

**IN THE SUPREME COURT OF NEVADA**

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Elizabeth A. Brown  
Clerk of Supreme Court

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DARRELL E. WHITE, an individual;

Petitioner,

v.

STATE OF NEVADA, *ex rel.* DIVISION OF FORESTRY; CANNON  
COCHRAN MANAGEMENT SERVICES, INC., a foreign corporation,

Respondents.

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On Appeal of the Decision of the Eighth Judicial District Court, Dept. 32,  
Judge Rob Bare presiding

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**PETITIONER'S SUPPLEMENTAL BRIEF**

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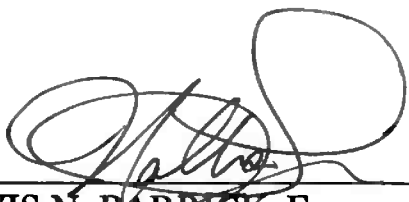


## **NRAP 26.1 DISCLOSURE.**

The undersigned counsel of record certifies the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. The Petitioner, DARRELL E. WHITE, is an individual to whom the corporate ownership disclosures under NRAP 26.1 are inapplicable. Petitioner is appearing under his proper name and is not using any pseudonym.
2. The undersigned counsel of record have appeared before this Court in this matter and/or before the District Court and in the prior administrative proceedings related thereto.

Dated this 1<sup>st</sup> day of November 2019.

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## TABLE OF CONTENTS.

I.	STATEMENT OF JURISDICTION .....	iv
II.	ROUTING STATEMENT .....	iv
III.	STATEMENT OF ISSUES PRESENTED FOR REVIEW .....	iv
IV.	STANDARD OF REVIEW .....	v
V.	STATEMENT OF THE CASE .....	1
VI.	STATEMENT OF THE FACTS AND PROCEDURAL HISTORY .....	1
VII.	SUMMARY OF THE ARGUMENT .....	2
VIII.	ARGUMENT .....	3
	a. Nevada Constitution Article 15, Section 16 controls wages for all employees in the State and binds all employers in the State (including the State) to pay not less than the minimum wage .....	3
	b. The <i>State</i> of Nevada, <i>ex rel.</i> Division of Forestry (as well as the State of Nevada, <i>ex rel.</i> NDOC) is an “employer” under Nevada Constitution Article 15, Section 16; NRS 209.457, <i>et seq.</i> ; and NAC 616B.960, <i>et seq.</i> .....	5
	c. Prior case law related to the Fair Labor Standards Act or other state minimum wage statutes does not defeat the status of the State, the DOF, or the NDOC as an “employer.” .....	7
	d. Mr. White and all inmates in the Program are “employees” under Nevada Constitution Article 15, Section 16; NRS 209.457, <i>et seq.</i> ; and NAC 616B.960, <i>et seq.</i> .....	9
	e. NRS 209.461(8) does not statutorily preclude an inmate from receiving the minimum wage (or greater), and, even if it did, it would still be subject to constitutional override. ....	10
	f. The definition of wages under NAC 616B.964 prevents compliance with the Amendment, and it should, therefore, be held to be unconstitutional. ....	11
IX.	CONCLUSION .....	13
X.	Certificate of Compliance .....	15
XI.	Certificate of Service .....	17



## TABLE OF AUTHORITIES.

### CASES.

<i>Flamingo Paradise Gaming, LLC v. Chanos</i> , 217 P.3d 546 (2009) .....	v
<i>Clean Water Coal. v. The M Resort, LLC</i> , 255 P.3d 247 (2011) .....	3
<i>Alexander v. Sara, Inc.</i> , 721 F.2d 149 (5th Cir. 1983) .....	7, 8
<i>Bennet v. Frank</i> , 395 F.3d 409 (7th Cir. 2005) .....	7
<i>Vanskike v. Peters</i> , 974 F.2d 806 (7th Cir. 1992) .....	8
<i>Harker v. State Use Indus.</i> , 990 F.2d 131 (4th Cir. 1993) .....	8
<i>Carter v. Dutchess Cmty. Coll.</i> , 735 F.2d 8, (2d Cir. 1984) .....	9
<i>Danneskjold v. Hausrath</i> , 82 F.3d 37 (2d Cir. 1996) .....	9
<i>Zheng v. Liberty Apparel Co. Inc.</i> , 355 F.3d 61 (2d Cir. 2003) .....	9
<i>Watson v. Graves</i> , 909 F.2d 1549 (5th Cir.1990) .....	9
<i>Carter v. Dutchess Community College</i> , 735 F.2d 8 (2d Cir.1984) .....	9

### STATUTES, RULES, AND REGULATIONS.

Nevada <b>Constitution</b> , Article 15, §16 .....	<i>passim</i>
Fair Labor Standards Act of 1938 .....	7, 8, 9
29 U.S.C.A. § 202 .....	8
NRS 209.457 .....	5, 9
NRS 209.457(2)(1) .....	6
NRS 209.457(3)(a) .....	6
NRS 209.481 .....	5, 6
NRS 209.461(1) .....	5
NRS 209.461(8).....	3, 4, 10
NRS 616A.105 .....	4
NRS 616A.230 .....	4
NRS 616B.222 .....	14
NAC 616B.960 .....	iv, 1, 5, 6, 9
NAC 616B.964 .....	iv, 1, 2, 11, 12, 13
NAC 616B.968(3) .....	iv
NAC 616B.968(4) .....	iv
NAC 616B.986 .....	iv, 1, 6
NAC 616C.420 .....	13
NAC 616C.423 .....	13
NAC 616C.435(7) .....	13
NRAP 17(a)(11) .....	iv



## **I. STATEMENT OF JURISDICTION.**

Jurisdiction before this Court is sufficiently established, the Court having already taken up the case, heard oral arguments thereon on October 15, 2019, and issued, on October 17, 2019, an Order Directing Simultaneous Supplemental Briefing by both parties, addressing whether NAC 616B.964 is unconstitutional under Nevada Constitution Article 15, Section 16, Nevada's minimum wage Amendment (the "Amendment").

## **II. ROUTING STATEMENT.**

The Court has properly retained this case on appeal from the District Court under authority of NRAP 17(a)(11), finding that the matter raises "as a principal issue a question of first impression involving the... Nevada Constitution."

## **III. STATEMENT OF ISSUES PRESENTED FOR REVIEW.**

Per the Court's order of October 17, 2019, the particular question before the Court with respect to this Supplemental Brief is "whether NAC 616B.964 is unconstitutional under Nevada Constitution Article 15, Section 16, Nevada's minimum wage Amendment."



#### IV. STANDARD OF REVIEW.

“The determination of whether a statute is constitutional is a question of law, which [the Supreme Court] reviews de novo. Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. The court must interpret a statute in a reasonable manner, that is, [t]he words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results. In reviewing a statute, it should be given [its] plain meaning and must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory.” (internal quotation and citations omitted) *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009).



## **I. STATEMENT OF THE CASE.**

This matter is before the Court to correct the erroneous calculation of the Average Monthly Wage (“AMW”) for DARRELL E. WHITE (“Mr. White”) related to his award of damages for Temporary Total Disability (“TTD”) and Permanent Partial Disability (“PPD”) under the Modified Program for Offenders in Prison Industry Programs (defined under NAC 616B.960 to NAC 616B.986, inclusive). To enable correction of the error, the Court must determine the applicability of the Amendment to the Respondent State of Nevada (and its divisions) as an employer and to Mr. White as an employee, and, if deemed applicable, whether the language of the Amendment renders NAC 616B.964 unconstitutional.

## **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.**

The facts and procedural posture of the case have been thoroughly and adequately stated in the prior Briefs of both parties.



### **III. SUMMARY OF THE ARGUMENT.**

1. The Nevada constitution requires all employers to pay an employee no less than the minimum wage.
2. The State of Nevada and all divisions thereof are “employers” under the relevant definitions.
3. Inmates employed in the Prison Industry Program (the “Program”) are “employees” under the relevant definitions.
4. The State of Nevada, the Division of Forestry, and the Nevada Department of Corrections are all therefore required to pay employed inmates no less than the minimum wage.
5. NAC 616B.964 specifically excludes the value of an inmate’s room, board, medical care, good time earned, and other goods and services, resulting in a paid or calculated wage for employed inmates significantly less than the minimum wage.
6. Striking NAC 616B.964 as unconstitutional allows the value of all currently excluded goods and services to be included in an inmate’s wage, which would likely exceed the minimum wage<sup>1</sup> and satisfy the constitutional mandate.

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<sup>1</sup> <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends> indicates a 2015 cost per inmate of \$17,851, which is less than minimum (\$21,186.24), but this affords no value to good time earned and may or may not be accurate. If this number is accurate, the constitution will still require no less than the minimum wage.



#### IV. ARGUMENT.

a. **Nevada Constitution Article 15, Section 16 controls wages for all employees in the State and binds all employers in the State (including the State) to pay not less than the minimum wage.**

“The Nevada Constitution is the supreme law of the state, which control[s] over any conflicting statutory provisions,” (internal quotations omitted) *Clean Water Coal. v. The M Resort, LLC*, 127 Nev. 301, 309, 255 P.3d 247, 253 (2011), and, by logical extension, the Amendment thereby controls over any conflicting statutes or administrative codes which fail to comport with the language therein. This constitutional primacy is overarching and is not limited or altered by recency of conflicting legislation, though it is noted that all potentially conflicting statutes and codes all predate the 2006 Amendment.<sup>2</sup>

In relevant part, Article 15, Section 16 states that

- A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section.<sup>3</sup>
- B. The provisions of this section may not be waived by agreement between an individual employee and an employer.<sup>4</sup> ... An employee claiming violation of this section may bring an action against his or her employer in the courts

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<sup>2</sup> NRS 209.461(8) was approved for addition (as NRS 209.461(5)) on July 6, 1995. All provisions of the Program under NAC 616B were effective on October 28, 1999.

<sup>3</sup> On the date of injury, the minimum wage was \$7.25 per hour, and the minimum wage for employees who do not receive health benefits was \$8.25 per hour.

<sup>4</sup> Waiver may be allowed under a collective bargaining agreement that is not otherwise unconscionable or unilateral. This portion is included here to forestall any argument that a waiver signed by an individual inmate would preclude applicability, as this particular argument is not elsewhere addressed in the brief.



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.<sup>5</sup> An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.<sup>6</sup>

- C. As used in this section, **“employee” means any person who is employed by an employer as defined herein** but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days. **“Employer” means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.**<sup>7</sup> (emphasis added)

Having established the primacy of the constitution and the incorporated mandate that all employers pay not less than the minimum wage to all employees, the evident threshold questions are whether the State of Nevada is an employer and whether Mr. White is an employee.

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<sup>5</sup> This portion is included here to illustrate proper standing by Mr. White or any similarly situated inmate to raise a claim under this constitutional provision, as lack of standing has been previously raised in oral arguments, pursuant to NRS 209.461(8).

<sup>6</sup> This portion is included for the obvious reasons.

<sup>7</sup> Whether conflicting or agreeing, the definitions in NRS 616A.105 through NRS 616A.230, inclusive, would not supersede this definition.



**b. The State of Nevada, *ex rel.* Division of Forestry (as well as the State of Nevada, *ex rel.* NDOC) is an “employer” under Nevada Constitution Article 15, Section 16; NRS 209.457, *et seq.*; and NAC 616B.960, *et seq.***

As noted, the Amendment applies to “each employer” as it is defined in the section, and that definition is extraordinarily broad, including “any... entity that may [whether or not it actually does] employ individuals or enter into contracts of employment.” The standard of review (cited above) requires that a statute be given its plain meaning and not be read in a way that would render words superfluous or make a provision nugatory, and this standard should hold at least equally true for constitutional language. The plain language defining employer is broad enough to include the State and its divisions. It is also commonly understood that the State does not exclude itself from this provision for conventional, free-world employment, and for such employment, the State pays no less than the minimum wage.

The plain language of applicable statutes and codes also clearly reflect the State’s identity as an employer. NRS 209.457 through NRS 209.481, addressing the actions of both the Division of Forestry (“DOF”) and the Nevada Department of Corrections (“NDOC”) are collected under the header “EMPLOYMENT OF OFFENDERS,” and employ-formative<sup>8</sup> words are used over sixty times therein, most notably in NRS 209.461(1)

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<sup>8</sup> Employ, employs, employee, employer, employing, and employment



wherein the NDOC is mandated to “approximate the normal conditions of ... employment in the community” and to “contract with governmental agencies and private employers for the employment of offenders, including their employment on public works projects under contracts with the State and with local governments.” NAC 616B.960 through NAC 616B.986, inclusive, are no less clear in their mirroring language, regularly referring to the inmate as an “employee” and to the inmate’s “employment.”

Authority for the DOF to employ inmates is granted under NRS 209.457(2)(a), which states that DOF “[m]ay use offenders... pursuant to the provisions of NRS 209.481<sup>9</sup> and the regulations adopted pursuant thereto to perform work relating to [the DOF].” With no intent to sound pedantic, “us[ing] offenders... to perform work” is employment. DOF is also allowed, under NRS 209.457(3)(a), to enter into “[c]ontracts with any state or federal public agency, municipal corporation or any person” to provide the employment services of such inmates.

Whether considering either employing an employee or entering into a contract for employment (which language is clearly sufficiently inclusive to encompass a “contract... for the employment of offenders” not just a

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<sup>9</sup> NRS 209.481 mandates that the Director (the NDOC) is solely responsible for selection and assignment of inmates to minimum security facilities, thereby, by extension, actually selecting which inmates are eligible for employment under this section.



contract with an individual employee), the DOF and the NDOC each engage in both activities. Accordingly, by plain language of both the Amendment and related statutes, each division of the State qualifies as an employer.

**c. Prior case law related to the Fair Labor Standards Act or other state minimum wage statutes does not defeat the status of the State, the DOF, or the NDOC as an “employer.”**

Though not entirely apposite, as such prior cases unequivocally do not relate to the Amendment or Nevada statutes, the question of prisons as employers has been much litigated, largely in connection with the federal Fair Labor Standards Act of 1938 (“FLSA”). An oft-cited case from a non-binding jurisdiction is *Alexander v. Sara, Inc.*, 721 F.2d 149 (5th Cir. 1983) which held, following the lead of the district court, that “the inmates were not covered by the [FLSA]” due to the fact that “that there was no employer-employee relationship [between inmates and an external private employer], because the inmates' labor belonged to the penitentiary.” *Id.* at 150. There is virtually no actual legal support for this holding, as acknowledged in the comparable *Bennett v. Frank*, 395 F.3d 409 (7th Cir. 2005), which asserted that “[o]ddly, this is so only because of presumed legislative intent and not because of anything in the actual text of the FLSA.” Regardless, to the extent that *Alexander* and similar rulings may be applicable, they actually only work to exclude the external third-party



private employer, which does not really exist in the current circumstance, and *Alexander* appears to hold that the prison is the employer.

Per *Alexander*, the labor/employment may only belong to the NDOC (the penitentiary), but here a distinction is drawn for two reasons: (1) there is no external third-party private employer, as that role is filled by the DOF, also a division of the State; and (2) the DOF is not reasonably excluded from this analysis as a private employer since it is specifically included in the statute governing EMPLOYMENT OF OFFENDERS. Accordingly, *Alexander* speaks to both the NDOC and the DOF being employers.

Another distinction often relied on in cases similar to *Alexander*<sup>10</sup> is that the purported purpose of the FLSA relates largely to the “standard of living necessary for health, efficiency, and general well-being of workers.”<sup>11</sup> This again is a substantial point of distinction here, as no such purpose is enumerated in the Amendment. Whether or not it is judicially justified to assert the FLSA did not intend for inmates to be covered by a minimum wage (despite the absence of any actual exclusion in the law), no such argument or intent is justifiably appended to the Amendment, as is further discussed below.<sup>12</sup>

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<sup>10</sup> See generally *Vanskike v. Peters*, 974 F.2d 806, 810 (7th Cir. 1992); *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993).

<sup>11</sup> Quoting from 29 U.S.C.A. § 202

<sup>12</sup> Noted, if not entirely apposite, that inmates employed in work-release programs are



**d. Mr. White and all inmates in the Program are “employees” under Nevada Constitution Article 15, Section 16; NRS 209.457, et seq.; and NAC 616B.960, et seq.**

There are only three exclusions in the Amendment for an “employee,” and not one of them is for inmates (covering only minors, non-profit after school or summer work, or short-term training). Again, as discussed above, the only proper definition for an employee is under the Amendment, whereunder an “employee means any person who is employed by an employer.” If it established that both the DOF and the NDOC are an employer under the relevant meaning, then Mr. White and those similarly situated are doubtlessly employees, not subject to any exclusion.

Reverting briefly to case law associated with the FLSA, it has affirmatively been stated by the Second Circuit that “an inmate may be [an employee] entitled under the law to receive the federal minimum wage from an outside employer” based on certain “economic realities.” *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 14 (2d Cir. 1984), *holding modified by Danneskjold v. Hausrath*, 82 F.3d 37 (2d Cir. 1996) (excluding as employment any services provided to the prison directly... not applicable here), and *holding modified by Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61 (2d Cir. 2003) (unrelated to inmates, modifying the “economic realities”

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entitled to the minimum wage. *See generally Watson v. Graves*, 909 F.2d 1549 (5th Cir.1990); *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8 (2d Cir.1984).



factors). This case illustrates that a minimum wage standard certainly can apply to an inmate employee in the right circumstances, and that is sufficient analysis here. Arguments based on the “economic realities” to determine if Mr. White was an employee of the NDOC versus an employee of the DOF (the “outside employer”) are irrelevant, inasmuch as the NDOC and DOF are functionally linked and united by the language of NRS 209.457 through NRS 209.481 for EMPLOYMENT OF OFFENDERS, and both are also “employers” under the Amendment’s controlling definition.

**e. NRS 209.461(8) does not statutorily preclude an inmate from receiving the minimum wage (or greater), and, even if it did, it would still be subject to constitutional override.**

NRS 209.461(8) states that “[t]he provisions of this chapter do not create a right on behalf of the offender to employment or to receive the federal or state minimum wage for any employment and do not establish a basis for any cause of action against the state or its officers or employees for employment of an offender or for payment of the federal or state minimum wage to an offender.” It was asserted in oral argument that this provision may actively exclude an inmate from receiving a minimum wage or having a standing to bring suit. The language of this section poses no such bar, stating only that the indicated chapter does not create the rights in question, but, certainly another statute, chapter, or (as here) the



Constitution could so do. In any case, even if a statutory bar had been imposed, it would still be subject to Constitutional primacy as discussed in Paragraph a.

**f. The definition of wages under NAC 616B.964 prevents compliance with the Amendment, and it should, therefore, be held to be unconstitutional.**

NAC 616B.964 is particular in its definition of “wages” for purposes of calculating the workers compensation AMW, excluding everything but the actual money paid to the inmate. The actual money paid is not even close to the minimum wage, and this is the crux of the evident conflict with the Amendment, though it does not necessarily or obviously follow that this makes the provision unconstitutional.

If it's properly established that the Amendment applies here to the DOF and the NDOC, the exclusion under NAC 616B.964 can allow for two outcomes, one of which is likely much more palatable to the Court and to the State as a whole. The less palatable option is that NAC 616B.964 is not unconstitutional, that the Amendment still requires a payment not less than the minimum wage, and the only way to reconcile the two conflicting points is to require an actual money wage to inmates not less than the minimum wage. Clearly, the impact of this result is far reaching, affecting the State budget, cash flow, cost of firefighting services, the profitability of



the Prison Industry Programs, and many other matters not even envisioned. This outcome is fraught with problems, not the least of which being that it may reach beyond the scope of the matter presently before the Court.

This case is before the Court specifically due to the calculation of AMW for Mr. White, and that calculation was limited by NAC 616B.964, leading to an unconstitutional result. As this is the specific matter before the Court, addressing it solely in this context and declaring NAC 616B.964 unconstitutional, limits the consequence of the correction and yields the more palatable result.

If the proscription on incorporating the value of room, board, medical services, good time earned, and other goods and services is stricken, the effective wage paid should at least approach or possibly exceed the minimum wage. The only impact for the State, the NDOC, and other affected parties will be what Mr. White has sought from the onset: a calculation of AMW, applicable only to individuals who are injured while incarcerated and subsequently released from custody, that incorporates all the above considerations to effect a wage substitute that at least satisfies the mandate of the Nevada Constitution, that is reasonable and fair, and offers a freed man, unable to work, some chance of economic survival.



## V. CONCLUSION.

For the reasons set forth above, Mr. White requests that the Court find NAC 616B.964 inconsistent with Nevada Constitution Article 15, Section 16, Nevada's minimum wage Amendment, and, therefore, unconstitutional.

Upon such finding, Mr. White further requests that the Court remand the matter to the District Court or the Appeals Office for recalculation of AMW for the 144-day period following Mr. White's incarceration, for both his TTD and PPD payments. The AMW calculation, no longer being limited by the stricken NAC 616B.964 or other provision of the Modified Program for Offenders in Prison Industry Programs should be based on the full scope of allowable wages under NAC 616C.420 and NAC 616C.423<sup>13</sup> as of the day of injury and should further ensure compliance with NAC 616C.435(7)<sup>14</sup> and the minimum wage Amendment; to wit, the AMW calculation should properly include the full "value of room and board, medical care and other goods and services provided by the Department of

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<sup>13</sup> NRS 616B.028 states that an "offender is not entitled to any rights and remedies established by the provisions of chapters 616A to 617, inclusive, of NRS," so it is not asserted here that the related NAC 616C is controlling, only that it is a proper guide for calculation of the meaning of "wage" absent the stricken NAC 616B.964 or other controlling provision, and it would allow for full value of room and board, etc.

<sup>14</sup> To achieve a fair and reasonable result.




Corrections” as well as the “value of good time earned towards reducing the prison sentence,” and, in no case, be based upon an amount less than the applicable minimum wage.<sup>15</sup>

Further, Mr. White requests that he be awarded his reasonable attorney’s fees and costs associated with the entirety of this action, pursuant to Nevada Constitution Article 15, Section 16, Subparagraph B, along with any punitive damages and such other and further relief as the Court deems just and equitable.

DATED this 1<sup>st</sup> day of November 2019.

Respectfully submitted,

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<sup>15</sup> NRS 616B.222 may cap this calculation, stating that, “[t]o determine the total amount paid to employees for services performed, the maximum amount paid to any one employee during a policy year shall be deemed to be \$36,000.” There is no applicable, lesser “deemed wage” provided for in the statute.



## **CERTIFICATE OF COMPLIANCE**

1. 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 in 14 font size Georgia type face.

2. I further certify that this brief complies with the page- or type-volume limitations in NRAP 32(a)(7) because, exclusive of those sections excluded under NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points, and contains approximately 3,161 words within 14 pages.

3. Finally, I hereby certify that I have read this appellate brief, 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 that every assertion in the brief regarding matters in the record be supported by reference to the page and volume number, if any, of the Appendix.



4. 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.

DATED this 1<sup>st</sup> day of November 2019.

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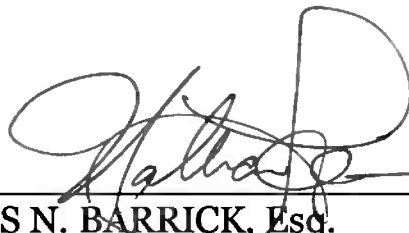
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## CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing **PETITIONER'S SUPPLEMENTAL BRIEF** was made on the 1<sup>st</sup> day of November 2019, by depositing a copy of the same with the U.S. Postal Service, first-class mail, postage prepaid, to the following Respondents' counsel:

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