

IN THE SUPREME COURT OF NEVADA

JOHN W. NEVILLE, JR., on behalf of
himself and all others similarly
situated,

Petitioner-Plaintiff,

VS.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, in and for the COUNTY
OF CLARK, and the HONORABLE
ADRIANA ESCOBAR, DISTRICT
JUDGE

Respondents

and

TERRIBLE HERBST, INC.,

Defendant-Real Party in Interest

Electronically Filed
Docket Number: Jun 30 2016 11:56 a.m.
Tracie K. Lindeman
Clerk of Supreme Court
District Court Case No.: A-15-728134-C

PETITION FOR WRIT OF MANDAMUS

Mark R. Thierman, Nev. Bar No. 8285
mark@thiermanbuck.com
Joshua D. Buck, Nev. Bar No. 12187
josh@thiermanbuck.com
Leah L. Jones, Nev. Bar No. 13161
leah@thiermanbuck.com
THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, Nevada 89511
Tel. (775) 284-1500
Fax. (775) 703-5027
Attorneys for Petitioner-Plaintiff

NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the Petitioner John W Neville, Jr. is a natural person, who has no stock or ownership interest in any entity involved in these proceedings, and does not have a parent or subsidiary company or corporation.

The undersigned counsel of record further certifies that the firm of Thierman Buck, LLP, and its attorneys, Mark R. Thierman, Nev. Bar No. 8285, Joshua D. Buck, Nev. Bar No. 12187, and Leah L. Jones, Nev. Bar No. 13161, are the only attorneys who have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court.

Dated June 30, 2016.

THIERMAN BUCK LLP

/s/ Mark R. Thierman

Mark R. Thierman, Bar No. 8285

Joshua D. Buck, Bar No. 12187

Leah L. Jones, Bar No. 13161

7287 Lakeside Drive

Reno, Nevada 89511

Attorneys for Petitioner-Plaintiff

TABLE OF CONTENTS

I. Relief Sought.....	1
II. Issues Presented	1
III. Summary Of Petitioner-Plaintiffs’ Arguments.....	2
IV. Facts Necessary To Understand the Issue Presented	4
A. The Underlying Claims	4
B. The District Court’s Order of Dismissal.....	5
V. Argument	6
A. Nevada’s Constitutional Minimum Wage Provision Expressly Permits Employee Wag Suits To Be Filed in Court.....	7
B. Nevada’s Wage-Hour Statutes Also Expressly Allow Employees To Seek Unpaid Wages In Court	8
C. <i>Baldonado</i> Supports Nevada Employees’ Right To Recover Unpaid Wages In Court	13
D. Nevada Employees Are Not Limited To Only Seeking Unpaid Wages Pursuant To A Breach of Contract Theory	14
1. The statutory scheme does not limit private actions to contractually-owed unpaid wages	15
2. Legislative history and intent support a private right of action for statutorily-owed unpaid wages	17
E. The Labor Commissioner Does Not Have Exclusive Jurisdiction to Enforce NRS Chapter 608	22
F. Preventing Employees From Seeking Statutorily Owed Wages Would Run Afoul Of The Legislative Intent And Lead to Absurd Results	24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VI. Conclusion.....	26
---------------------	----

TABLE OF AUTHORITIES

Cases

<i>Baldonado v. Wynn Las Vegas, LLC</i> , 124 Nev. 951, 194 P.3d 96 (2008).....	passim
<i>Buckwalter v. Dist. Ct.</i> , 126 Nev. 200, 234 P.3d 920 (2010).....	6
<i>Buenaventura v. Champion Drywall, Inc.</i> , 2011 U.S. Dist. LEXIS 86508, 2011 WL 1071760 (D. Nev. Mar. 21, 2011).....	13
<i>Busk v. Integrity Staffing Solutions, Inc.</i> , 2011 WL 2971265 (D. Nev. July 19, 2011)	12
<i>Busk v. Integrity Staffing Solutions, Inc.</i> , 713 F.3d 525 (9th Cir. 2013)	13
<i>Colello v. Administrator, Real Est. Div.</i> , 100 Nev. 344, 683 P.2d 15 (1984).....	8
<i>Coming Glass Works v. Brennan</i> , 417 U.S. 188 (1974).....	8
<i>Csomos v. Venetian Casino Resort, LLC</i> , No. 55203, 2011 Nev. Unpub. LEXIS 1629, 2011 WL 4378744 (Nev. Sept. 19, 2011)	3, 10, 11, 26
<i>Cueto-Reyes v. All My Sons Moving Co.</i> , 2010 U.S. Dist. LEXIS 119787, 6-7 (D. Nev. Nov. 10, 2010)	13
<i>Daprizio v. Harrah’s Las Vegas, Inc.</i> , 2010 U.S. Dist. LEXIS 84307, *11-12 (D. Nev. Aug. 17, 2010)	13
<i>Eddington v. Eddington</i> , 119 Nev. 577, 80 P.3d 1282 (2003).....	8
<i>Fierle v. Perez</i> , 125 Nev. 728, 219 P.3d 906 (2009).....	11, 12
<i>Fetrow-Fix v. Harrah’s Entm’t, Inc.</i> , 2010 U.S. Dist. LEXIS 125625 (D. Nev. Nov. 16, 2010).....	13
<i>Guzman v. Lincoln Tech. Inst., Inc.</i> , Case No. 2:13-cv-2251-RFB-VCF, 2015 WL 1729711 (D. Nev. Apr. 15, 2015)	12
<i>Hardin v. Jones</i> , 102 Nev. 469, 727 P.2d 551 (1986).....	8
<i>Int’l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. Cnty. of Washoe</i> , 124 Nev. 193, 179 P.3d 556 (2008).....	8, 26
<i>Lambert v. Ackerley</i> , 180 F.3d 997 (9th Cir. 1999)	9

1	<i>Las Vegas Downtown Redevelopment Agency v. Crockett,</i>	
2	117 Nev. 816 (Nev. 2001)	21
3	<i>Libby, McNeill & Libby v. Alaska Indus. Bd.,</i>	
4	191 F.2d 262 (9th Cir. 1951)	9
5	<i>Lucatelli v. Texas de Brazil (Las Vegas) Corp.,</i>	
6	2012 U.S. Dist. LEXIS 66765, *7 (D. Nev. May 11, 2012)	3, 10, 26
7	<i>Madera v. SIIS,</i>	
8	114 Nev. 253 (1998)	10
9	<i>Mitchell v. Lublin</i>	
10	<i>McGaughy & Assoc.,</i> 358 U.S. 207 (1959)	9
11	<i>Moriarty v. Moriarty,</i>	
12	No. 59607, 2013 WL 621922 (Nev. Feb. 15, 2013)	26
13	<i>Mountain View Hosp. v. Dist. Ct.,</i>	
14	128 Nev. Adv. Op. 17, 273 P.3d 861 (2012)	6, 7
15	<i>Northern Nev. Ass’n Injured Workers v. SIIS,</i>	
16	107 Nev. 108 (1991)	21
17	<i>Phelps v. MC Communs., Inc.,</i>	
18	2011 U.S. Dist. LEXIS 84428, 6-7 (D. Nev. Aug. 1, 2011)	12
19	<i>Sandpointe Apts. v. Eighth Jud. Dist. Ct.,</i>	
20	313 P.3d 849 (2013)	27
21	<i>SIIS v. Campbell,</i>	
22	109 Nev. 997, 862 P.2d 1184 (1993)	8
23	<i>Silvers v. Sony Pictures Entm’t, Inc.,</i>	
24	402 F.3d 881 (9th Cir. 2005)	15
25	<i>Smith v. Hutchins,</i>	
26	93 Nev. 431, 566 P.2d 1136 (1977)	26
27	<i>Terry v. Sapphire Gentlemen’s Club,</i>	
28	130 Nev. Adv. Op. 87, 336 P.3d 951 (2014)	8
	Statutes	
	29 U.S.C. § 216(b)	10
	Article 6, Section 4 of the Nevada Constitution	1
	Nev. Const. Art. 15 § 16	1, 2, 7
	Nevada Revised Statutes 607.160(7), 607.170(1)	23
	NRS 108.221 to 108.246	11
	NRS 108.237	12
	NRS 108.238	12
	NRS 108.239	12
	NRS 11.190 (3)(a)	24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NRS 34.160.....	1
NRS 34.170.....	1
NRS 34.190.....	1
NRS 607.160(6).....	22
NRS 607.170.....	22
NRS 608.012.....	13
NRS 608.016.....	passim
NRS 608.018.....	passim
NRS 608.018; and (c).....	2
NRS 608.020.....	2, 5, 24, 26
NRS 608.040.....	11, 18
NRS 608.050.....	passim
NRS 608.050(2).....	12
NRS 608.140.....	passim
NRS 608.150.....	3, 14
NRS 608.160.....	11
NRS 608.250.....	2
NRS 608.005.....	9
NRS 608.010.....	16, 17
NRS 608.260.....	2
Rules	
NRAP 21.....	1
NRAP 26.1.....	2
NRAP 28(e)(1).....	28
NRAP 32(a)(4).....	28
NRAP 32(a)(5).....	28
NRAP 32(a)(6).....	28
NRAP 32(a)(7).....	28
NRAP 32(a)(7)(C).....	28
Regulations	
NAC 607.075.....	22
NAC 607.095.....	22
NAC 707.095.....	23
Nevada Administrative Code 608.075(2).....	23

MEMORANDUM OF POINTS AND AUTHORITIES

I.

RELIEF SOUGHT

Pursuant to NRAP 21, NRS 34.160, NRS 34.170, NRS 34.190, and Article 6, Section 4 of the Nevada Constitution, Petitioner John W. Neville, Jr. (hereinafter “Petitioner-Plaintiff”) seeks this Court’s resolution by writ of mandamus concerning the following unsettled and serious question of Nevada employment law that has thus far evaded appellate review:

Do Nevada employees have a private right of action to seek unpaid wages pursuant to Nevada constitutional and statutory violations?

The issue presented by this Petition is a pure question of law that has been subject to intense debate and conflicting judicial opinions within both the state and federal judiciary since this Court’s decision in *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 194 P.3d 96 (2008). The Honorable Adriana Escobar Judge of the Eighth Judicial District dismissed Petitioner-Plaintiff’s claims for unpaid wages under the Nevada Constitution, Nev. Const. Art. 15 § 16, and various provisions of NRS Chapter 608 on the grounds that Petitioner-Plaintiff did not have a private right of action to seek those unpaid wages in court. Petitioner-Plaintiff respectfully submits that the District Court’s decision was erroneous and thus must be reversed.

II.

ISSUES PRESENTED

(1) Do Nevada employees have a private right of action to bring suit based upon alleged failures to pay minimum wages required by Article 15, Section 16 of the Nevada Constitution; and

(2) Do Nevada employees have a private right of action to bring suit based upon alleged failure to pay (a) wages for all hours worked pursuant to NRS 608.016;

(b) overtime wages pursuant to NRS 608.018; and (c) wages due and owing upon termination of employment pursuant to NRS 608.020-.050?

III.

SUMMARY OF PETITIONER-PLAINTIFF'S ARGUMENTS

The District Court committed legal error by dismissing Petitioner-Plaintiff's causes of action for unpaid wages pursuant to the Nevada Constitution and various provision of Nevada's wage and hour statutes, NRS Chapter 608, on the grounds that Nevada employees do not have a private right of action to seek those wages in court for the following four reasons. First, the Nevada Constitutional minimum wage provision expressly provides for a private right of action:

An employee claiming violation of this section *may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section*, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.¹

Nev. Const. Art. 15 § 16 (emphasis added).

Second, Nevada's wage and hour statutes, NRS Chapter 608, expressly recognize an employee's right to seek wages in court. NRS 608.140 provides that an attorney who represents a successful litigant in the recovery of unpaid wages may collect his or her attorneys' fees for such an action. It would thus be

¹ There is also an express private cause of action to pay minimum wages required by statute because NRS 608.260 states: "If any employer pays any employee a lesser amount than the minimum wage prescribed by regulation of the Labor Commissioner pursuant to the provisions of NRS 608.250, the employee may, at any time within 2 years, bring a civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage. A contract between the employer and the employee or any acceptance of a lesser wage by the employee is not a bar to the action."

1 “‘illogical’ that a plaintiff who can privately enforce a claim for attorneys’ fees
2 under NRS § 608.140 cannot privately enforce the underlying claim the fees arose
3 from.” *See Lucatelli v. Texas de Brazil (Las Vegas) Corp.*, 2012 U.S. Dist. LEXIS
4 66765, *7 (D. Nev. May 11, 2012) (citing *Csomos v. Venetian Casino Resort, LLC*,
5 No. 55203, 2011 Nev. Unpub. LEXIS 1629, 2011 WL 4378744, at *2 (Nev. Sept.
6 19, 2011) (emphasis added)). NRS 608.050 also allows an employee to file a lien
7 for unpaid wages on the property where the unpaid work was performed. The grant
8 of lien rights for the recovery of unpaid wages equals the grant of a private right of
9 action.

10 This Court’s decision in *Baldonado v. Wynn* confirms this fact. The
11 *Baldonado* case was a tip case, not a wage case. In concluding that there was no
12 private right of action for *tips*, this Court specifically distinguished an employee’s
13 right to seek unpaid *wages* in court:

14 [T]wo other statutes in NRS Chapter 608, otherwise
15 enforceable by the Labor Commissioner, expressly
16 recognize a civil enforcement action to recoup unpaid
17 wages: NRS 608.140 (civil actions by employees to
18 recoup unpaid wages) and NRS 608.150 (civil actions by
19 the district attorney to recoup unpaid wages from general
20 contractors).

21 124 Nev. 951, 966 n. 33, 194 P.3d 96, 106 (2008). This Court confirmed that “a
22 private cause of action to recover unpaid wages is entirely consistent with the
23 express authority under NRS 608.140 to bring private actions for wages unpaid and
24 due.” *Id.*

25 Third, the Labor Commissioner is not the exclusive enforcer of Nevada’s
26 wage and hour statutes. The Labor Commissioner shares jurisdiction with
27 employees who wish to enforce their rights under NRS Chapter 608. Indeed, the
28 Labor Commissioner’s jurisdiction to hear and prosecute wage disputes is limited

1 to indigent employees who cannot afford legal counsel and who assign all rights to
2 the Labor Commissioner.

3 Fourth, the remedial purpose of Nevada’s wage and hour laws and public
4 policy support Nevada employees’ right to collect unpaid wages in court.
5 Furthermore, negating an employee’s right to seek unpaid wages in court would
6 lead to absurd results. Since Nevada employees undeniably have a private right of
7 action to seek unpaid minimum wages in court, denying employees from seeking
8 statutorily owed wages in that same forum, for instance, would lead to the
9 numerous duplicative actions (one action in court and one action with the labor
10 commissioner) concerning the same operative facts but which would lead to
11 inconsistent and conflicting results. Such a decision would also burden a state
12 agency with an increase cost to Nevada taxpayers and contravene the public policy
13 of Nevada’s wage and hour statutory provisions.

14 IV.

15 FACTS NECESSARY TO UNDERSTAND

16 THE ISSUE PRESENTED

17 A. The Underlying Claims

18 Petitioner-Plaintiff filed an action for unpaid wages against Real Party in
19 Interest Terrible Herbst, Inc. (“Terrible Herbst”) for allegedly being required to
20 perform work prior to, and at after the end of, his scheduled shift without
21 compensation. App. at 5-27 (Plaintiff’s Complaint). Plaintiff alleged that Terrible
22 Herbst required him to clock in to the timekeeping system approximately 7-minutes
23 prior to his regularly scheduled shift and start performing work activities but that
24 Terrible Herbst would round his time clock hours to the nearest 15-minute
25 increment so that he was not compensated for all of the work that he performed.
26 App. at 7-8 Plaintiff alleged that the same rounding of work hours occurred after
27 the end of his shift. *Id.* Plaintiff alleged that this rounding policy systematically
28 deprived him of compensation for work that he performed in violation of Nevada

1 law. *Id.* Indeed, Plaintiff alleged that failing to pay any amount at all for these
2 hours worked represented a payment of zero dollars for such time—a *per se* less
3 than the minimum wage. *Id.* As a result of these facts, Plaintiff asserted the
4 following causes of action: (1) failure to pay minimum wages in violation of the
5 Nevada Constitution; (2) failure to compensate for all hours worked in violation of
6 NRS 608.140 and 608.016; (3) failure to pay overtime in violation of NRS 608.140
7 and 608.018; and (4) failure to timely pay all wages due and owing in violation of
8 NRS 608.140 and 608.020-050.² App. at 8-27.

9 **B. The District Court’s Order of Dismissal**

10 On April 22, 2016, the District Court entered its order dismissing all of
11 Petitioner-Plaintiff’s constitutional and statutory causes of action for unpaid wages.
12 App. at 1-4. Despite express constitutional language to the contrary (i.e., “An
13 employee claiming violation of this section may bring an action against his or her
14 employer in the courts of this State to enforce the provisions of this section and
15 shall be entitled to all remedies available under the law or in equity appropriate to
16 remedy any violation of this section”), the District Court concluded that a Nevada
17 employee does not have a “private right of action to bring claims based upon alleged
18 failures to pay minimum wages (Article 15 Section 16 of the Nevada
19 Constitution)[.]” App. at 2. The District Court similarly held that a Nevada
20 employee does not have a “private right of action to bring claims based upon [an]
21 alleged . . . failure to pay wages for all hours worked (NRS 608.016); failure to pay
22 overtime wages (NRS 608.018); and failure to pay all wages due and owing upon
23 termination (NRS 608.020 through NRS 608.050)[.]” App. at 2. The District Court
24 concluded that the Nevada Labor Commissioner is the only person who can
25 adjudicate Nevada’s labor laws. App. at 2.

26
27 ² Plaintiff also asserted a breach of contract cause of action for allegedly
28 failing to compensate him the promised and agreed upon rate of pay for hours
worked during the graveyard shift. That claim is not at issue here.

1 The District Court’s rationalization for depriving Nevada employees the right
2 to seek unpaid wages in court pursuant constitutional and statutory violations
3 appears to be based on the misguided idea that Nevada employees can only seek
4 unpaid wages in court pursuant to breach of an employment contract theory. The
5 District Court latches on to the phrase “terms of his or her employment” that is
6 contained in NRS 608.140 as the basis for concluding that Nevada employees only
7 have a private right of action to pursue contractually owed wages in court, as
8 opposed to wages that may be owed pursuant to the Nevada Constitution or
9 Nevada’s wage and hour statutes. App. at 2. As set forth below, this is a narrow
10 and misguided reading of Nevada’s wage and hour constitutional and statutory
11 scheme that contravenes the remedial purpose of those laws.

12 V.

13 ARGUMENT

14 Since this Court’s pronouncement that tipped employees do not have a
15 private right of action to recover improperly retained tips in *Baldonado v. Wynn*,
16 employers in the state of Nevada have sought to exclude employees from seeking
17 unpaid wages pursuant to constitutional and statutory wage violations. This case
18 presents an opportunity for this Court to decide the issue presented once and for all
19 and provide all litigants in the state of Nevada much needed resolution on the issue
20 of whether employees have a private right of action to seek unpaid wages pursuant
21 to constitutional and statutory wage violations. See *Buckwalter v. Dist. Ct.*, 126
22 Nev. 200, 201, 234 P.3d 920, 921 (2010) (stating that the Court may accept a writ
23 of mandamus where “the issue is not fact-bound and involves an unsettled and
24 potentially significant, recurring question of law.”); *Mountain View Hosp. v. Dist.*
25 *Ct.*, 128 Nev. Adv. Op. 17, 273 P.3d 861, 864-65 (2012) (“[C]onsideration of
26 extraordinary writ relief is often justified ““where an important issue of law needs
27 clarification and public policy is served by this court’s invocation of its original
28 jurisdiction.””) (internal quotations and citations omitted). Petitioner-Plaintiff

1 submits that this Court should use its discretion to grant this Writ of Mandamus
2 and affirm that all Nevada employees may seek redress for alleged wage violations
3 in Nevada courts.

4 **A. Nevada’s Constitutional Minimum Wage Provision Expressly**
5 **Permits Employee Wage Suits To Be Filed In Court**

6 The District Court terminated Petitioner-Plaintiff’s constitutional and
7 statutory claims for unpaid wages on the grounds that there was no private right of
8 action without looking at the plain language of the relevant constitutional and
9 statutory schemes. The Nevada Constitutional minimum wage amendment
10 expressly states that an employee has the right to seek unpaid minimum wages in
11 any court in this state. Nev. Const. Art. 15 § 16 provides that “An employee
12 claiming violation of this section *may bring an action against his or her employer*
13 *in the courts of this State to enforce the provisions of this section.*” There is
14 nothing ambiguous about this constitutional provision. It expressly grants all
15 Nevada employees the ability to seek unpaid minimum wages in court. The
16 constitutional provision further provides that employees “shall be entitled to *all*
17 *remedies* available under the law or in equity appropriate to remedy any violation
18 of this section, including but not limited to back pay, damages, reinstatement or
19 injunctive relief.” *Id.* If an employee is successful in the litigation, he or she is
20 also entitled to recover attorney’s fees and costs. Based on the plain language of
21 this constitutional provision, the District Court’s decision to dismiss Petitioner-
22 Plaintiff’s claim under the minimum wage provision was clearly erroneous. But
23 the District Court’s faulty constitutional interpretation was not in isolation. It was
24 further misguided in its conclusion that Nevada employees cannot seek unpaid
25 wages under various provisions of the wage-hours statutes contained in NRS
26 Chapter 608.

B. Nevada's Wage-Hour Statutes Also Expressly Allow Employees To Seek Unpaid Wages In Court

Like the Constitutional minimum wage provision, various provisions contained in NRS Chapter 608 expressly authorize employee unpaid wage suits to be filed in court. The express provisions of these statutes, taken in concert with the remedial purpose of Nevada's wage-hour statutes, lead only to the conclusion that employees have a private right of action to seek relief for unpaid wages under NRS Chapter 608.

As an initial matter, it is important to note that the statutes at issue here are remedial in nature and must be liberally construed in order to effectuate the purpose of the legislation. *See Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951 (2014) (recognizing that Nevada's wage and hour statutes provided under NRS Chapter 608 are remedial in nature); *Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. Cnty. of Washoe*, 124 Nev. 193, 201, 179 P.3d 556, 560-61 (2008) ("[R]emedial statutes . . . should be liberally construed to effectuate the intended benefit."); *Eddington v. Eddington*, 119 Nev. 577, 583, 80 P.3d 1282, 1287 (2003) ("[S]tatutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained."); *Colello v. Administrator, Real Est. Div.*, 100 Nev. 344, 347, 683 P.2d 15, 17 (1984) (recognizing that "[s]tatutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained."); *SIIS v. Campbell*, 109 Nev. 997, 1001, 862 P.2d 1184, 1186 (1993) (citing the "long-standing policy to liberally construe workers' compensation laws to protect injured workers and their families"); *Hardin v. Jones*, 102 Nev. 469, 471, 727 P.2d 551, 552 (1986) (applying same principle to unemployment statute).³ The purpose of NRS Chapter 608 is to protect the health

³ Other courts also apply this long-standing canon of construction. *Coming Glass Works v. Brennan*, 417 U.S. 188, 207 (1974) (holding that the Equal Pay Act is broadly remedial and should be construed to effectuate

1 and welfare of workers employed in private enterprise and provide concrete
2 safeguards concerning hours of work, working conditions, and employee
3 compensation. *See* NRS 608.005 (“The Legislature hereby finds and declares that
4 the health and welfare of workers and the employment of persons in private
5 enterprise in this State are of concern to the State and that the health and welfare of
6 persons required to earn their livings by their own endeavors require certain
7 safeguards as to hours of service, working conditions and compensation therefor.”).
8 The interpretation of NRS Chapter 608 (and determining whether there is a private
9 right of action to seek wages in violation of the provisions in that chapter) must
10 always be considered in light of the Legislature’s statement of purpose—i.e., to
11 protect the health and welfare of Nevada employees concerning “hours of work”
12 and “employee compensation”.

13 With that lens applied to the question at hand, it is clear that the Legislature
14 intended for employees to be able to seek unpaid wages pursuant to statutory
15 violations in the courts of this state. Two provisions specifically identify this right:
16 NRS 608.140 and NRS 608.050, both of which have been codified since 1925.

17 NRS 608.140 expressly provides that an employee may bring a suit for
18 unpaid wages in court:

19 Whenever a mechanic, artisan, miner, laborer, servant or
20 employee ***shall have cause to bring suit for wages*** earned

21 that purpose); *Mitchell v. Lublin. McGaughy & Assoc.*, 358 U.S. 207, 211
22 (1959) (“[W]ithin the tests of coverage fashioned by Congress, the [Fair Labor
23 Standards] Act has been construed liberally to apply to the furthest reaches
24 consistent with congressional direction.”); *Lambert v. Ackerley*, 180 F.3d 997,
25 1011-12 (9th Cir. 1999) (en banc) (“[T]he definition of ‘employer’ under the Fair
26 Labor Standards Act is not limited by the common law concept of ‘employer,’ but
27 is to be given an expansive interpretation in order to effectuate [the Act’s] broad
28 remedial purposes.”); *Libby, McNeill & Libby v. Alaska Indus. Bd.*, 191 F.2d 262,
264 (9th Cir. 1951) (holding that if the meaning of an employee compensation
statute is doubtful, it should be construed liberally in favor of the employee).

1 and due according to the terms of his or her employment,
2 and shall establish by decision of the court or verdict of
3 the jury that the amount for which he or she has brought
4 suit is justly due, and that a demand has been made, in
5 writing, at least 5 days before suit was brought, for a sum
6 not to exceed the amount so found due, the court before
7 which the case shall be tried shall allow to the plaintiff a
8 reasonable attorney fee, in addition to the amount found
9 due for wages and penalties, to be taxed as costs of suit.

10 Emphasis added. Much like its federal equivalent codified in 29 U.S.C. § 216(b)⁴,
11 NRS 608.140 is a fee shifting statute that provides for the recovery of a reasonable
12 attorney fee in the event an employee is successful in recovering unpaid wages
13 owed. In providing for the recovery of an attorney fee, the statute specifically states
14 that an employee “shall have a cause of action to bring suit for wages.” It thus
15 plainly recognizes that an employee can file for unpaid wages in court. *See Madera*
16 *v. SIIS*, 114 Nev. 253, 257 (1998) (internal quotations omitted) (“Where the
17 language of a statute is plain and unambiguous and its meaning clear and
18 unmistakable, there is no room for construction, and the courts are not permitted to
19 search for its meaning beyond the statute itself.”)

20 Indeed, other courts have also opined that it would be “illogical” to hold that
21 an employee could recover his or her attorney fee under NRS 608.140 but could
22 not file suit for the underling wages owed. *See Lucatelli v. Texas de Brazil (Las*
23 *Vegas) Corp.*, 2012 U.S. Dist. LEXIS 66765, *7 (D. Nev. May 11, 2012) (“***[I]t is***
24 ***‘illogical’ that a plaintiff who can privately enforce a claim for attorneys’ fees***
25 ***under NRS § 608.140 cannot privately enforce the underlying claim the fees***
26 ***arose from.*”) (citing *Csomos v. Venetian Casino Resort, LLC*, No. 55203, 2011**

27 ⁴ “The court in such action shall, in addition to any judgment awarded to the
28 plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant,
and costs of the action.” 29 U.S.C. § 216(b)

1 Nev. Unpub. LEXIS 1629, 2011 WL 4378744, at *2 (Nev. Sept. 19, 2011)
2 (emphasis added)).⁵

3 But NRS 608.140 is not the only statute in NRS Chapter 608's statutory
4 scheme that expressly provides that an employee can seek unpaid wages in court.
5 NRS 608.050 provides that an employee can file a lien to secure payment for his or
6 her unpaid wages: "Every employee *shall have a lien* as provided in NRS

7
8 ⁵ Petitioner-Plaintiff is cognizant of this Court's prior rule prohibiting the
9 citation to unpublished opinions. Petitioner-Plaintiff's citation to the *Csomos*
10 unpublished decision is included here because it was relied upon by the federal
11 Court in *Lucatelli*. In full disclosure and transparency, the panel in *Csomos* held
12 as follows:

13 The Venetian contends that there is no private cause of
14 action under NRS 608.040 to recover service fees, citing
15 *Baldonado*. However, *Baldonado* only applies to NRS
16 608.160. 124 Nev. at 961, 194 P.3d at 102. Some labor
17 laws expressly create private rights of action to obtain
18 unpaid wages or other benefits. Id. at 964 n.33, 194 P.3d
19 at 104 n.33. Although NRS 608.040, which assesses
20 penalties for failure to pay a discharged employee, does
21 not have explicit language authorizing a private cause of
22 action, NRS 608.140 allows for assessment of attorney
23 fees in a private cause of action for recovery of wages. *It*
24 *is doubtful that the Legislature intended a private cause*
25 *of action to obtain attorney fees for an unpaid wages suit*
26 *but no private cause of action to bring the suit itself. See*
27 *Fierle v. Perez*, 125 Nev. 728, 735, 219 P.3d 906, 911
28 (2009) (statutes should be interpreted in a manner to avoid
conflict with other related statutes). The legislative
scheme is consistent with a private cause of action for
employees and the Legislature enacted the statute to
protect employees, supporting a private cause of action
under NRS 608.040.

2011 Nev. Unpub. LEXIS 1629, 5-6 (Nev. 2011) (emphasis added).

1 108.221 to 108.246, inclusive, *and all other rights and remedies for the protection*
2 *and enforcement of such salary or wages* as the employee would have been entitled
3 to had the employee rendered services therefor in the manner as last employed.”
4 NRS 608.050(2) (emphasis added). Incorporated by reference, NRS 108.237 gives
5 the employee the right to foreclose his or her lien, NRS 108.238 recognizes the right
6 of the employee lien holder to maintain civil action for the amount of the lien or
7 more, and NRS 108.239 provides a private cause of action to enforce a notice of
8 lien. The right to file a lien “for the protection and enforcement of . . . wages”
9 equals a private right of action to seek those wages in court. Thus, via NRS 608.050,
10 the Legislature has expressly and plainly spoken that an employee shall have the
11 right to seek recover wages in court. These two statutes—NRS 608.140 and
12 608.050—when read together with the Legislative purpose of Nevada’s wage-hour
13 statutory scheme, can only be reconciled to support a private right of action to seek
14 unpaid wages sought pursuant to statutory violations. *See Fierle v. Perez*, 125
15 Nev. 728, 735, 219 P.3d 906, 911 (2009) (statutes should be interpreted in a manner
16 to avoid conflict with other related statutes) (reversed in part on other grounds by
17 *Egan v. Chambers*, 299 P.3d 364 (2013)).⁶

18
19 ⁶ Most courts that have addressed this issue have held that an employee-
20 plaintiff has a private right of action to recover wages pursuant to NRS Chapter
21 608’s various statutory provisions. *See Guzman v. Lincoln Tech. Inst., Inc.*, Case
22 No. 2:13-cv-2251-RFB-VCF, 2015 WL 1729711 (D. Nev. Apr. 15, 2015) (holding
23 that employee-plaintiffs have a private right of action for unpaid wages pursuant to
24 NRS Chapter 608) (App. at 158-219) App. 28-39, 42, 44-45); *Phelps v. MC*
25 *Communs., Inc.*, 2011 U.S. Dist. LEXIS 84428, 6-7 (D. Nev. Aug. 1, 2011) (“When
26 this Court has considered th[e] question [whether a plaintiff has a private right of
27 action to recover unpaid overtime wages due and owing], it has held that a plaintiff
28 may resort to §608.140 to vindicate the failure to pay overtime under §608.018.”);
Busk v. Integrity Staffing Solutions, Inc., 2011 WL 2971265, *7 (D. Nev. July 19,
2011) (rejecting the defendant’s argument that overtime compensation does not
constitute “wages” and holding the plaintiffs “correctly use NRS § 608.140 as the
private right of action to recoup unpaid wages . . . under NRS §§ 608.018 and

C. *Baldonado* Supports Nevada Employees' Right To Recover Unpaid Wages In Court

It is readily apparent that this Court's decision in *Baldonado v. Wynn* was limited to the question of whether an employee had a private right of action to seek the recovery of allegedly unlawfully retained tips. It was not a case about allegedly unlawfully retained wages. Tips are different than wages. Tips are gratuities bestowed upon a person by a customer. Wages are payments by an employer to an employee for the performance of work. See NRS 608.012 (defining "wages" as "[(1.)] The amount which an employer agrees to pay an employee for the time the employee has worked, computed in proportion to time; and [(2.)] Commissions owed the employee, but excludes any bonus or arrangement to share profits.").

Indeed, this Court recognized the distinction between wages and tips in the *Baldonado* opinion itself. In doing so, this Court expressly and specifically limited

608.019") affirmed by *Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525 (9th Cir. 2013) rev'd on other grounds by *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 190 L. Ed. 2d 410 (2014); *Buenaventura v. Champion Drywall, Inc.*, 2011 U.S. Dist. LEXIS 86508, 2011 WL 1071760, *3 (D. Nev. Mar. 21, 2011) ("[N]othing in the language of §608.018 suggests that the overtime compensation that an employer must pay to covered employees is other than a wage. Accordingly, as employees can maintain a private cause of action for unpaid wages pursuant to §608.140, employees covered by §608.018 can bring a private cause of action for the unpaid overtime wages owed pursuant to §608.018."); *Daprizio v. Harrah's Las Vegas, Inc.*, 2010 U.S. Dist. LEXIS 84307, *11-12 (D. Nev. Aug. 17, 2010) (recognizing a private right of action for wages under NRS 608.140); *Fetrow-Fix v. Harrah's Entm't, Inc.*, 2010 U.S. Dist. LEXIS 125625 (D. Nev. Nov. 16, 2010) (recognizing a private cause of action for NRS 608.050 and 608.115, and collecting cases); *Cueto-Reyes v. All My Sons Moving Co.*, 2010 U.S. Dist. LEXIS 119787, 6-7 (D. Nev. Nov. 10, 2010); See *Mark v. Bluebird Apps, LLC, et al*, Case No. A-15-716939-C, Dept. 27 (July 15, 2015) (App. at 224-227). *Phelps v. MC Communications, Inc., et al.*, Case No. A-11-6349650-C, Dept. 18 (Dec. 13, 2012) (App. at 228-232); *Valdez v. Cox Communications Las Vegas, Inc., et. al.*, Case No. A-09-597433-C, Dept. 1 (Aug. 6, 2012) (App. at 233-236).

1 its holding to a private cause of action for tips, and distinguished a private cause of
2 action for wages arising under NRS Chapter 608, stating that,

3 [T]wo other statutes in NRS Chapter 608, otherwise
4 enforceable by the Labor Commissioner, expressly
5 recognize a civil enforcement action to recoup unpaid
6 wages: NRS 608.140 (civil actions by employees to
7 recoup unpaid wages) and NRS 608.150 (civil actions by
8 the district attorney to recoup unpaid wages from general
9 contractors).

10 124 Nev. 951, 966 n. 33, 194 P.3d 96, 106 (2008). This Court concluded that “a
11 private cause of action to recover unpaid wages is entirely consistent with the
12 express authority under NRS 608.140 to bring *private actions* for wages unpaid and
13 due.” *Id.* (emphasis added). *Baldonado* thus rejects the notion that Nevada
14 employees must file their statutory wage claims with the Nevada Labor
15 Commissioner.

16 **D. Nevada Employees Are Not Limited To Only Seeking Unpaid**
17 **Wages Pursuant To A Breach of Contract Theory**

18 At Respondent-Defendant’s urging, the District Court held that Nevada
19 employees can only seek unpaid wages under the Nevada Constitution and NRS
20 Chapter 608 if they are brought pursuant to a breach of contract action. It does so
21 by conflating the phrase “terms of employment” contained in NRS 608.140 with
22 the phrase “employment contract”. App. at 2 (stating that “*Baldonado* applies only
23 to unpaid wage claims based upon the “terms of employment” and not unpaid wage
24 claims based upon alleged violations of Nevada’s labor laws.”). This is an overly
25 restrictive reading of NRS 608.140 and would have the net effect of limiting the
26 enforceability of those statutory provisions to the few Nevada employees who are
27 fortunate to work under a contract of employment.
28

1 **1. The statutory scheme does not limit private actions to**
2 **contractually-owed unpaid wages.**

3 Nowhere in NRS Chapter 608 does the Legislature limit the right to seek
4 enforcement of Nevada’s wage-hour laws to employees who work under an
5 employment contract. Quite the contrary.

6 The phrase “terms of his or her employment” is not synonymous with
7 “employment contract”. Rather, “terms of employment” means the conditions
8 under which someone will be employed, which also includes statutory conditions
9 like minimum wage laws, withholding of taxes, and provisions for employee
10 benefits both statutory and consensual. *Black’s Law Dictionary* 1510 (9th ed.
11 2009)(defining “terms” as “[p]rovisions that define an agreement’s scope;
12 conditions or stipulations”). A court cannot read into a statute words that are not
13 there. *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en
14 banc) (“The doctrine of *expressio unius est exclusio alterius* ‘as applied to statutory
15 interpretation creates a presumption that when a statute designates certain persons,
16 things, or manners of operation, all omissions should be understood as
17 exclusions.’”). There is nothing contained in NRS 608.140 that limits the recovery
18 of unpaid wages to only those conferred by express terms of the contract between
19 the employer and employee without reference to statutorily imposed conditions of
20 employment like safety regulations, minimum wage, and the like.

21 Had the Legislature intended to limit a private right of action to wages owed
22 pursuant only to those terms and conditions expressed by the employer in the
23 contract of employment, it could have easily done so. Indeed, in the same year it
24 enacted NRS 608.140, the Legislature actually included the word “contract” in a
25 related statutory provision—NRS 608.050—which specifically provides that an
26 employee’s wages continue for 30-days under two (2) scenarios: “Whenever an
27 employer of labor [1] shall discharge or lay off employees without first paying them
28 the amount of any wages or salary then due them, in cash and lawful money of the
 United States, or its equivalent, or [2] shall fail, or refuse on demand, to pay them

1 in like money, or its equivalent, the amount of any wages or salary at the time the
2 same becomes due and owing to them *under their contract of employment . . .*”
3 Emphasis added. In other words, NRS 608.050 contemplates two scenarios in
4 which wages come due and owing—those pursuant to statute and those pursuant to
5 contract—and provides separate payment obligations depending for each. Non-
6 contract wages become due and owing immediately upon discharge or layoff
7 whereas wages owed pursuant to contract must be paid when they become due and
8 owing under the contract, i.e. the next paycheck or the next bonus period, etc. NRS
9 608.050.

10 This statute is important for two reasons. First, it demonstrates that the
11 Legislature was fully capable of inserting the specific term “contract” when it
12 wanted to distinguish between wages pursuant to contract versus non-contract
13 wages. Second, it specifically contemplates employer obligations to pay non-
14 contract wages due and owing.

15 Finally, NRS 608.140 provides that an “employee” shall have the right to
16 bring suit for unpaid wages. An “employee” in Nevada is any person “in the service
17 of an employer under any appointment or contract of hire or apprenticeship, express
18 or implied, oral or written, whether lawfully or unlawfully employed.” NRS
19 608.010. This definition is not limited to a person who only works pursuant to an
20 employment contract. Rather, it is expansive to include all persons in the service
21 of an employer. Interpreting NRS 608.140 to only permit wage suits by employees
22 who have an employment contract would effectively rewrite the definition of
23 employee to only include a small handful of persons who work pursuant to
24 employment agreements in this state. Because the term “employee” is not limited
25 to those persons employed by an employment contract, NRS 608.140’s right to
26 “bring suit for wages” is not limited to only contract wages.

27 In sum, to conclude that the phrase “according to the terms of his or her
28 employment” only means the articulated express terms of a “contract” ignores that

every employment relationship in this state must abide by the minimum statutory guarantees provided by the Legislature. A term and condition of employment in this state is that the employer will compensate an employee for all hours worked, pay overtime (either daily or weekly), and pay all wages due and owing at the end of the employment relationship. *See* NRS 608.016, NRS 608.018, and 608.020-.050. The District Court and Respondent-Defendant do not deny that these statutory rights exist, they simply want the forum to be limited to the Labor Commissioner. Even if Respondent-Defendant were correct in that assertion (which they are not) that limitation on the forum for enforcement does not mean those claims are not terms of every employment in the state of Nevada. To conclude that statutory wage and hour provisions are not “terms of employment” degrades the authority of the State to legislate essential employment terms and conditions that every employer must abide by. For these reasons, the plain language of NRS 608.140 does not limit an employee’s private right of action to recover unpaid wages to only those conferred by contract.

2. Legislative history and intent support a private right of action for statutorily-owed unpaid wages.

Prior to the enactment of NRS 608.140 and NRS 608.050 in 1925, Nevada had approximately fifteen statutes on the books governing wages, hours, and working conditions, twelve of which are still codified today.⁷ *See* Rev. Laws of Nev. (“RL”), pp. 2773-2777 (App. at 238-246). For example, in 1919 the Legislature enacted a statute requiring the semimonthly payment of wages and provided as follows:

All wages or compensation of employees in private employments shall be due and payable semimonthly . . .

⁷ *See* NRS 608.010; 608.020; 608.030; 608.040; 608.060; 608.070; 608.080; 608.090; 608.110; 608.120; 608.190; 608.190.

1 but nothing contained herein shall be construed as
2 prohibiting the contracting for the payment or of the
3 payment of wages at more frequent periods than
4 semimonthly. Every agreement made in violation of this
5 section, except hereinafter provided, shall be null and
6 void; except any employee shall be entitled to payment of
such wages or compensation for the period during which
the same were earned.

7 1919 RL, pp. 2775-76. This statute plainly contemplates that wages must be paid
8 on a regular basis irrespective of whether any contract exists or not. This is one
9 example demonstrating the Legislature's desire to regulate the manner in which
10 wages are paid to employees outside the confines of the traditional pure contractual
11 relationship.

12 The Nevada Legislature also enacted a statute requiring that payment for
13 wages and compensation must be paid either upon termination or within 24 hours
14 of resignation, providing a penalty of 30-days pay for non-payment of wages upon
15 termination. 1919 RL, pp. 2776. The 1919 version is very simple and states in
16 essential terms that if an employer fails to pay wages or compensation due, the
17 wages or compensation continues for 30-days as a penalty. The 1919 version of the
18 waiting penalty provision is codified today at NRS 608.040.

19 The 1925 version of waiting penalties is almost identical to the 1919 version
20 of waiting penalties but also provides a private right of action to file a lien. The 1925
21 act specifically gave workers the right to foreclose an implied at law lien for these
22 waiting penalty wages thus making the owner of the land upon which the employee
23 worked responsible for the correct payment of wages due its subcontractors'
24 employees. The 1925 "lien" version became NRS 608.050.⁸

25 ⁸ The Court said the 1925 version does not replace or supplant the 1919
26 version. Under the 1919 version, the employees do not have any lien rights and all
27 wages or compensation owed run as daily penalty for 30-days against the employer.
28 Under the 1925 version, the employee has lien rights against both the employer and
third party, non-employers. In addition, under the 1925 version the employee is

1 No matter which version of waiting penalty wages were at issue in the 1932
2 Nevada Supreme Court Decision in *Doolittle v. Eighth Judicial Dist. Court*, both
3 versions are strictly a creation of statute. *Doolittle*, 54 Nev. 319 (1932). And in
4 *Doolittle*, the Nevada Supreme Court confirmed that there was a private cause of
5 action based upon the 30-day waiting penalties created by that statute against the
6 landowner, who had no contract of employment with the employee. *Id.* at 321-22.
7 The Nevada Supreme Court first noted that “We have three acts relative to the
8 payment of laborers: The one above referred to, which provides for semimonthly
9 pay days; the act of March, 1911, N. C. L., sec. 2783, requiring payment by check
10 or other writing, payable in cash and without discount; and the act of March, 1925,
11 sec. 2785 N. C. L.” *Id.* at 320-21.⁹ The Court necessarily implied that those three
12 acts each gave rise to a private cause of action. *Id.* at 319. Therefore, as early as
13 1932, the Nevada Supreme Court recognized that there was a private right of action
14 to sue under the common law for statutory wages imposed by statute as a penalty at
15 a rate imposed by the statute regardless of any contractual provisions between the
16 parties. *Id.*

17 Again, by enacting this statute, the Legislature was circumventing the
18 employment contractual relationship and setting forth uniform laws to govern the
19
20

21 _____
22 entitled to wages owed plus 30-days of *pay* (not just 30-days of the amount owed).
23 *See* 54 Nev. at 322 (“The 1925 act does not purport to be amendatory of the other
24 acts or to repeal any portion of them. It is clearly an independent act intended to
meet an entirely different situation than that contemplated by the act of 1919.”)

25 ⁹ The defendant in *Doolittle* was not the employer of the plaintiff. 54 Nev. at
26 320, 322. The plaintiff sued the owner of the property upon which he worked for
27 wages due and penalties. *Id.* at 320. The Court awarded wages due and penalties
28 under the 1925 “lien” statute against the owner of the building. *Id.* at 320-21.

1 employer-employee relationship as a “term of employment.”¹⁰ In other words, the
2 Nevada Legislature was fully adept at regulating non-contractual wages and hours
3 prior to the enactment of NRS 608.140 and NRS 608.050. There is nothing in the
4 legislative history that suggests the Legislature only intended to regulate contractual
5 wages or hours. In fact, when considering the backdrop of the 1925 amendments,
6 it becomes clear that the Legislature enacted NRS 608.140 and NRS 608.050
7 because employees had the right to sue their employer in court directly for wages
8 owed. The “terms of their employment” includes all conditions of the employment
9 relationship, including statutorily imposed conditions.

10 Furthermore, prior to 1925, the Labor Commissioner was charged with
11 enforcing the various statutory pay provisions. *See* 1919 RL, p. 2777 (“It shall be
12 the duty of the labor commissioner to cause this act to be duly enforced and upon
13 notice from him the district attorney of any county in which a violation of this act
14 has occurred, shall prosecute the same according to law.”). No one seriously argued
15 that the wages due did not include all the wages due by whatever reasons, as long
16 as that reason was a condition of the employment relationship. By enacting NRS
17 608.140, the Legislature provided a trade-off—notice with opportunity to cure for
18 the benefit of the employer in exchange for attorney’s fees should suit need to be
19 filed for the benefit of the employee. In so doing, the Legislature also confirmed
20 that the labor commissioner *was not the exclusive enforcement mechanism* for
21 violation of wage laws. Similarly, the Legislature expressly provided for a private
22 right of action to bring suit for all wages due and owing by enacting NRS 608.050
23 and setting forth a lien provision to attach real property in the event of non-payment.
24 And, as stated above, an employee’s private right of action under NRS 608.050 and
25 other related statutes was confirmed in the Supreme Court’s *Doolittle* decision.

26
27 ¹⁰ In addition to these wage regulations, the Nevada Legislature also
28 regulated working hours for women. *See* RL p. 2774 (App. at 238-246).

1 *Doolittle* 54 Nev. 319. The historical significance of these legislative acts does not
2 suggest that the Legislature intended to force employees to go through the
3 administrative process; to the contrary, it suggests that the Legislature was
4 genuinely concerned about the wages, hours, and working conditions of Nevada
5 employees and sought to allow employees to pursue their claims in court.

6 A statutory or constitutional command to regular wages or overtime wages
7 to an employee for all hours worked in excess of a certain amount per day or per
8 week is not different than a statutory (or constitutional) command to pay a minimum
9 amount to employees for each hour worked. They are both obligations that an
10 employer must agree to comply with in order to do business in the state of Nevada.
11 Thus, when an employer agrees to pay an employee an hourly rate in excess of the
12 minimum wage rate, the employer nonetheless agrees to pay the employee the
13 overtime rate for which the employee is entitled to receive. An employer cannot
14 seriously argue that it only agrees to pay an employee the hourly rate but not the
15 overtime rate. They are one in the same.

16 Lastly, the fact that the Legislature has not amended NRS 608.140 since its
17 enactment in 1925 indicates that the Legislature continues to support its 1925
18 decision to create an express private right of action to file suit for unpaid wages.
19 This argument carries particular weight when we look at legislative action post-
20 *Baldonado*, which was decided on October 9, 2008. *Baldonado*, 124 Nev. at 951.
21 As stated above, in *Baldonado* the Nevada Supreme Court held that an employee
22 has an express private right of action to pursue unpaid wage claims in court. *Id.*, at
23 n.33. If the Legislature had any issue with the Nevada Supreme Court's decision
24 in this regard, it could have amended the statute accordingly. Since *Baldonado*, the
25 Legislature has had four sessions (2009, 2011, 2013 and 2015) to amend the statute,
26 but has refused to do so. Thus, the Legislature's refusal to act post-*Baldonado*
27 indicates that it agrees with the Nevada Supreme Court's decision that employees
28 hold private rights of action to sue for unpaid wages. *See City of Las Vegas*

1 *Downtown Redevelopment Agency v. Crockett*, 117 Nev. 816, 825, n.15 (Nev.
2 2001); *Northern Nev. Ass'n Injured Workers v. SIIS*, 107 Nev. 108, 112
3 (1991) (stating that legislative amendment of other parts of a law may indicate
4 approval of interpretations pertaining to the unchanged and unaffected parts of the
5 law); 2B Norman J. Singer, *Statutes and Statutory Construction* note 14, § 49:10,
6 at 112 (6th ed. 2000) 2B (“Legislative inaction following a contemporaneous and
7 practical interpretation is evidence that the legislature intends to adopt such an
8 interpretation.”). In sum, the Legislature’s decision to leave NRS 608.140 (and
9 NRS 608.050) undisturbed for more than 90 years only shows that they have
10 continued to express the intent to permit employees to file claims for unpaid wages
11 directly with the court.

12 **E. The Labor Commissioner Does Not Have Exclusive Jurisdiction**
13 **To Enforce NRS Chapter 608**

14 Despite the plain language of the statutory scheme to the contrary, the District
15 Court concluded that the Nevada Labor Commissioner retained exclusive
16 jurisdiction to enforce NRS Chapter 608 violations. The District Court’s decision
17 is simply incorrect.

18 The Labor Commissioner maintains concurrent jurisdiction with private
19 litigants to make sure the Legislature’s mandate to protect the health and welfare of
20 Nevada employees is enforced. *See, e.g.*, NRS 607.160(6) (“The actions and
21 remedies authorized by the labor laws are cumulative.”). NRS 607.170 states that
22 the Labor Commissioner’s legislative mandate is to only exercise jurisdiction over
23 claims in instances where a claimant demonstrates that he or she cannot afford a
24 private attorney to take his or her wage case. “The Labor Commissioner may
25 prosecute a claim for wages and commissions or commence any other action to
26 collect wages, commissions and other demands of any *person who is financially*
27 *unable to employ counsel* in a case in which, in the judgment of the Labor
28 Commissioner, the claim for wages or commissions or other action is valid and

enforceable in the courts.” NRS 607.170 (emphasis added). “If it appears to the Commissioner that a complainant can afford to employ private counsel, the Commissioner may inquire into the financial condition of the complainant *to determine whether to take jurisdiction of the matter.*” NAC 607.095 (emphasis added); *see also* NAC 607.075 (“If the Commissioner, after reviewing the claim and conducting such further inquiry as he deems necessary, determines that the complainant has the ability to employ counsel . . . the Commissioner may decline to take jurisdiction of the claim . . .”). The Labor Commissioner’s practice is consistent with the Legislature’s mandate:

[T]he Labor Commissioner’s] office determines whether claimants have the financial ability to employ an attorney to represent them in pursuing their wage claims.

...

Consistent with Nevada Revised Statutes 607.160(7), 607.170(1) and Nevada Administrative Code 608.075(2) (effective 12/4/03), [the Labor Commissioner’s] office does not usually prosecute wage claims on behalf of individuals in this state who have the financial ability to employ an attorney. In most cases, those claimants have already retained counsel to represent them in the matter. Otherwise, *we advise such individuals, [those who can afford private counsel,] to employ an attorney to represent them and to pursue their claim in court. . . . It is my opinion that individuals who can afford to employ their own attorneys can directly file and maintain a claim for wages against their employer in Nevada courts.*

See App. at 247-250 (Declaration of Michael Tanchek (“Tanchek Dec.”), at ¶¶ 2-3) (emphasis added); *see also* http://labor.nv.gov/About/Forms/FORMS_FOR_EMPLOYEES/ (last visited June 28, 2016) (Wage Claim Form stating that “IF YOU ELECT TO RETAIN [LEGAL] COUNSEL, THE OFFICE OF THE LABOR COMMISSIONER MAY ELECT TO DECLINE JURISDICTION OVER YOUR

1 WAGE CLAIM PURSUANT TO NAC 707.095.”). This is consistent with the
2 Labor Commissioner’s authority contained in NRS Chapter 607.

3 Here, it is clear that Petitioner-Plaintiff has demonstrated the ability to
4 employ private counsel who are members of the Nevada state bar. Had Petitioner-
5 Plaintiff filed first with the Nevada Labor Commissioner, the Labor Commissioner
6 could have refused to take jurisdiction over the wage claim and, given the District
7 Court’s ruling, Petitioner-Plaintiff would have been left without any remedy.

8 In addition to the financial requirement, the Labor Commissioner also
9 conditions jurisdiction over potential wage claimants to assign all rights and
10 settlement authority to the Labor Commissioner’s office. This presents two
11 apparent problems. First, wage claimants are at the mercy of the Nevada Labor
12 Commissioner’s decision making as to whether to accept a settlement amount or
13 not. This flies in the face of the ethical responsibility of an attorney to respect the
14 client’s desires with regard to settlement of an action. Second, the Labor
15 Commissioner only seeks recovery of unpaid wages under a 2-year statute of
16 limitations even though a 3-year limitation applies to statutory wage violations.
17 Compare *see also* http://labor.nv.gov/About/Forms/FORMS_FOR_EMPLOYEES/
18 (last visited June 28, 2016) (“The Commissioner will not accept any claim or
19 complaint based on an act or omission that occurred more than 24 months before
20 the date on which the claim or complaint is filed with the Commissioner.”) with
21 NRS 11.190 (3)(a) (setting a 3-year statute of limitations for “An action upon a
22 liability created by statute”).

23 Given that Petitioner-Plaintiff is not an indigent wage claimant incapable of
24 employing private counsel to prosecute his claims, and the suit includes time for
25 which the Labor Commissioner lacks jurisdiction but which are clearly within the
26 three-year statute of limitations (NRS 608.016, NRS 608.018, and NRS 608.020-
27 .050), the Labor Commissioner’s would not have jurisdiction over his claims.

Clearly, there must be a private cause of action where there is no remedy before the Labor Commissioner.

F. Preventing Employees From Seeking Statutorily Owed Wages Would Run Afoul Of The Legislative Intent And Lead To Absurd Results

As stated above, the Legislature enacted NRS Chapter 608 to protect the health and welfare of employees in their hours of work and compensation. The Labor Commissioner fills the void and may decide to represent indigent litigants in the recovery of unpaid wages. But what happens when litigants hire an attorney to recover those same statutorily-owed unpaid wages? The District Court holds that there is no remedy for such violations. Nevada employees are simply out of luck. This runs afoul of the Legislature's mandate and disregards that express provisions contained Chapter 608 that authorize employee to seek redress in court. But that is not all, the District Court's decision that Nevada employees cannot seek statutorily-owed unpaid wages also has another intended effect. It would lead to duplicative actions—overburdening both the Labor Commissioner and the Nevada courts.

No one (not even Respondent-Defendant) can dispute that the Nevada constitutional provision permits employees to file suit in Nevada courts. The constitution provides that the employee is entitled “to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief.” But if an employee is prohibited from seeking relief for non-minimum wage statutory wage-hour violations, he or she will be required to submit multiple claims in multiple venues that concern the same underlying facts.

For example, proof of a violation of the Constitution's minimum wage provision necessarily includes proof of a violation of NRS 608.016, “Failure to Pay for All Hours Worked.” When the failure to pay the minimum wage is the result of the employer's failure to pay wages for all hours worked (NRS 608.016), then

1 shouldn't this claim be adjudicated in the same proceeding? Likewise, since the
2 employees worked a full eight-hour day before being required to work "off the
3 clock", proof of the number of hours worked will also prove that overtime
4 compensation was due as well under NRS 608.018, "Failure To Pay Overtime
5 Wages." And since the dates of each worker's employment will be necessary to
6 establish the extent of the claim for underpayment of the constitutional minimum
7 wage, and there is obviously wages due and owing at the time of termination that
8 have never been paid, the same facts will lead to proof of a violation of NRS
9 608.020-050, "Failure To Pay All Wages Due And Owing Upon Termination."
10 Petitioner-Plaintiff should not be required to split his legal action in two different
11 forums when the claims arise out of the same facts and circumstances. *Moriarty v.*
12 *Moriarty*, No. 59607, 2013 WL 621922, at *1 (Nev. Feb. 15, 2013), *Smith v.*
13 *Hutchins*, 93 Nev. 431, 432, 566 P.2d 1136, 1137 (1977) (holding that a party is
14 prohibited from splitting causes of action and maintaining separate actions on the
15 same claims). Such a requirement would clog the courts and the Labor
16 Commissioner's office, create a risk of inconsistent judgments, and frustrate the
17 remedial purpose of the wage-hour statutes.

18 VI.

19 CONCLUSION

20 In light of the important precedential questions of statewide interest and
21 serious issues of substantial public policy at issue in this case, this Court should
22 exercise its discretion to consider Petitioner-Plaintiff's petition and issue a writ as
23 requested herein. See, *Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex rel.*
24 *Cty. of Washoe*, 124 Nev. 193, 196, 179 P.3d 556, 558 (2008). The questions
25 presented in this case raise important issues of law that impact tens of thousands of
26 employees statewide, thus requiring clarification, and an appeal from the final
27 judgment in this case will not provide an adequate and speedy legal remedy given
28 the urgent need for resolution of these issues. Petitioner-Plaintiff's complaint

alleges that the employer required minimum wage employees to perform certain tasks “off the clock”—i.e. the employer required its employees to work certain hours without being paid. Minimum wage employees need to be paid in full promptly, and do not have the personal resources to withstand the time it takes to resolve an appeal after trial when the issue raised is a pure question of law with no factual dispute. *Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 313 P.3d 849 (2013).

Executed this 30th day of June, 2016.

Respectfully Submitted,

THIERMAN BUCK LLP

/s/ Mark R. Thierman

Mark R. Thierman, Bar No. 8285

Joshua D. Buck, Bar No. 12187

Leah L. Jones, Bar No. 13161

7287 Lakeside Drive

Reno, Nevada 89511

Attorneys for Petitioner-Plaintiff

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

- ☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size and Times New Roman.
- ☐ This brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*]

I further certify that this brief complies with the page length or type volume limitations of NRAP 32(a)(7) and because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

- ☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words; or
- ☐ Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or
- ☒ Does not exceed 30 pages.

Finally, I hereby certify that I have read this petition for writ of mandamus, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: June 30, 2016

THIERMAN BUCK LLP

/s/ Mark R. Thierman

Mark R. Thierman, Bar No. 8285

Joshua D. Buck, Bar No. 12187

Leah L. Jones, Bar No. 13161

7287 Lakeside Drive

Reno, Nevada 89511

Attorneys for Petitioner-Plaintiff

CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 7287 Lakeside Drive, Reno, Nevada 89511. On June 30, 2016, the following document was served on the following:

PETITION FOR WRIT OF MANDAMUS

- By **United States Mail** – a true copy of the document listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Las Vegas, Nevada addressed as set forth below.

Rick D. Roskelley, ESQ.
Roger L. Grandgenett II, ESQ.
Montgomery Y. Paek, ESQ.
Kathryn B. Blakey, ESQ.
LITTLER MENDELSON, P.C.
3960 Howard Hughes Parkway
Suite 300
Las Vegas, NV 89169-5937
Attorneys for Defendant-Real Party in Interest

Honorable Adriana Escobar
Eighth Judicial District Court
County of Clark
Dept. 14, Ctrm 3F
200 Lewis Avenue
Las Vegas, NV 89155
Respondents

I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary

1 course of business. I declare under penalty of perjury that the foregoing is true and
2 correct.

3 Executed on June 30, 2016 at Reno, Nevada.

4
5 /s/ Tamara Toles
6 Tamara Toles
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28