characterization of the per diem as not part of the 'regular wage.'" App. 26. But a Ninth Circuit panel disagreed and reversed. *See id.* 23; Pet. at 10-13.

Relying on two inapposite Ninth Circuit cases—both involving the "other similar payments" catch-all category, rather than the "traveling expenses" category, of excludable payments under § 207(e)(2)—the court of appeals asserted that "a payment's *function* controls whether the payment is excludable from the regular rate under § 207(e)(2)." App. 10. According to the court of appeals, "determining whether a per diem must be included in the regular rate of pay is a case-specific inquiry that turns on whether the payments function to reimburse employees for expenses or instead operate to compensate employees for hours worked." *Id.* 16. In the court's view, "[s]everal features of AMN's per diem payments make evident that they function as remuneration for hours worked rather than reimbursement for expenses." *Id.*

Attempting to justify its use of this "payment-function test" in connection with business travel-related per-diem payments, *id.* 11, the court of appeals made short work of the unambiguous text and plain meaning of the applicable statutory provision, 29 U.S.C. § 207(e)(2), and implementing DOL regulation, 29 C.F.R. § 778.217(b)(3)—both of which categorically exclude reasonable, travel-related per-diem payments from an employee's regular rate of pay, and say *nothing* about some sort of case-specific, payment-function analysis. Instead of adhering to the statute and regulation, the court asserted that "[DOL] interpretations of § 207(e)(2) support assessing how

payments operate to determine if they are properly excluded from the FLSA's regular rate of pay." App. 14.

Without citing *Kisor*, *Auer*, or *Skidmore*, the court of appeals pointed to, and relied upon, a sentence in an internal DOL handbook as one of these supposed "interpretations." *See id.* 15. The sentence states that "[i]f the amount of per diem or other subsistence payment is based upon and thus varies with the number of hours worked per day or week, such payments are not a part of the regular rate in their entirety." Dep't of Labor, Wage & Hour Div., Field Operations Handbook ("FOH") § 32d05a(c).[2] Unlike the court of appeals, the district court rejected reliance on the Handbook, explaining that "the FOH is not authoritative guidance on the Labor Code or Labor Regulations." App. 27 (citing *Probert v. Family Centered Servs. of Alaska, Inc.*, 651 F.3d 1007 (9th Cir. 2011)). In *Probert*, a Ninth Circuit panel declined a plaintiff's invitation to interpret an ambiguous term in a different FLSA provision based on "guidance" contained in the same Field Operations Handbook. The *Probert* panel indicated "it does not appear to us that the FOH is a proper source of interpretive guidance. The handbook itself says that it 'is not used as a device for establishing interpretive policy.'" 651

[2] *Available at* https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-32#B32d05.

F.3d at 1012 (citing FOH, Foreword at 1) (internal citation omitted).

Indeed, the internal, out-of-date, unauthoritative DOL Handbook "guidance" on which the court of appeals relied here to interpret 29 C.F.R. § 778.217(b)(3), *see* App. 14-15, is not entitled to judicial deference of any type: *Auer* deference is unwarranted because the Handbook fails to satisfy the criteria established by the Court in *Kisor*. *Skidmore* deference is inapplicable too, especially because the Handbook's Foreword expressly cautions that it should not be used for interpretative purposes. *Probert*, 651 F.3d at 1012. In short, the Handbook should be afforded no weight at all.

The Ninth Circuit erred by relying on the Handbook as the pretext for essentially rewriting an important, broadly applicable, duly promulgated DOL overtime calculation regulation upon which countless businesses and industries rely. This conflict with Supreme Court judicial deference precedent is a compelling reason for the Court to grant review.

A. The Handbook does not satisfy *Kisor*'s criteria for *Auer* deference

"The Field Operations Handbook (FOH) is an operations manual that provides Wage and Hour Division (WHD) investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance. . . . *It is not used as a device for establishing*

interpretative policy." FOH, Foreword (emphasis added).[3] The Foreword also cautions that because "there often will be a delay" in updating the Handbook, it "may not reflect current legislation, regulations, significant court decisions, and decisions and opinions of the WHD Administrator . . . . The Federal Register and the Code of Federal Regulations (CFR) remain the *official resources for regulatory information* published by the DOL." *Id.* (emphasis added).

The Ninth Circuit's reliance on § 32d05a(c) of the Handbook to interpret 29 C.F.R. § 778.217(b)(3)—an "interpretation" that, as a practical matter, rewrites DOL's definition of "regular rate" by engrafting a subjective, case-by-case "payment-function test" onto the regulation's straightforward exclusion for business travel-related per-diem payments—was improper. In effect, the court bestowed *Auer* deference upon an unreasonable, unauthoritative, putative interpretation of DOL's own unambiguous regulation. This is reversible error because the Ninth Circuit's analysis violated the Court's teaching in *Kisor* regarding the prerequisites for—and limits of—*Auer* deference. *Kisor* makes it clear that because federal agencies do not have "freedom to read their rules however they may like," courts "must interpret unambiguous rules exactly as they are written."

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[3] *Available at* https://www.dol.gov/agencies/whd/field-operations-handbook.

Paul J. Larkin, Jr., *Agency Deference After Kisor v. Wilkie*, 18 Geo. J.L. & Pub. Pol'y 105, 118 (2020).

The overarching issue in *Kisor* was "whether to overrule *Auer*." *Kisor*, 139 S. Ct. at 2409. A majority of Justices declined to "say goodbye to *Auer*," *id.* at 2425 (Gorsuch, J., concurring in the judgment), and instead, as explained in Justice Kagan's majority opinion, decided to "reinforce its limits." *Id.* at 2408. The Court accomplished this narrowing of *Auer* by providing lower courts with a detailed roadmap for determining whether *Auer* deference applies to a federal agency's interpretation of one of its own regulations.

1. "First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Id.* at 2415. As Justice Kagan explained, "when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." *Id.* at 2414. More specifically, a "court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning." *Id.* at 2423-24. In *Kisor* the Court remanded the case to the Federal Circuit because it "jumped the gun in declaring the regulation ambiguous." *Id.* at 2423. The Court "insisted that a court bring all its interpretive tools to bear before finding that to be so." *Id.*

Here, nothing in the Ninth Circuit's opinion finds that the DOL regulation at issue, § 778.217(b)(3), was ambiguous, much less genuinely ambiguous. In fact, the term "ambiguous" nowhere appears in the court's opinion. Nor did the Ninth Circuit, as required by *Kisor*, engage in a "conscientious effort," using "all the standard tools of interpretation," *id.* at 2424, to determine whether the regulation is ambiguous or susceptible to more than one reasonable meaning.

Instead, the court virtually ignored the unambiguous text of the regulation, and treated the first sentence in § 32d05a(c) of the Handbook as if *it* were the governing regulation. This judicial sleight-of-hand was entirely unjustifiable for many reasons, including because the Handbook, unlike the regulation, was not subject to notice-and-comment rulemaking.

Because the court of appeals did not find that the DOL regulation is ambiguous, it simply was improper to defer to the "interpretation" contained in the Handbook. (We surround "interpretation" with quotation marks because it defies common sense to construe as an agency interpretation of a regulation, a sentence in an agency handbook that expressly cautions it should not be used as interpretive device.) Where, as here, "uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law." *Kisor*, 139 S. Ct. at 2415. Deference to an agency interpretation under

these circumstances "would 'permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.'" *Id.* (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000)).

This is exactly what the Ninth Circuit has done here even though DOL, undoubtedly aware of the long-standing content of its own Handbook, never has amended 29 C.F.R. § 778.217 in a way that requires a "payment-function test" or ties excludable, travel-related per diem payments to hours worked. *See, e.g.*, 84 Fed. Reg. 68,736 (Dec. 16, 2019) (final rule that "updates a number of regulations on the calculation of overtime compensation both to provide clarity and to better reflect the 21st-century workplace"). Rather than changing the language of § 778.217(b)(3), the 2019 updated regulations provide that a "per diem allowance" for an employee's business-related travel expenses is "per se reasonable" if it does not exceed federal per-diem guidelines. *See* 29 C.F.R. § 778.217(c)(2), as amended; 84 Fed. Reg. at 68,772-73.

2. Even if after "exhaust[ing] all the 'traditional tools' of construction . . . genuine ambiguity remains . . . the agency's reading still must be 'reasonable.'" *Kisor*, 139 S. Ct. at 2415-16. Here, without engaging in any sort of ambiguity analysis, the court of appeals conducted a so-called case-specific, "payment-function test" to determine whether AMN's per-diem payments should be included in traveling employees' regular rates on the theory that § 778.217(b)(3) does not apply

to per-diem payments that "function as remuneration for hours worked rather than reimbursement for expenses." App. 16. But insofar as § 32d05a(c) of the Handbook impliedly interprets § 778.217(b)(3) as requiring a case-by-case test to determine whether a particular employer's per diem payments function as reimbursement for travel expenses, the court's opinion does not explain why such a requirement, i.e., why the Handbook's interpretation, is reasonable.

In *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018), the Court rejected a supposed principle, invoked by the Ninth Circuit in that case, requiring FLSA exemptions to be construed narrowly. The Court indicated that "FLSA exemptions are construed under a fair (rather than a narrow) interpretation." *Id.* (internal quotation marks omitted). Here, the Ninth Circuit pays lip service to the need for a fair rather than narrow interpretation of DOL's unambiguous per-diem regulation, App. 8, but then proceeds to interpret it in a way that is unfairly and unreasonably narrow.

Neither of the Ninth Circuit cases cited in the opinion in support of a payment-function test involve interpretation of § 778.217(b)(3) or per-diem payments for business travel. *See* App. 10 (citing *See Flores v. City of San Gabriel*, 824 F.3d 890 (9th Cir. 206); *Local 246 Utility Workers Union v. So. Cal. Edison Co.*, 83 F.3d 292 (9th Cir. 1996)). And neither relies on or cites the DOL Handbook. Instead, both cases involve application of 29 U.S.C. § 207(e)(2) in connection with

excluding statutorily unspecified "other similar payments" from an employee's regular rate.

The court's opinion nonetheless contends that "[a]pplying the payment-function test from *Flores* and *Local 246* comports with out-of-circuit case law that has addressed the reimbursement clause of 207(e)(2)." App. 11. None of the three pre-*Kisor* cases from other courts of appeals cited by the Ninth Circuit, however, finds that 29 U.S.C. § 207(e)(2), or 29 C.F.R. § 778.217(b)(3), is ambiguous. And although each of those decisions misplaces reliance on the Handbook, none demonstrate that the Handbook's interpretation of § 778.217(b)(3) is reasonable where, as the Ninth Circuit acknowledged here, App. 3-4, an employer's per-diem payments are consistent with federal per-diem guidelines, and thus, "per se reasonable." 29 C.F.R. § 778.217(c)(2).

Instead, unlike the per-diem exclusion question squarely presented here, each of the other circuits' cases involved a situation where an employer *intended* the payments at issue to compensate employees without increasing their regular rates of pay, rather than provide them with per diem-based reimbursements that approximated employees' travel expenses. *See Baouch v. Werner Enter., Inc.*, 908 F.3d 1107, 1112 (8th Cir. 2018) (per-diem payments were "intended to act as remuneration for work performed"); *Newman v. Advanced Tech. Innov. Corp.*, 749 F.3d 33, 35 (1st Cir. 2014) (per-diem payments "made up the difference between the regular rate in

each plaintiff's contract and the supposedly promised hourly figure"); *Gagnon v. United Technisource, Inc.*, 607 F.3d 1036, 1041 (5th Cir. 2010) (employer "tried to avoid paying [employee] a higher 'regular rate' by artificially designating a portion of [employee's] wages as 'straight time' and a portion as 'per diem'").

Petitioner readily identifies the many reasons why the Handbook's interpretation is unreasonable, i.e., why precluding the exclusion of travel-related per-diem payments that vary with hours (or shifts) worked, would be deleterious to both employers and employees. *See* Pet. at 24-35. In particular, the Ninth Circuit's ruling provides employees who receive per-diem allowances for business travel with a financial incentive to miss work deliberately in order to increase their regular rate of pay when they do work overtime. *See, e.g.*, Pet. at 9-10 (summarizing Respondents' allegations). Essential industries such as healthcare staffing, and the public, cannot afford to suffer the consequences of nurses and other critical employees intentionally missing work shifts, or reducing the hours they work, in order to be eligible for higher overtime.

3. Under *Kisor*, even if an agency's interpretation of a genuinely ambiguous regulation is reasonable, "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight" before it is entitled to *Auer* deference. *Kisor*, 139 S. Ct. at 2416. One of the "especially important markers for identifying whether

Auer deference is and is not appropriate" is that the "regulatory interpretation . . . must be the agency's 'authoritative' or 'official' position." *Id.* To be authoritative, the agency's interpretation "must at the least emanate from those actors, *using those vehicles*, understood to *make authoritative policy* in the relevant context." *Id.*

Under these criteria, the Handbook on its face is unauthoritative. As discussed above, its Foreword unequivocally states that the Handbook "is not used as a device for establishing interpretative policy," and refers readers to the Federal Register and Code of Federal Regulations as the "official resources for regulatory information." FOH, Foreword, *supra.* The Court indicated in *Kisor* that deference should be declined where, as here, "the agency had itself 'disclaimed the use of regulatory guides as authoritative'" or as "binding interpretations of its own rules." 139 S. Ct. at 2417 (quoting *Exelon Generation Co. v. Local 15, Int'l Brotherhood of Elec. Workers, AFL-CIO*, 676 F.3d 576,, 577 (7th Cir. 2012)). The undeniable fact that the Handbook is not a "vehicle. . . understood to make authoritative policy," *id.* at 2416, is therefore another reason why it is not entitled to deference.

The strict limitations that the Court now has placed on the circumstances under which *Auer* deference applies liberates courts to a much greater degree than before to interpret agency regulations independently of agency interpretations. *See Kisor*,

139 S. Ct. at 2418 ("[T]his Court has *cabined Auer's scope* in varied and critical ways—and in exactly that measure, has maintained a *strong judicial role in interpreting rules*.") (emphasis added). Indeed, Justice Gorsuch, who along with three other Justices would have discarded *Auer* altogether, indicated in his separate opinion that "[t]he majority leaves *Auer* so riddled with holes that, when all is said and done, courts may find that it does not constrain their independent judgment any more than *Skidmore*." *Id.* at 2448 (Gorsuch, J., concurring in the judgment). Despite these and other calls for courts to exercise their own judgment when interpreting or applying agency regulations, the Ninth Circuit, directly contrary to *Kisor* and *Auer*, interpreted an unambiguous regulation by giving deference to an unauthoritative, unreasonable, agency interpretation.

B. The Handbook is not even entitled to *Skidmore* deference

Under *Skidmore*, a court accords an agency's interpretation of a statute or regulation "a measure of deference proportional to the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (internal quotation marks omitted). In *Christopher*, the Court not only found that DOL's interpretation of certain FLSA regulations was unworthy of *Auer* deference, but also was "quite unpersuasive" for *Skidmore* purposes. *Id.*

The same is true here. *Auer* deference is unwarranted for the reasons discussed above, and *Skidmore* deference is inappropriate because the DOL interpretation contained in § 32d05a(c) of the Handbook is devoid of persuasive power. Like the DOL interpretation at issue in *Christopher*, the Handbook "plainly lacks the hallmarks of thorough consideration." 567 U.S. at 159. As in *Christopher*, "there was no opportunity for public comment." *Id.* In fact, although § 32d05a(c) apparently has been buried in the bowels of the Handbook for decades, DOL never has amended the regulation to which it apparently relates, 29 C.F.R. § 778.217(b), to conform to the Handbook's conflicting interpretation. Instead, FOH § 32d05a(c) remains "flatly inconsistent" with 29 C.F.R. § 778.217(b)(3). *Id.* More specifically, unlike the Handbook, nothing in the plain text of the regulation precludes exclusion of per-diem payments that are legitimate approximations of travel expenses—even if under certain circumstances the payment amounts are reduced due to missed shifts. As the Court indicated in *Christopher* in connection with *Auer*, "[d]eference is undoubtedly inappropriate when the agency's interpretation is . . . inconsistent with the regulation." *Id.* at 155.

The "'out-of-circuit' case law" cited by the Ninth Circuit, App. 11, does nothing to cure the Handbook's lack of persuasiveness. *Baouch*, 908 F.3d at 1117, "treat[s] the Handbook as persuasive authority," and asserts that it is "entitled to respect" under *Skidmore.* But the only reason the Eighth Circuit offered for giving § 32d05a(c) of the Handbook any weight is the

sweeping generality that "we do not discount the expertise offered by the DOL, as it handles and regulates the application of the FLSA." *Id.* This superficial rationale is oblivious to the requirement that for *Skidmore* deference to apply, a court must find that an agency interpretation is the product of a considered judgment. *See Christopher*, 567 U.S. at 159.

Similarly, the First Circuit's opinion in *Newman*, 749 F.3d at 37, asserts that the Handbook is "persuasive authority" and entitled to *Skidmore* deference, but rather than attempting to explain why, simply parrots *Gagnon,* 607 F.3d at 1041. In *Gagnon*, the Fifth Circuit, in a footnote quoting a general statement extracted from *Skidmore*, *id.* at 1041 n.6, merely asserts that "[a]lthough the Handbook does not bind our analysis, we can and do consider its persuasive effect." None of these decisions explains how the Handbook can be considered as "authoritative" or as interpretive "authority"—or why DOL wage-and-hour expertise contained in the Handbook should be treated as "persuasive"—in view of the Handbook's caveat that it is not to be used for interpretative purposes.

Furthermore, each of these three decisions was decided without the benefit of the guidance that this Court provides to lower courts in *Kisor*. Although *Kisor* creates a significantly higher hurdle than in the past for application of *Auer* deference, *Skidmore*, when it applies, imposes a less deferential burden on the exercise of a court's independent judgment in interpreting agency regulations. *See Kisor*, 139 S. Ct.

at 2424 (Roberts, C.J., concurring in part) ("[T]here 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."); *id.* at 2428 (Gorsuch, J., concurring in the judgment) ("*Skidmore* . . . reaffirmed the traditional rule that an agency's views about the law may persuade a court but can never control its judgment.").

In light of *Kisor*, "cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation." *Id.* at 2425 (Roberts, C.J., concurring in part). It follows that the converse also is true: Where, as here, *Auer* deference is unwarranted, the non-binding weight that a court affords to an agency interpretation of an agency regulation by explicitly or implicitly invoking *Skidmore* should be somewhere between minimal and nil. But here, the Ninth Circuit—despite *Kisor*'s multiple admonitions— relied *substantially* on the unauthoritative DOL Handbook—both directly and through citation of other circuits' cases that rely on the Handbook. The court's reliance on the Handbook, no matter how that reliance is characterized, runs counter to this Court's judicial deference precedent—especially the Court's concerted effort in *Kisor* to restore the judiciary's independent interpretive role where, *unlike* here, an ambiguous agency regulation is at issue.

The Ninth Circuit's seeming indifference to this Court's criteria for invoking *Kisor/Auer* and/or

Skidmore deference, and the court's resultant erroneous interpretation of an exceedingly important FLSA regulation, provide a strong reason for granting review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

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