IN THE SUPREME COURT OF THE STATE OF NEVADA

HG STAFFING, LLC, and MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT,

Petitioner-Defendants,

vs.

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the COUNTY OF WASHOE, and the HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE

Respondents

and

EDDY MARTEL (also known as MARTEL-RODRIGUEZ), MARY ANNE CAPILLA, JANICE JACKSON-WILLIAMS and WHITNEY VAUGHAN, on behalf of themselves and all others similarly situated,

Real Parties in Interest-Plaintiffs

Docket Number: 79118

District Court Case No.: CV16-01264

REAL PARTIES IN INTEREST-PLAINTIFFS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the Real Parties in Interest-Plaintiffs Eddy Martel (also known as Martel-Rodriguez), Mary Anne Capilla, Janice Jackson-Williams and Whitney Vaughan are natural persons, who have no stock or ownership interest in any entity involved in these proceedings, and do 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: August 30, 2019

THIERMAN BUCK LLP

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I. INTRODUCTION

In a serious case of *déjà vu,* Petitioner, the Defendant-employer makes the same losing argument that the defendant-employer, real party in interest, Terrible Herbst made in the seminal case of *Neville v. Eighth Judicial District Court of the State of Nevada, In and For the County of Clark,* 406 P.3d 499 (Dec. 7, 2017). In *Neville,* as well as here, the defendant-employer argued that employees must first exhaust administrative remedies through the Office of the Labor Commissioner before filing a civil action for violations of Nevada Revised Statutes ("NRS") 608.016, 608.018, and 608.020-.050. This Court rejected the defendant-employer's argument based in part on the language of NRS 607.170(1) which states, "[t]he Labor Commissioner **may** prosecute a claim for wages and commissions or commence any other action to collect wages, commissions and other demands of any person who **is financially unable to employ counsel** in a case in which, in the judgment of the Labor Commissioner, the claim for wages or commissions or other action is valid and enforceable in the courts." *See* NRS 607.170 (emphasis added). The Petitioner is simply wrong in its assertion that the *Neville* analysis did not address the exhaustion argument. In fact, the exhaustion argument was thoroughly discussed. Justice Hardesty scrutinized the language in NRS 607.170, dubiously questioning the exhaustion argument, and noting that the employer's reading of the statute would leave employees who could afford counsel no recourse for alleged

wage theft.[1] *Id.* Justice Hardesty aptly described such a reading as rendering the language in NRS 607 "surplusage."[2] Indeed, the Petitioner-Defendant ("Petitioner" or "Defendant-employer") here would have this Court hold that only employees who are financially unable to employ counsel have the right to seek redress for wage violations—a position that is legally indefensible and would effectively leave tens

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[1] *See* Real Parties In Interest-Plaintiffs' Appendix at 1-27, transcript from the oral argument in *Neville v. Eighth Judicial District Court of the State of Nevada, In and For the County of Clark,* 406 P.3d 499 (Dec. 7, 2017) at p. 22:15-16. The exchange between Justice Hardesty and the defendant-employer's counsel specific to the exhaustion requirement with the Labor Commissioner's office takes up five and a half pages of a 28-page transcript. *See* pp. 17:17-25 through p. 22:25. Specifically, Justice Hardesty questioned the distinction in 607 for indigent and financially able claimants:

> "So under 607, if I understand your view of today's labor schemes, under 607 the Labor Commissioner can prosecute a claim for the kinds of claims that are being made by the Plaintiff in this case for somebody who is financially unable to do so; but they can't do that for somebody who isn't financially able to do so because the statue limits the Labor Commissioner for those people to prosecute a claim for unpaid wages only. *See* p. 20:8-15
> …
> "What is the purpose of the distinctions being made in 607 that says only financially unable people? After investigation the Labor Commissioner is going to pursue these claims. What about the other guys and ladies?" *See* p. 21:20-24.

[2] *See id.* at p. 22:15-16, stating, "So it's just s surplusage these statutes are on the books and have no effect?"

of thousands of Nevada workers at risk of wage theft from employers who violate Nevada wage and hour laws.

Nowhere in Petitioner's brief does the Defendant-employer acknowledge the fact that the Labor Commissioner cedes jurisdiction if private legal action has already begun and that jurisdiction has always been discretionary and concurrent. Since the *Neville* decision the Labor Commissioner's Web site has been updated to clearly reject jurisdiction stating, "The Office of the Labor Commissioner **does not have jurisdiction if … you have already begun private legal action to recover the wages claimed."**[3] This statement reflects the historical position of the Labor Commissioner's office[4] and the holding in *Neville*, and thus, this Court's inquiry can end here.

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[3] *See* Real Parties in Interest-Plaintiffs' Appendix at 28-29, printout of main page of the Office of the Labor Commissioner's Website: http://labor.nv.gov/About/Forms/FORMS_FOR_EMPLOYEES/ (last visited August 13, 2019) (*THE OFFICE OF THE LABOR COMMISSIONER DOES NOT HAVE JURISDICTION IF: You have already begun private legal action to recover the wages claimed … .*)

[4] *See* Real Parties in Interest Plaintiffs' Appendix at 30-34, printout of pre-2017 claim form utilized by the Office of Labor Commissioner, advising individuals who can afford private counsel to employ an attorney to represent them and to pursue their claim in court. *See also,* Real Parties in Interest-Plaintiffs' Appendix at 35-37 Declaration of Michael Tanchek ("Tanchek Dec.") at ¶¶ 2-3 ("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.")

However, should the Court find any merit to Petitioner's arguments, they can each be rejected for the following reasons. In addition to the unmistakable fact that the Labor Commissioner refuses to take wage cases unless the employee is indigent (and may refuse to do so even then), the Defendant-employer is also incorrect because: (i) a plain reading of the NAC, NRS, and historical practice of the Labor Commissioner's office supports discretionary and concurrent jurisdiction, (ii) requiring employees to first exhaust administrative remedies with the Labor Commissioner would result in untenable claim splitting further burdening a state agency with increased costs to Nevada taxpayers; and (iii) limiting the ability to redress wage violations to only indigent employees would contravene the robust public policy set forth by Nevada's wage and hour statutory provisions aimed at protecting the health and welfare of Nevada employees by providing concrete safeguards concerning hours of work, working conditions, and employee compensation. *See* NRS 608.005.

II. SUMMARY OF REAL PARTIES IN INTEREST-PLAINTIFFS' ARGUMENTS

The Defendant-employer's argument that employee-plaintiffs in Nevada must first exhaust administrative remedies through the office of the Labor Commissioner fails for four reasons.

First, the Labor Commissioner cedes jurisdiction if private legal action has already begun. Since the *Neville* decision the Labor Commissioner's Web site has

been updated to clearly reject jurisdiction stating, "The Office of the Labor Commissioner **does not have jurisdiction if … you have already begun private legal action to recover the wages claimed."**[5] This position is consistent with the historical practice of the Labor Commissioner's Office[6] and is also consistent with this Court's decision in *Neville.*

Second, although Petitioner is correct that "original jurisdiction" does not amount to "exclusive jurisdiction,"[7] the Labor Commissioner's jurisdiction is actually discretionary and concurrent as opposed to original. The Labor Commissioner's discretionary authority originates from both the Nevada Administrative Code ("NAC") and the Nevada Revised Statue ("NRS"). Specifically, NAC section 607.060(1) clearly provides discretionary authority to the Labor Commissioner stating, "[t]he Commissioner **may** inquire into and investigate possible violations of law in all matters relating to his duties." *See* NAC 607.060(1)

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[5] *See e.g.* footnotes 3 and 4 at page 3, above, comparing the current Web site language with the pre-*Neville* language on the claim forms.

[6] *See* Real Parties in Interest-Plaintiffs' Appendix at 35-37, Tanchek Dec., at ¶¶ 2-3 ("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.")

[7] "Original jurisdiction" is defined as: A court's power to hear and decide a matter before any other court can review the matter. *Black's Law Dictionary,* 869 (8th ed. 2004). *Compare* to "Exclusive jurisdiction" defined as: A court's power to adjudicate an action or class of actions **to the exclusion** of all other courts." *Id.* (emphasis added).

(emphasis added). And, NAC 607.075(2) states, "[i]f the Commissioner, after reviewing the claim and conducting such further investigation as he deems necessary, determines that the complaint has the ability to employ counsel or that the information submitted with the claim is insufficient to substantiate a claim, the Commissioner **may decline to take jurisdiction of the claim** …" *See* NAC 607.075(2) (emphasis added). Further, NAC 607.095 states, "[i]f 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).

Nevada Revised Statute 607.170(1) states, "[t]he Labor Commissioner **may** prosecute a claim for wages and commissions or commence any other action to collect wages, commissions and other demands of any person who **is financially unable to employ counsel** in a case in which, in the judgment of the Labor Commissioner, the claim for wages or commissions or other action is valid and enforceable in the courts." *See* NRS 607.170(1) (emphasis added). Indeed, this discretionary authority is carried throughout the language of both the NRS and the NAC sections relating to wage and hour violations and provides for the statutory displacement of any original jurisdiction.

Third, Petitioner's position would lead to untenable claim splitting. Petitioner does not seek to argue that the Real Parties in Interest-Plaintiffs' ("Plaintiffs" or "Plaintiff-employees") must first exhaust their minimum wage claim under the Nevada Constitutional Minimum Wage Act ("MWA") provision because such an argument would fly in the face of the MWA's express mandate. *See* Nev. Const. Art. 15 Sec. 16 ("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.")[8] But therein lies the problem. Just like the employer-defendant argued in *Neville*, Petitioner seeks to force Nevada employees to first exhaust their overtime wage claims with the Labor Commissioner yet concedes that the minimum wage claim that arises out of the same facts and circumstances can be pursued directly in court. Requiring an employee to first seek

[8] Real Parties in Interest–the Plaintiff employees' original complaint was filed in the Second Judicial District Court of the State of Nevada in and for the County of Washoe alleging four causes of action: (1) failure to compensate for all hours worked in violation of NRS 608.140 and NRS 608.016; (2) failure to pay minimum wages in violation of the Nevada Constitution; (3) failure to pay overtime in violation of NRS 608.140 and NRS 608.018; and (4) failure to timely pay all wages due and owing in violation of NRS 608.140 and NRS 608-020.-.050. *See* Real Parties in Interest-Plaintiffs' Appendix at 38-146, Complaint. The First Amended Complaint ("FAC") and operative complaint alleges the same causes of action. *See* Petitioner's Appendix at APP 1-155.

redress from the Labor Commissioner on "non-minimum wage claims" as a prerequisite to seeking those wages in court would lead to the absurd result of numerous duplicative actions (one minimum wage action in court and one non-minimum wage action with the labor commissioner) concerning the same operative facts, resulting in the strong likelihood of inconsistent and conflicting results. Moreover, such a decision would further burden a state agency with an increased cost to Nevada taxpayers.

And fourth, by accepting the Defendant-employer's position, this Court would be limiting the ability to redress unpaid minimum-wage violations to only indigent employees; such a holding would contravene the strong public policy of protecting all Nevada workers as set forth by Nevada's wage and hour statutory provisions. The purpose of NRS Chapter 608 is to protect the health and welfare of workers employed in private enterprise and provide concrete safeguards concerning hours of work, working conditions, and employee compensation. *See* NRS 608.005 ("The Legislature hereby finds and declares that the health and welfare of workers and the employment of persons in private enterprise in this State are of concern to the State and that the health and welfare of persons required to earn their livings by their own endeavors require certain safeguards as to hours of service, working conditions and compensation therefor.") The interpretation of the NAC and NRS Chapters 607 and 608 (and determining whether administrative exhaustion is a prerequisite to filing a

lawsuit for unpaid wages) must always be considered in light of the Legislature's statement of purpose—i.e., to protect the health and welfare of Nevada employees concerning "hours of work" and "employee compensation."

III. FACTS NECESSARY TO UNDERSTAND ISSUE PRESENTED

Real Party in Interest–Plaintiffs Martel, Capilla, Jackson-Williams, and Vaughan on behalf of themselves and all others similarly situated ("Plaintiffs") filed their original complaint in the Second Judicial District Court of the State of Nevada in and for the County of Washoe on June 14, 2016 alleging four causes of action.[9] A jury demand was made and lien pursuant to NRS 608.050 was requested. The District Court improperly dismissed Plaintiffs' original Complaint for failure to state a claim and also failed to grant Plaintiffs leave to amend. Plaintiffs filed a motion to reconsider requesting leave to amend and after full briefing the District Court granted leave to amend. *See* Petitioner's Appendix at APP 781-794. The First Amended Complaint ("FAC") and operative complaint alleges the same four causes of action: (1) failure to compensate for all hours worked in violation of NRS 608.140 and NRS 608.016; (2) failure to pay minimum wages in violation of the Nevada Constitution; (3) failure to pay overtime in violation of NRS 608.140 and NRS 608.018; and (4) failure to timely pay all wages due and owing in violation of NRS

[9] Plaintiffs made their requisite NRS 608.140 demand for wages on June 6, 2016, nine days prior to filing suit. *See* Petitioner's Appendix at APP 632-636, Plaintiffs' NRS 608.140 demand letter.

608.140 and NRS 608-020.-.050. *See* Petitioner's Appendix at APP 1-155. The Defendant-employer filed a motion to dismiss the FAC and after full briefing the District Court barred the claims of named-Plaintiffs Capilla and Vaughan on statute of limitations grounds but allowed the claims of named-Plaintiffs Martel and Williams to survive. See Petitioner's Appendix at APP 781-794.

The District Court properly denied the Defendant-employer's motion to dismiss the Plaintiffs' NRS 608.140, 608.016, 608.018, and 608.020-.050 claims on various grounds, including that employees are not required to exhaust administrative remedies prior to initiating a civil action.[10] The District Court cited to this Court's decision in *Neville* and held that "the Labor Commissioner does not have exclusive jurisdiction over statutory claims [and] [t]herefore, Plaintiffs [are] not required to exhaust administrative remedies." *See* Petitioner's Appendix at APP 778-795. The Petitioner here actually agrees with the District Court's holding conceding the fact that "original jurisdiction" does not amount to "exclusive jurisdiction." *See* GSR Writ at pp 15-15).

The factual basis for Plaintiffs' NRS 608.140, 608.016, 608.018, and 608.020-.050 claims is that the Defendant-employer maintained a policy, practice and

[10] *See* Petitioner's Appendix at APP 781-794. The District Court also held that issue and claim preclusion did not apply, at the present stage of the litigation Mr. Martel and Ms. Jackson-Williams had standing to represent union employees, and that Plaintiffs' FAC had provided sufficient factual allegations to put the Defendant-employer on notice of the nature and basis of the claims and relief requested.

procedure of requiring employees to perform work activities without proper compensation, either through improperly rounding hours, requiring employees to complete work tasks without being clocked in to the timekeeping system, and failing to pay the correct overtime premium pay rate. *See* Petitioner's Appendix at APP 1-155 (FAC). The Defendant-employer accomplished these unlawful compensation policies by requiring employees to complete job tasks off the clock, before and/or after their regularly scheduled shifts (*id.*), improperly rounding hours actually worked (*id.*), failing to pay employees the correct rate of pay for hours worked over eight in a workday and/or for hours worked over forty in a workweek (*id.*), and requiring employees to work shifts with less than 16 hours between the end of one shift and the beginning of the next shift ("jammed shift") without being paid the applicable overtime premium pay rate. *See id.* Each of these factual allegations resulted in the Defendant-employers' policy of systematically depriving employees of compensation for work they performed on behalf of and at the request of the employer in violation of Nevada law. *Id.*

IV. ARGUMENT

A. The Labor Commissioner Rejects Jurisdiction If Private Legal Action Has Already Begun

The Labor Commissioner clearly rejects original jurisdiction affirming, "The Office of the Labor Commissioner **does not have jurisdiction if … you have**

already begun private legal action to recover the wages claimed."[11] This position is consistent with the historical practice of the Labor Commissioner's Office and reflects this Court's decision in *Neville.*

1. The Historical Practice Of The Labor Commissioner Supports Discretionary And Concurrent Jurisdiction.

The Labor Commissioner's actual practice is consistent with the discretionary authority to take—or reject/deny—jurisdiction and is consistent with the historical position of the Labor Commissioner's Office:

> [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.***

[11] *See* Real Parties in Interest-Plaintiffs' Appendix at 28-29, printout of main page of the Office of the Labor Commissioner's Website: http://labor.nv.gov/About/Forms/FORMS_FOR_EMPLOYEES/ (last visited August 13, 2019) (*THE OFFICE OF THE LABOR COMMISSIONER DOES NOT HAVE JURISDICTION IF: You have already begun private legal action to recover the wages claimed …* .)

See Real Parties in Interest-Plaintiffs' Appendix at 35-37, Tanchek Dec. at ¶¶ 2-3.

Although Petitioner is correct that "original jurisdiction" does not amount to "exclusive jurisdiction," (*see* GSR Writ at pp 15-15) the Labor Commissioner's jurisdiction is actually discretionary and concurrent as opposed to original. *Blacks' Law Dictionary* defines "original jurisdiction" as the "power to hear and decide a matter before any other court can review the matter." *See Black's Law Dictionary,* 869 (8th ed. 2004). *Black's* defines "exclusive jurisdiction" as the "power to adjudicate an action or class of actions to the exclusion of all other courts." *Id.* Although the Labor Commissioner's office has the "power to hear and decide a matter" the Labor Commissioner's Office clearly has discretion on whether to exercise that power because the Labor Commissioner cedes that power by rejecting jurisdiction for any employee who has commenced legal action—which the employee-Plaintiffs have done here.

And, even if the complainant is financially unable to employ counsel, the Labor Commissioner can still refuse to take wage claims, clearly illustrating concurrent jurisdiction, otherwise, employees in Nevada would be left with no recourse for their employers' wage violations.[12] *See* NRS 607.170(1) ("The Labor

[12] Likewise, wage claimants are at the mercy of the Labor Commissioner's decision making as to whether to accept a settlement amount or not, and whether to access penalties under NRS 608.020-.050, which is problematic in the respect that it

Commissioner **may** prosecute a claim for wages and commissions or commence any other action to collect wages … of a person who is financially unable to employ counsel …"). "Concurrent jurisdiction" is defined as: "[j]urisdiction that might be exercised simultaneously by more than one court over the same subject matter and within the same territory, a litigant having the right to choose the court in which to file the action." *See Black's* at 868. Because the Labor Commissioner is not required to take cases, even from indigent employees, and because the Labor Commissioner's office advises claimants to employ an attorney to represent them for unpaid wage claims, concurrent jurisdiction must exist, otherwise indigent as well as financially able employees would have no legal recourse for wage theft.

Accordingly, the Commissioner's statutory commands and declaratory statements illustrate the discretionary aspect of the Office of the Labor Commissioner by affirming the Office "does not usually prosecute wage claims on behalf of individuals … who have the financial ability to employ an attorney." Likewise, the Labor Commissioner's statutory commands and declaratory statements illustrate concurrent jurisdiction by asserting, "we advise such individuals to … pursue their claims in court." *Id.*

2. This Court's Analysis And Holding In *Neville v. Eighth Judicial District Court* Is Consistent With The Labor Commissioner's Discretionary And Concurrent Jurisdiction.

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flies in the face of the ethical responsibility of an attorney to respect the client's desires with regard to settlement of the action.

The Labor Commissioner's position of refusing to take cases for employees who can afford to hire their own counsel has not changed, and in fact, has become even more clear since this Court's decision in *Neville* through updated/revised language on the Labor Commissioner's Web site. Previous to the *Neville* decision (entered on Dec. 7, 2017) the forms section of the Web site did not include the bullet point language, on the main page, specifying that the "Office of the Labor Commissioner **does not have jurisdiction if … you have already begun private legal action to recover the wages claimed.**"[13] Prior to *Neville,* this language was present in a similar form (albeit on the claim form itself) but stating, "You may be solicited by outside legal counsel concerning representation in this and related matters concerning your claim for wages. If you elect to retain [legal] counsel, the office of the Labor Commissioner **may** elect to close your wage claim/" *Id.* Since *Neville,* the Labor Commissioner has clarified the position that any employee who is able to employ counsel to initiate his/her own lawsuit, unequivocally may no longer seek assistance from the Office of the Labor Commissioner.

The Petitioner is simply wrong in its assertion that the *Neville* analysis did not address the exhaustion argument. This Court noted that the dismissal of the *Neville*

[13] *See e.g.* footnotes 3 and 4 at page 3, above, comparing the current Web site language with the pre-*Neville* language on the claim forms.

NRS 608.016, 608.018, and 608.020-.050 claims by the district court judge below was focused on "a jurisdictional issue, that all of these disputes were to go to the Labor Commissioner"[14] and that the language of NRS 607.160(7) clearly restricts investigation of claims by the Labor Commissioner for those who are financially unable to afford counsel.[15]

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[14] *See* Real Parties in Interest-Plaintiffs' Appendix at 1-27, Transcript of *Neville v. Eighth Judicial* at p. 10:7-10 stating, "But the focus was on the fact that it was a jurisdictional issue, that all of these disputes were to go to the Labor Commissioner …."

[15] *Id.* at p. 22:15-16. The exchange between Justice Hardesty and the defendant employer's counsel specific to the exhaustion requirement with the Labor Commissioner's office takes up five and a half pages of a 28-page transcript. *See* pp. 17:17-25 through p. 22:25. Specifically, Justice Hardesty questioned the distinction in 607 for indigent and financially able claimants:

> "So under 607, if I understand your view of today's labor schemes, under 607 the Labor Commissioner can prosecute a claim for the kinds of claims that are being made by the Plaintiff in this case for somebody who is financially unable to do so; but they can't do that for somebody who isn't financially able to do so because the statue limits the Labor Commissioner for those people to prosecute a claim for unpaid wages only. *See* p. 20:8-15
> …
> "What is the purpose of the distinctions being made in 607 that says only financially unable people? After investigation the Labor Commissioner is going to pursue these claims. What about the other guys and ladies?" *See* p. 21:20-24.

Furthermore, the *Neville* decision was readily available during the Nevada Legislature's most recent session[16] but the Legislature left undisturbed the sections addressing the Labor Commissioner's duties under the NAC as well as the ability for attorneys to seek fees under NRS 608.140.[17] In *Neville* this Court opined that in

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[16] *See* https://www.leg.state.nv.us/Session/80th2019/ (last visited August 13, 2019) (The 80th (2019) Session of the Nevada Legislature began on February 4, 2019 at 11:28 AM , and adjourned *sine die* on June 4, 2019 , at 12:15 a.m.

[17] During the 2019 Legislative Session the Legislature did make changes to Nevada wage and hour laws that have direct bearing on the Legislature desire to leave the holding in *Neville* undisturbed. Particularly, the Legislature passed SB 493 amending NRS 607, which creates a task force to address misclassification of independent contractors. (SB 493.) It also provides the Office of the Labor Commissioner with the power to impose civil penalties for misclassification. *Id.* Notably, in amending NRS 607, AB 456 removes the Labor Commissioner from the process of deciding increases to the minimum wage. (AB 456.) These two bills are of particular significance because, had the Legislature wished to clarify the Labor Commissioner's jurisdiction or duties related to any purported exhaustion requirement they could have clearly done so.

In addition, the Legislature passed SB 192 which specifies the minimum level of health benefits an employer must provide to be eligible for the lower tiered minimum wage rate. (SB 192.) The Legislature also proposed a constitutional amendment to eventually remove the two-tier minimum wage system. (AJR 10).

And, the Legislature passed bills requiring paid leave for private employers with at least 50 employees (SB 312); restricting confidentiality agreements in certain settlement agreements (SB 248); made change to the Nevada Equal Rights Commission procedures and remedies in cases involving unlawful employment practices relating to discrimination based on sex, including the ability to access penalties for employers with at least 50 employees (SB 166, SB 177); passed a bill that prohibits an employer from requiring an employee to be physically present in order to call in sick (AB 181); and passed a bill limiting employers from taking adverse hiring actions for certain employees based on a positive marijuana test (SB 132).

Each of the above bills have been signed into law by the Governor.

adopting NRS 608.140 the Legislature demonstrated its "intent to create a private cause of action for unpaid wages." In particular, NRS 608.140 allows for an assessment of attorneys' fees in a private cause of action for recovery of unpaid wages." *Neville,* 406 P.3d at 503. This Court's analysis in *Neville* relied on Legislative intent, citing to *Birsch v. Las Vegas Metro Police Dep't* for the proposition that "[i]n order to give effect to the Legislative intent, [this court] ha[s] a duty to consider the statute[s] within the broader statutory scheme bearing harmoniously with one another in accordance with the general purposes of the statutes." *Neville,* 406 P.3d at 504, *citing Birsch v. Las Vegas Metro Police Dep't,* 129 Nev. 328, 336, 302 P.3d 1108, 1114 (2013) (internal quotation marks omitted). Moreover, by enacting NRS 608.140[18], the Legislature provided a trade-off—notice with opportunity to cure for the benefit of the employer in exchange for attorney's fees should a lawsuit need to be filed for the benefit of the employee. In doing so, the Legislature confirmed the Labor Commissioner's Office is not the exclusive

[18] The full text of NRS 608.140 states, "Whenever a mechanic, artisan, miner, laborer, servant or employee shall have cause to bring suit for wages earned and due according to the terms of his or her employment, and shall establish by decision of the court or verdict of the jury that the amount for which he or she has brought suit is justly due, and that a demand has been made, in writing, at least 5 days before suit was brought, for a sum not to exceed the amount so found due, the court before which the case shall be tried shall allow to the plaintiff a reasonable attorney fee, in addition to the amount found due for wages and penalties, to be taxed as costs of suit."

enforcement mechanism for wage violations and it would be illogical for an employee to send a demand prior to filing suit if he/she also had to exhaust administrative remedies before initiating private legal action. This double requirement on employees would frustrate the remedial purpose of the Nevada statutory scheme and would conflict with the Labor Commissioner's duty to facilitate resolution of employee wage claims, not to frustrate them.[19]

As this Court noted in *Neville*, "[i]t would be absurd to think that the Legislature intended a private cause of action to obtain attorney fees for an unpaid wages suit but no private cause of action to bring the suit itself" (*id.*); it would be just as absurd to think that the Legislature intended to limit the ability of claimant-employees to seek redress for wage violations based on their financial ability to initiate their own lawsuits. Indeed, the Legislature's refusal to act post-*Neville* indicates that it agrees with this Court's decision that employees need not resort to the Labor Commissioner to seek unpaid wages. *See City of Las Vegas Downtown*

[19] Moreover, the Labor Commissioner does not accept class action wage claims. *See* Petitioner's Appendix at APP 250, ¶ 4. ("My office does not accept class action wage claims against employers because there is no one from whom to take assignment of the debt."). This Court has agreed with the Labor Commissioner's practice of refusing to entertain class claims. *See Wynn Las Vegas, L.L.C. v. Baldonado*, 129 Nev. Adv. Op. 78, 311 P.3d 1179, 1182 (2013) ("The Labor Commissioner's conclusion that NAC 607.200 does not permit class actions was within the regulation's language; thus, the district court should have deferred to the Labor Commissioner's interpretation."). Thus, systematic wage violations cannot be effectively resolved before the Labor Commissioner.

Redevelopment Agency v. Crockett, 117 Nev. 816, 825 n. 15 (Nev. 2001); *Northern Nev. Ass'n Injured Workers v. SIIS,* 107 Nev. 108, 112 (1991) (stating that legislative amendment of other parts of a law may indicate approval of interpretations pertaining to the unchanged and unaffected parts of the law); 2B Norman J. Singer, *Statutes and Statutory Construction* note 14, § 49:10, at 112 (6th ed. 2000) ("Legislative inaction following a contemporaneous and practical interpretation is evidence that the legislature intends to adopt such an interpretation.").

Accordingly, the Labor Commissioner's rejection of jurisdiction and the plain Legislative intent support the Plaintiff-employees' position that exhaustion of administrative remedies is not a prerequisite to initiating legal action for statutory wage and hour claims in Nevada.

B. Both The Nevada Administrative Code And Nevada Revised Statutes Provide The Labor Commissioner With Discretionary And Concurrent Jurisdiction

The Labor Commissioner's jurisdiction has always been and remains discretionary and concurrent. *See* NRS 607.160(6) ("the actions and remedies authorized by the labor laws are cumulative.") *Black's Law* defines "discretionary" as "[o]f an act or duty involving an exercise of judgment and choice, not an implementation of a hard-and-fast-rule." *See Black's* at 499. "Discretionary duty" is defined as "a duty that allows a person to exercise judgment and choose to perform or nor perform." *Id.* at 544. And, "discretionary power" is defined as "[a] power

that a person may choose to exercise or not, based on that person's judgment." *Id.* at 1207. The Labor Commissioner is exercising that discretion by rejecting jurisdiction for people who have already begun private legal action to recover the wages claimed. *See* NAC 607.170(1). And, if the complainant is financially **unable** to employ counsel, the Labor Commissioner can still refuse to take wage claims. *Id*. Additionally, because the Labor Commissioner or any competent court may hear Nevada wage claims, the Labor Commissioner's jurisdiction must be concurrent and not original. "Concurrent jurisdiction" is defined as: "[j]urisdiction that might be exercised simultaneously by more than one court over the same subject matter and within the same territory, a litigant having the right to choose the court in which to file the action." *See Black's* at 868. Both the NAC and the NRS support discretionary and concurrent jurisdiction as opposed to Petitioner's assertion of original jurisdiction.

The first actual code section after the definitions in the NAC is section 607.060, which states, "[t]he Commissioner **may** inquire into and investigate possible violations of law in all matters relating to his duties." *See* NAC 607.060 (emphasis added). This section precedes all other sections of the NAC and plainly provides for a discretionary duty on the part of the Labor Commissioner. Likewise, NRS 607.170(1) states, "[t]he Labor Commissioner **may** prosecute a claim for wages and commissions or commence any other action to collect wages,

commissions and other demands of any person **who is financially unable to employ counsel** in a case in which, in the judgment of the Labor Commissioner, the claim for wages or commissions or other action is valid and enforceable in the courts." *See* NRS 607.170(1). Indeed, the Labor Commissioner may reject jurisdiction and even refuse to bring any action whatsoever. *See e.g.*, NRS 607.160(2) and NRS 607.160(6).[20]

Nevada Revised Statute 607.160(7) also plainly gives the Labor Commissioner discretionary duty stating, "[i]f, after due inquiry, the Labor Commissioner believes that a person who is financially **unable** to employ counsel has a valid and enforceable claim for wages, commissions or other demands, the Labor Commissioner **may** present the facts to the Attorney General.

This Court has already held that employees who tie their claims for unpaid wages and penalties under NRS 608.016, 608.018, and 608.020-.050 to NRS 608.140 have a private right of action to sue their employers in Nevada courts. *See Neville,* 406 P.3d at 504 ("[t]he Labor Commissioner's NRS Chapter 607 authority to pursue wage and commission claims on behalf of those people who cannot afford

[20] *See also,* NRS 607.160(2): If the Labor Commissioner has reason to believe that a person is violating or has a violated a labor law or regulation, the Labor Commissioner **may** take any appropriate action against the person to enforce the labor law or regulation whether or not a claim or complaint has been made to the Labor Commissioner concerning the violation; NRS 607.160(6): …If a person violates a labor law or regulation the Labor Commissioner **may** seek a civil remedy, impose an administrative penalty or take other administrative action.

counsel is also consistent with [the conclusion that there is authority under NRS 608.140 to bring private actions for wages unpaid and due]." *Id.* (parentheticals in original) *citing, Baldonado v. Wynn Las Vegas, LLC,* 124 Nev. 951, 964 n. 33, 194 P.3d 96, 104 n. 33 (2007); NRS 607.160(7); NRS 607.170(1). The Plaintiff-employees here have tied each of their claims to NRS 608.140, have hired private counsel, and have initiated their own legal action. Thus, the Labor Commissioner would not take jurisdiction of the Plaintiff-employees' claims and the Labor Commissioner's Office is well within its discretionary duty to refuse to do so.

Petitioner's argument, at its core, is that the Labor Commissioner is required to review all wage claims no matter the circumstance, effectively arguing that the auxiliary verb "may" denotes an obligation as opposed to option. While it is true that the word "may" can denote a requirement, *à la* "shall" in statutes, the word "may" must be read in context to determine if it means an act is optional or mandatory." *See The People's Law Dictionary,* Gerald N. Hill and Kathleen T. Hill, 266 (2002). This Court in *City Plan Development Inc., v. Office of the Labor Commissioner,* followed the same reasoning, noting that the provisions of NRS 607.160 and 607.170 uses of "the word 'may,' not 'shall,' do not set forth mandatory prehearing procedures that the Labor Commissioner was required to follow in this matter but rather delineate the general prosecutorial authority of the Labor Commissioner … ." *See City Plan Development , Inc. v. Office of the Labor Com'r,*

121 Nev. 418, 426-27 (2005) *citing Tarango v. SIIS,* 117 Nev. 444, 451 n. 20, 25 P.3d 175, 186 n. 20 (2001) ("[I]n statutes, "may" is permissive and "shall" is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature.") (*quoting S.N.E.A. v. Daines,* 108 Nev. 15, 19, 824 P.2d 276, 278 (1992)).[21] The analysis must be the same here. It would be illogical for the Labor Commissioner to refuse jurisdiction if the Labor Commissioner had original jurisdiction over claims that could not be superseded by the discretionary nature of the Legislative edict codified in both the NAC and NRS and left in place after this Court's decision in *Neville*.

1. Petitioner's Case Citations Do Not Support Exhaustion Of Administrative Remedies As A Prerequisite To Filing Suit.

[21] Petitioner is likely to argue that *S.N.E.A.* supports a mandatory duty on the part of the Labor Commissioner. However, the *S.N.E.A.* Court ruled "in statutes, 'may' is permissive and 'shall' is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature." *S.N.E.A.*, 108 Nev. at 278 *citing Givens v. State,* 99 Nev. 50, 54, 657 P.2d 97, 100 (1983). The Court explained, "however, that the term 'may' in a statute is conditional rather than permissive if the purpose of the statute requires that construction." *S.N.E.A.,* 108 Nev. at 278, *citing Nev. Real Est. Comm. v. Ressel,* 72 Nev. 79, 82, 294 P.2d 1115, 1116 (1956) ("may" in a statute was not permissive; the statute created a duty to act upon the occurrence of a specified condition, leaving "no area for the exercise of discretion"). The Court in *S.N.E.A* further explained, "[t]his construction of the word 'may' has been recognized in numerous cases, especially where used to define the duties of a public officer." *Id.* Thus, consistent with the Labor Commissioner's actual practice, *i.e.,* upon the specific occurrence of the condition of a potential employee claimant having initiated his/her own lawsuit, or being financially able to do so, the Labor Commissioner's Office is well within its duty to reject jurisdiction.

As an initial matter, this Court in *Neville* has already addressed the argument that the *Baldonado v. Wynn Las Vegas* case somehow supports an exhaustion requirement. *See* GSR Writ at pp. 12-13. In *Neville* this Court clarified that the central holding in *Baldonado* addressed NRS 608.160's tip provision as contrasted with NRS 608.140's express recognition of a private cause of action. *See Neville,* 406 P.3d at 503, *citing Baldonado v. Wynn Las Vegas, LLC,* 124 Nev. 951, 964 n. 33194 P.3d 96, 104 n. 33 (2008). Quoting from the *Baldonado* decision, this Court pointed to the discretionary jurisdiction of the Labor Commissioner's office as "consistent with the conclusion that there is authority under NRS 608.140 to bring a private action for wages unpaid and due." *Id. citing* NRS 607.160(7) ("If, after due inquiry, the Labor Commissioner believes that a person who is financially unable to employ counsel has a valid and enforceable claims for wages, commissions or other demands, the Labor Commissioner may present the facts to the Attorney General."); NRS 607.170(1) ("The Labor Commissioner may prosecute a claim for wages and commissioner or commence and action to collect wages, commissions and other demands of any person who is financially unable to employ counsel ….") *Id.* at 503-04.

Furthermore, contrary to Petitioner's assertion that the exhaustion doctrine was not even mentioned in *Neville* (see Writ at § B, p. 16:16-17), this Court spent significant time considering the exhaustion argument, ultimately rejecting the

defendant-employer's arguments.[22] Justice Hardesty scrutinized the language in NRS 607.170, dubiously questioning the exhaustion argument, and noting that the employer's reading of the statute would leave employees who could afford counsel no recourse for alleged wage theft.[23] Justice Hardesty aptly described such a reading as rendering the language in NRS 607 "surplusage"[24] *Id.* As noted above, under the Defendant-employer's reading of the statutes, it would be absurd to think that the Legislature intended to limit the ability of claimant-employees to seek redress for wage violations based on their financial ability to initiate their own lawsuits.

Putting aside the clear rejection of jurisdiction from the Labor Commissioner, and this Court's previous analysis in *Neville*, under Petitioner's argument, the Labor Commissioner would have to make a factual determination on the financial ability of each wage claimant's indigent or non-indigent status (whatever that may mean), then take or reject only the indigent employee's claims, and then issue some sort of

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[22] Petitioner is simply incorrect that this Court did not analyze the exhaustion argument in coming to its decision in *Neville*. This Court carefully reviewed the statutory language and analyzed the intent of the Nevada Legislature in adopting Chapter 607's and 608's wage and hour protections. Accordingly, Petitioner's footnote 1, citing to cases outside of Nevada, has absolutely no persuasive effect on Petitioner's argument for pre-suit exhaustion.

[23] *See* footnote 1, at p. 2, citing *Neville* transcript.

[24] *Id.* at p. 22:15-16, stating, "So it's just s surplusage these statutes are on the books and have no effect?"

right to sue letter to rejected claimants before those people could seek unpaid wages. This is not what the Legislature intended and would only serve to further burden an overburdened state agency, arguably increasing the need for judicial resources related to appeals of "indigent status," all the while frustrating the purpose of Nevada's wage and hour statutes, and certainly preventing workers employed in this State from receiving wages for work done on behalf of their employers.

The few other Nevada cases Petitioner cites to actually also support the Plaintiff-employees' position. Petitioner first cites to *Allstate Insurance Co. v. Thorpe*, however *Allstate* is distinguishable because the administrative agency at issue, the Department of Insurance, had **exclusive** rather than primary jurisdiction[25] over the suit. *See Allstate Insurance Co. v. Thorpe,* 123 Nev. 565 (2007). This Court explained that the statue at issue "contemplates an exclusive administrative procedure for resolving claims." *Id.* at 568. The statute at issue, NRS 686A.015(1) grants the Insurance Commissioner with exclusive jurisdiction stating in no uncertain terms, "[n]otwithstanding any other provision of law, the Commissioner has exclusive jurisdiction in regulating the subject of trade practices in the business of insurance in this state." *See* NRS 686A.015(1). There is no such express

[25] *Black's Law* defines "primary jurisdiction" as "[t]he power of an agency to decide an issue in the first instance when a court, having concurrent jurisdiction with the agency, determines that it would be more pragmatic for the agency to handle the case initially." *Black's* at 870.

provision in NRS 607 or NAC 607 providing for exclusive jurisdiction to the Labor Commissioner.

Likewise, in *Nevada Power Co. v. Eighth Judicial Dist. Court of Nevada, Cty. of Clark,* this Court held that although the Public Utilities Commission ("PUC") had original jurisdiction over the claims, the district court could refuse to defer primary jurisdiction to the PUC because the PUC had already spoken on the technical issue that was "within the specialized knowledge of the PUC staff" (the percentage of electricity used by transformers during the conversion process of incoming voltage of 12,000 volts to the reduced voltage of 480 volts that can be used by customers), and any other issues in the case were within the PUC's concurrent jurisdiction and did not warrant application of the primary jurisdiction doctrine. *See Nevada Power Co. v. Eighth Judicial Dist. Court of Nevada, Cty. of Clark,* 120 Nev. 948, 962-63, 102 P.3d 578, 588 (2004). The Court in *Nevada Power* explained:

> Primary jurisdiction "is a concept of judicial deference and discretion." The United States Supreme Court has explained that primary jurisdiction "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." As we explained in *Sports Form v. Leroy's Horse & Sports,* the "doctrine of primary jurisdiction requires that courts should sometimes refrain from exercising jurisdiction so that technical issues can first be determined by an administrative agency." The doctrine is premised on

> two policies: "'(1) the desire for uniformity of regulation and, (2) the need for an initial consideration by a tribunal with specialized knowledge.'" Thus, "[i]n every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." Application of the doctrine is discretionary with the court.

Nevada Power Co., 120 Nev. at 962, 102 P.3d at 587–88 (internal citations omitted). Notwithstanding the statutory private right of action provided for in NRS 608.140, and the fact that the Labor Commissioner refuses to take claims for employees who are financially able to institute a civil action for unpaid wages, there is no technical expertise in unpaid wage claims that require "specialized knowledge" of the Office of the Labor Commissioner. And, as further discussed in section C below, the potential for claim splitting supports the Plaintiff-employees' position that exhaustion of administrative remedies will create a risk of inconsistent judgments. Thus, under *Nevada Power* the Labor Commissioner cannot have primary jurisdiction, either.

Additionally, *State Department of Taxation v. Masco* does not support Petitioner's position. The *Masco* Court explained, "the exhaustion doctrine provides that, before seeking judicial relief, a petitioner must exhaust any and all available administrative remedies, so as to give the administrative agency opportunity to correct mistakes and perhaps avoid judicial intervention altogether." *State Dep't of Taxation v. Masco Builder,* 129 Nev. 775, 779, 312 P.3d 475, 478

(2013), *citing Allstate Ins. Co. v. Thorpe,* 123 Nev. at 571-72, 170 P.3d at 993-94. In *Masco* this Court held that "the exhaustion doctrine applies to this matter" citing NRS 372.680, which provides for the administrative review of the Department's decisions.[26] *See Masco,* 129 Nev. at 779, 312 P.3d at 478. Because the Court held that the Department had already made a decision, plaintiff Masco had indeed exhausted his administrative remedies by filing his claim in district court. *Id.*

Here, the oft-repeated fact that the Labor Commissioner outright refuses to take wage claims by employees who have initiated their own lawsuits and may refuse to take claims of indigent employees as well is dispositive. *See* NAC 607.075 and NAC 607.095; NRS 607.160(7) and NRS 607.170(1). The only option employee-claimants who have been rejected by the Labor Commissioner's Office is to find a licensed Nevada attorney who is willing to take their case and initiate a civil action. Moreover, there is no procedure for administrative review should the Labor Commissioner refuse to take an indigent claimant's case. Nevada Revised Statute 607.215(1)—Decision of the Labor Commissioner, provides that **only after**

[26] NRS 372.680(1) states, ["w]ithin 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City, the county of this State where the claimant resides or maintains his or her principal place of business or a county in which any relevant proceedings were conducted by the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed."

the "conclusion of a hearing … the Labor Commissioner shall issue a written decision …." And, NRS 607.215(3) allows for petition of judicial review of that decision, whereby the court may order trial *de novo*. *See* NRS 607.215(3). However, the Labor Commissioner is not required to actually hold a hearing or even take a claimant's case. *See* NAC 607.060(1) ("[t]he Labor Commissioner **may** inquire into an investigate …"); NAC 607.075(2) ("[i]f the Labor Commissioner … determines that the complainant has the ability to employ private counsel … the Commissioner **may** decline to take jurisdiction …"); NAC 607.095 ("[i]f 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."). And should the Labor Commissioner's Office take an indigent person's case but fail to hold a hearing or issue a decision, the NAC does not provide for any administrative procedure for judicial review. Only after a hearing will the Labor Commissioner issue a decision. *See* NRS 607.525 ("[**a**]**fter holding a hearing** on a determination issued by the commissioner, the Commissioner will enter a decision …"). And, the NAC strictly prohibits any person who is a party to an action pending before the Commissioner, or in a civil proceeding from requesting an advisory opinion. *See* NAC 607.650(3) ("[a] person **may not** request and advisory opinion concerning a question or matter that is an issue in a pending administrative, civil or criminal proceeding which a

person is a party). Likewise, the NAC strictly prohibits any person who is a party to an action pending before the Commissioner, or in a civil proceeding from requesting a petition for declaratory order. *See* NAC 607.670(3) (A person may not file a petition for a declaratory order concerning a question or matter that is an issue in a pending administrative, civil or criminal proceeding in which the person is a party.).

C. Requiring Nevada Workers To First Exhaust Administrative Remedies With The Labor Commissioner Would Result In Untenable Claim Splitting

The Legislature enacted NRS Chapter 608 to protect the health and welfare of employees in their hours of work and compensation. *See* NRS 608.005. As discussed throughout the proceeding sections, the Labor Commissioner has discretion on whether to represent—or refuse to represent—indigent litigants in the recovery of unpaid wages. And, the Labor Commissioner outright refuses to represent litigants who have hired an attorney and initiated a lawsuit to recover unpaid wages, which the Plaintiff-employees have clearly done.

Petitioner has conceded that the Plaintiff-employees claim under the MWA is proper and this claim will proceed in court. The District Court will determine the hours worked but unpaid. No one (not even Petitioner, the Defendant-employer) can dispute that the Nevada Constitution permits employees to file suit in Nevada courts. The Constitution provides that "[a]n 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." *See* NEV. CONST. ART. 15 § 16; see also NRS 608.260 (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." (emphasis added)). But, if an employee is prohibited from seeking relief for statutory non-minimum 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 shouldn't this claim be adjudicated in the same proceeding? Likewise, since the employees worked a full eight-hour day before being required to work "off the clock," proof of the number of hours worked will also prove that overtime compensation was due as well under NRS 608.018, "Failure To Pay Overtime Wages." And since the dates of each worker's employment will be necessary to establish the extent of the claim for underpayment of the constitutional minimum

wage, and there is obviously wages due and owing at the time of termination that have never been paid, the same facts will lead to proof of a violation of NRS 608.020-050, "Failure To Pay All Wages Due And Owing Upon Termination." The plaintiff-employees should not be required to split their legal action in two different forums when the claims arise out of the same facts and circumstances. *Moriarty v. Moriarty*, No. 59607, 2013 WL 621922, at *1 (Nev. Feb. 15, 2013), *Smith v. Hutchins*, 93 Nev. 431, 432, 566 P.2d 1136, 1137 (1977) (holding that a party is prohibited from splitting causes of action and maintaining separate actions on the same claims). Such a requirement would clog the courts and the Labor Commissioner's office, create a risk of inconsistent judgments, and frustrate the remedial purpose of the wage-hour statutes.

Furthermore, the availability of continuation wages under NRS 608.050 is another example of duplicate litigation that would take place should the Court adopt Petitioner's arguments. Under the Defendant-employers proposal, employees would have to initiate another action for the statutorily imposed conditions of the employment contract (i.e. payment for all hours worked and overtime premiums) with the Labor Commissioner, first, who would have to apply the finding of the District Court anyway, or be appealed right back to the same District Court under NRS 607.233. This Court has previously rejected the very process that the Defendant-employer is advocating here. *See e.g., Smith v. Hutchins*, 93 Nev. 431,

432, 566 P.2d 1136, 1137 (1977) ("As a general proposition, a single cause of action may not be split and separate actions maintained. (citation omitted) . . . The great weight of authority supports the single cause of action rule when the plaintiff in each case is the same person. Cases collected Annot. 62 A.L.R.2d 977 (1958)."). *Cf. Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 852, 124 P.3d 530, 540–41 (2005) (recognizing the benefit of avoiding "duplicative proceedings and inconsistent results.").

D. Requiring Nevada Workers To Exhaust Administrative Remedies With The Office Of The Labor Commissioner Runs Afoul Of Nevada's Robust Public Policy Of Providing Comprehensive Protections To Nevada Workers

The purpose of the Labor Commissioner's office is to facilitate resolution of employee wage claims, not to frustrate them; an edict the Labor Commissioner wholly embraces by rejecting jurisdiction for cases where legal action has already begun. With limited state funding, the Labor Commissioner uses its offices to pursue cases on behalf of low paid workers who cannot afford counsel only, leaving to the courts those cases where claimants are represented by private attorneys. *See e.g.,* NAC 607.095 ("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."); NRS 607.160(7) ("If, after due inquiry, the Labor Commissioner believes that a person who is financially unable to employ counsel has a valid and enforceable

claim for wages . . ."); "The Office of the Labor Commissioner does not have jurisdiction if … you have already begun private legal action to recover the wages claimed."[27] The creation of the office of the Labor Commissioner was not intended to create a bottle neck of legitimate claims which avoid timely resolution by private attorneys in Nevada courts. *See* NRS 607.160(6) ("The actions and remedies authorized by the labor laws are cumulative.").

The Defendant-employer's position is insidious in two respects: first because it would prevent a whole class of employees (those who can afford counsel) from seeking redress for wage theft and second because it seeks to have wage enforcement funded entirely by Nevada taxpayers, as opposed to allowing private parties to seek their own wages. As Justice Hardesty noted during oral argument in the *Neville* case, Nevada employees who are not indigent would simply be out of luck. *See Neville Transcript,* footnote 2 (Justice Hardesty questioning what the "guys and ladies" who could afford counsel are supposed to do under the plain language of NRS 607.160(7).) Petitioner's position that only indigent persons can seek redress for wage theft runs afoul of the Legislature's mandate and disregards the express

[27] *See* http://labor.nv.gov/About/Forms/FORMS_FOR_EMPLOYEES/ (last visited August 13, 2019) (*THE OFFICE OF THE LABOR COMMISSIONER DOES NOT HAVE JURISDICTION IF: You have already begun private legal action to recover the wages claimed … .*).

provisions contained in Chapters 607 and Chapter 608 authorizing employees to seek redress in court.

The Office of the Nevada Labor Commissioner, an agency funded by Nevada taxpayers, is already cash-strapped and understaffed. *See* Petitioner's Appendix at APP 249 ("Because of limited staffing and budged constraints, my office investigates and prosecutes wage claims on behalf of those wage claimants, generally of low and moderate incomes, who can't afford their own attorneys."). Pursuant to its Legislative authority, the Office of the Labor Commissioner only pursues wage claims on behalf of Nevada employees who cannot afford an attorney. *See Id.* at ¶ 3. ("It is my opinion that individuals who can afford to employ their won attorneys can directly file and maintain a claim for wages against their employer in the Nevada courts."); *Id.* at ¶ 2 ("My office determines whether claimants have the financial ability to employ an attorney to represent them in pursuing their wage claims."); NRS 607.160(7), 607.170(1); NAC 608.075(2); *see also City Plan Dev., Inc. v. Office of Labor Com'r,* 121 Nev. 419, 426-27, 117 P.3d 182, 187 (2005) (recognizing that the Labor Commissioner's jurisdiction is discretionary).

Ultimately, the Defendant-employer's position would represent an appalling shift from the current understanding of the law and saddle a state agency with an unworkable caseload by preventing tens of thousands of Nevada workers with a way to seek redress for their employers' wage and hour violations.

IV. CONCLUSION

The express rejection of jurisdiction by the Labor Commissioner for employees who have initiated legal action, the plain language and plain reading of the Nevada Administrative Code and Nevada Revised Statutes, and this Court's analysis in *Neville*, taken in concert with the remedial purpose of Nevada's wage-hour statutes eliminates any exhaustion requirement as a prerequisite to filing claims for unpaid wages. For these reasons and the reasons more fully set forth herein, this Court should deny Petitioner's writ and uphold the District Court's finding that there is no exhaustion requirement for wage and hour claims pursuant to NRS 608.016, NRS 608.018, and NRS 608.020-.050.

Dated this 29th day of August, 2019.

Respectfully Submitted,

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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.

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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:

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Finally, I hereby certify that I have read this Answering 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 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.

Dated: August 30, 2019

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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 August 30, 2019, the following document was served on the following:

REAL PARTIES IN INTEREST-PLAINTIFFS' ANSWERING BRIEF

■ 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.

The Honorable Lynne K. Simons
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Executed on August 30, 2019, at Reno, Nevada.

/s/ Tamara Toles
Tamara Toles