

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

5 Petitioners-Defendants,

6 vs.

7 EIGHTH JUDICIAL DISTRICT COURT
8 FOR THE STATE OF NEVADA IN AND
9 FOR THE COUNTY OF CLARK, THE
10 HONORABLE LYNNE K. SIMONS,
11 DISTRICT COURT JUDGE,

12 Respondent,

13 and

14 EDDY MARTEL (also known as
15 MARTEL-RORIGUEZ), MARY ANNE
16 CAPILLA, JANICE JACKSON-
17 WILLIAMS and WHITNEY VAUGHAN,
18 Real Parties in Interest - Plaintiffs.

Supreme Court No. 79118
District Court No. CV16-01264
Electronically Filed
Sep 11 2019 01:24 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

19 **REPLY IN SUPPORT OF**
20 **PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION**

COHEN|JOHNSON|PARKER|EDWARDS
H. STAN JOHNSON, ESQ.
Nevada Bar No. 00265
sjohnson@cohenjohnson.com
375 E. Warm Springs Road, Suite 104
Las Vegas, Nevada 89119
Telephone: (702) 823-3500
Facsimile: (702) 823-3400

SUSAN HEANEY HILDEN, ESQ.
Nevada Bar No. 5358
shilden@meruelogroup.com
CHRIS DAVIS, ESQ.
Nevada Bar No. 6616
chris.davis@saharalavasvegas.com
2500 East Second Street
Reno, Nevada 89595
Telephone: (775) 789-5362

Attorneys for Petitioners-Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS..... i

II. TABLE OF AUTHORITIES..... ii

III. INTRODUCTION..... 1

IV. POINTS AND AUTHORITIES SUPPORTING WRIT..... 2

A. Exhaust of Administrative Remedies Is Mandatory Because the Labor Commissioner Has Original Jurisdiction Based on His Mandatory, Non-Discretionary Duty to Hear and Resolve Wage Complaints Brought under NRS 608.005 to 608.195.2

B. This Court’s Precedent Mandates Exhaust of Administrative Remedies.....7

C. Legislative Mandated Administrative Remedies Must Still Be Exhausted Even When this Court Has Implied a Private Right of Action.....10

D. Plaintiffs Misrepresent that *Neville* Addressed Exhaustion, Even Though this Court Never Even Mentioned Exhaustion in *Neville*.12

E. The Labor Commissioner Has Full Authority to Resolve All Wage Claims and Therefore Exhaustion Would *NOT* Lead to Claim Splitting.13

F. Exhaustion of Administrative Remedies with the Labor Commissioner Is the Proper Method to Protect Workers.15

V. CONCLUSION..... 16

VI. CERTIFICATE OF COMPLIANCE 16

II. TABLE OF AUTHORITIES

CASES

Alexander v. Sandoval, 532 U.S. 275 (2001)14

Allstate Ins. Co. v. Thorpe, 123 Nev. 565, 170 P.3d 989 (2007).....7

Baldonado v. Wynn Las Vegas, LLC,
124 Nev. 951, 194 P.3d 96 (2008)..... 3, 4, 6, 7, 9, 11, 12, 15

City Plan Dev., Inc. v. Office of Labor Com'r,
121 Nev. 419, 429, 117 P.3d 182, 188 (2005).....5, 6

Department of Taxation v. Masco Builder,
129 Nev. 775, 312 P.3d 475 (2013).....2, 8

First American Title Co. of Nevada v. State,
91 Nev. 804, 543 P.2d 1344 (1975)..... 11, 15

In re Steven Daniel P., 129 Nev. 692, 309 P.3d 1041 (2013)13

Lindauer v. Allen, 85 Nev. 430, 456 P.2d 851 (1969).....4

Lucas v. Bell Trans, Case No. 208-CV-01792-RCJ-RJJ,
2009 WL 3336112 (D. Nev. Oct. 14, 2009)4

*MDC Restaurants, LLC v. The Eighth Judicial Dist. Court of the State of
Nevada in & for County of Clark*,
134 Nev. 315, 419 P.3d 148 (2018).....14

*Nevada Power Co. v. Eighth Judicial Dist. Court of Nevada
ex rel. County of Clark*, 120 Nev. 948, 102 P.3d 578 (2004).....8, 9

Neville v. Eighth Judicial Dist. Court in & for County of Clark,
133 Nev. 777, 406 P.3d 499 (2017)..... 10, 12

Rosequist v. Int'l Ass'n of Firefighters Local 1908,
118 Nev. 444, 49 P.3d 651 (2002).....7

Schroeder v. Texas Iron Works, Inc.,
813 S.W.2d 483 (Tex. 1991)10

1 *Sheffer v. U.S. Airways, Inc.*,
 107 F. Supp. 3d 1074, 1078 (D. Nev. 2015).....5

2 *Stein v. Forest Pres. Dist. of Cook Cty., Ill.*,
 3 829 F. Supp. 251, 255 (N.D. Ill. 1993)..... 10, 11

4 *Trujillo v. Santa Clara Cty.*, 775 F.2d 1359, (9th Cir. 1985)10

5 **STATUTES**

6 NAC 607.07511

7 NAC 607.52511

8 NRS 288.110.....7

9 NRS 288.280.....7

10 NRS 34.160.....6

11 NRS 607.160.....5, 11

12 NRS 607.170.....5

13 NRS 607.205.....6

14 NRS 607.207.....6

15 NRS 607.215..... 8, 9, 11, 13

16 NRS 608.005.....7, 11

17 NRS 608.195.....7, 11

18 **RULES**

19 Nev. R. App. P. 2816

20 Nev. R. App. P. 3216

1 **III. INTRODUCTION**

2 Plaintiffs Eddy Martel (“Martel”), Mary Anne Capilla (“Capilla”), Janice
3 Jackson-Williams (Williams) and Whitney Vaughan (“Vaughan”) (collectively,
4 “Plaintiffs”), do not dispute that they failed to exhaust the administrative
5 remedies statutorily mandated by NRS Chapter 607 before bringing their
6 complaint alleging wage claims under NRS 608.016 – 608.140. Plaintiffs,
7 however, ignore this Court’s express ruling that the Labor Commissioner has a
8 mandatory duty to hear and resolve all such wage complaints. Because the Labor
9 Commissioner’s duty to resolve such complaints is not discretionary, Plaintiffs
10 effectively concede that the Labor Commissioner’s jurisdiction is original, and
11 therefore exhaustion of administrative remedies with the Labor Commissioner is
12 mandatory.

13 Plaintiffs wrongly point to the Labor Commissioner’s prosecutorial powers
14 which involves discretion, and misrepresent that this discretion is also permitted
15 when adjudicating wage claims. This argument, however, has been expressly
16 rejected by this Court.

17 This Court has repeatedly confirmed that where the administrative agency
18 statutorily maintains original jurisdiction, then exhaustion is required. The mere
19 fact that this Court has implied a private right of action, does not alter the
20 requirement that administrative remedies with the Labor Commissioner must be

1 exhausted before proceeding with that implied right of action. This Court has
2 repeatedly required the exhaustion of administrative remedies because exhaustion
3 provides an efficient and effective means to resolve disputes without court
4 intervention. The comprehensive administrative remedies with the Labor
5 Commissioner, mandated by the Nevada legislature, are no different. This Court
6 should therefore grant Defendant GSR’s petition for a writ of mandamus and/or
7 prohibition and mandate that the district court grant Defendants’ motion to
8 dismiss Plaintiffs’ First, Third and Fourth Claims of Relief for failure to exhaust
9 administrative remedies with the Labor Commissioner.

10 **IV. POINTS AND AUTHORITIES SUPPORTING WRIT**

11 **A. Exhaust of Administrative Remedies Is Mandatory Because the**
12 **Labor Commissioner Has Original Jurisdiction Based on His**
13 **Mandatory, Non-Discretionary Duty to Hear and Resolve Wage**
14 **Complaints Brought under NRS 608.005 to 608.195.**

15 Plaintiffs do not dispute that they failed to seek any remedy before the Labor
16 Commissioner. Plaintiffs also do not dispute that this Court, in *State Department*
17 *of Taxation v. Masco Builder*, 129 Nev. 775, 779, 312 P.3d 475, 478 (2013),
18 expressly held “the exhaustion doctrine applies” when the agency “statutorily
19 maintains original jurisdiction” over the claims asserted. *See* Answering Brief
20 (“Ans.”) at 29-30. Plaintiffs wrongly argue, however, that the Labor
Commissioner’s jurisdiction is not “original” because the Labor Commissioner
“has discretion” to resolve wage claims. *See* Ans. at 13 – 15, 20 – 24. Such an

1 argument was completely rejected by this Court in *Baldonado v. Wynn Las*
2 *Vegas, LLC*, 124 Nev. 951, 194 P.3d 96 (2008).

3 In *Baldonado*, this Court expressly held that “the Labor Commissioner's
4 duty to hear and resolve enforcement complaints is not discretionary” because
5 “labor statutes, including NRS 607.205 and NRS 607.207, require the Labor
6 Commissioner to hear and decide complaints seeking enforcement of the labor
7 laws.” *Id.* at 963, 194 P.3d at 104. (emphasis added). The Court reasoned that
8 “the Labor Commissioner is charged with knowing and enforcing the labor laws;
9 these responsibilities acknowledge a special expertise as to those laws” which
10 imposes “the duty to hear and resolve labor law complaints.” *Id.* In reaching this
11 decision, this Court rejected Plaintiffs’ argument that simply because NRS
12 Chapters 607 and 608 use the word “may,” the use of the word “may” denotes
13 discretion hear and resolve wage claims. *Compare* Ans. at 21 – 24 with
14 *Baldonado*, 124 Nev. at 962-63, 194 P.3d at 102-04. As this Court has expressly
15 held that “the Labor Commissioner's duty to hear and resolve enforcement
16 complaints is not discretionary,” but is mandatory, Plaintiffs’ argument that the
17 Labor Commissioner lacks original jurisdiction because the Labor Commissioner
18 has discretion to resolve labor complaints is nonsensical and must be rejected.

19 Plaintiffs also wrongly imply that because the Labor Commissioner may
20 have discretion to assume jurisdiction to prosecute actions on behalf of claimants,

1 that somehow translates into discretion to hear and resolve labor complaints. *See*
2 *Ans.* at 21 -23. First and foremost, such an argument ignores *Baldonado*' s
3 express holding that the Labor Commissioner is required "to hear and decide
4 complaints seeking enforcement of the labor laws." 124 Nev. at 963, 194 P.3d at
5 104. Contrary to Plaintiff's claim, the Labor Commissioner's authority to hear
6 claims is *not* limited to instances where the employee "cannot afford a private
7 attorney to take his or her wage case." *See Ans.* at 11:19-27. While the Labor
8 Commissioner is certainly free to prosecute claims on behalf of those without
9 financial resources under NRS 607.170(1) and NRS 607.160(7), this Court
10 expressly rejected any argument that "the Labor Commissioner may choose not to
11 decide a complaint."¹ *Baldonado*, 124 Nev. at 962–64, 194 P.3d at 103–04.

12
13
14 ¹ Plaintiffs' quote the unofficial declaration of former Nevada labor
15 commissioner, Michael Tanchek, to support its claim that the labor
16 commissioner's jurisdiction is limited to representing indigent wage claimants.
17 *See Ans.* at p.3 & n.4, p.5 & n.6, p.12 – p.13. The opinion of a former labor
18 commissioner, however, cannot contradict the binding authority of the Nevada
19 Supreme Court, set forth above. Moreover, such unofficial opinions are not legal
20 authority. *See Lucas v. Bell Trans*, Case No. 208-CV-01792-RCJ-RJJ, 2009 WL
3336112, at *4 (D. Nev. Oct. 14, 2009) (holding unofficial opinions of the labor
commissioner are "not legal authority at all," [n]or are they persuasive"). Finally,
this unofficial opinion, along with supposed labor commissioner forms, were not
part of the record below and therefore should not be considered by this Court.
See Lindauer v. Allen, 85 Nev. 430, 433, 456 P.2d 851, 852 (1969) (holding this
Court "can only consider the record as it was made and considered by the court
below").

1 Plaintiffs simply confuse the Labor Commissioner’s prosecutorial powers,
2 which involve some discretion, with the Labor Commissioner’s adjudicatory
3 powers which are mandatory. In *City Plan Dev., Inc. v. Office of Labor Com'r*,
4 121 Nev. 419, 429, 117 P.3d 182, 188 (2005), this Court recognized that the
5 Labor Commissioner’s enforcement responsibilities include “investigating,
6 prosecuting and judging functions.” The Court found that statutes, such as NRS
7 607.160 and NRS 607.170, “delineate the general *prosecutorial authority* of the
8 Labor Commissioner (and Attorney General) in carrying out his duties under all
9 of the labor laws” by “authoriz[ing] the Labor Commissioner, after due inquiry,
10 to take assignments of wage claims for prosecution or to refer claims to the
11 Attorney General when the claimants are financially unable to employ counsel.”
12 *Id.* at 426–27, 117 P.3d at 187 (emphasis added). While provisions of NRS
13 Chapters 607 and 608 may grant the Labor Commissioner discretion with respect
14 to the Commissioner’s investigative and prosecutorial functions, under
15 *Baldonado*, that discretion does not extend to “the duty to hear and resolve labor
16 law complaints.” 124 Nev. at 963, 194 P.3d at 104.

17 In *Sheffer v. U.S. Airways, Inc.*, 107 F. Supp. 3d 1074, 1078 (D. Nev.
18 2015), the court similarly explained that “NRS 607.160(7) and 607.170(1)—cited
19 by Plaintiff to show that the Labor Commissioner will not prosecute civil actions
20 on behalf of complainants unless they are indigent—does nothing to abrogate the

1 Labor Commissioner's power and duty to determine labor claims
2 administratively. . . .” The court, relying upon this Court holding in *Baldonado*,
3 held “the Labor Commissioner has the statutory authority and duty to hear and
4 decide Plaintiff's claims administratively regardless of whether he chooses to
5 institute a civil action.” *Id.* The Court continued, that if plaintiff “means to argue
6 that the Labor Commissioner refuses to hear and decide her complaint in his
7 administrative capacity in violation of his statutory duties, her remedy is to seek a
8 writ of mandamus under NRS 34.160 in the state courts. *Id.*, relying upon
9 *Baldonado*, 124 Nev. at 963, 194 P.3d at 104 (“[W]e conclude that the labor
10 statutes, including NRS 607.205 and NRS 607.207, require the Labor
11 Commissioner to hear and decide complaints seeking enforcement of the labor
12 laws.”).

13 Despite all of Plaintiffs’ protestations that the Labor Commissioner would
14 not hear and resolve their wage claims, the fact is that Plaintiffs never attempted
15 to exhaust their administrative remedies. If they had done so, their claims would
16 have been resolved without the need of any court intervention. If the Labor
17 Commissioner refused to exercise this mandatory duty, under *Baldonado*, he
18 could have been compelled to do so. Because there can be no doubt that the
19 Labor Commissioner’s duty to hear and resolve all labor complaints is
20 mandatory, regardless of financial means, there can be no doubt that Labor

1 Commissioner had original jurisdiction over all of wage claims asserted under
2 NRS 608.005 to 608.195, and that Plaintiffs are required to exhaust their
3 administrative remedies with the Labor Commissioner before asserting those
4 claims in the district court.

5 **B. This Court’s Precedent Mandates Exhaust of Administrative
6 Remedies.**

7 Now that it is clear that Labor Commissioner was required to hear and
8 resolve Plaintiffs’ wage claims, it is equally clear that this Court’s precedent
9 requires exhaustion of those claims. In *Rosequist v. Int’l Ass’n of Firefighters*
10 *Local 1908*, 118 Nev. 444, 450–51, 49 P.3d 651, 655 (2002), *overruled on other*
11 *ground by Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 170 P.3d 989 (2007), this
12 Court similarly rejected the claim that “‘may’ contained in NRS 288.110(2) and
13 NRS 288.280 means that there is no mandatory requirement for the EMRB to
14 hear the complaint,” and therefore concluded “the remedies provided under the
15 Act and before the EMRB [Employee Management Relations Board] must be
16 exhausted before the district court has subject matter jurisdiction.” This Court
17 had no concerns that the EMRB would provide a fair review of a public
18 employee’s complaint. 118 Nev. at 450, 49 P.3d at 654. In *Baldonado*, this
19 Court expressly relied upon *Rosequist* and held that employees have “access to an
20 adequate administrative enforcement mechanism” because the Labor

1 Commissioner likewise must “hear and resolve complaints seeking the
2 enforcement of labor laws.” *Baldonado*, 124 Nev. at 962-64, 194 P.3d at 103-04.

3 In *Masco Builder*, this Court held “the exhaustion doctrine applies” when
4 the agency “statutorily maintains original jurisdiction” over the claims asserted.
5 129 Nev. at 779, 312 P.3d at 478 Plaintiffs concede this Court found the Nevada
6 Tax Commission had original jurisdiction because NRS 372.680(1) provides that
7 “after a final decision . . . is rendered by the Nevada Tax Commission, the
8 claimant may bring an action . . . in a court of competent jurisdiction” Ans.
9 at 29-30 *citing Masco*, 129 Nev. at 779, 312 P.3d at 478. Plaintiffs, however,
10 ignore that NRS 607.215, which similarly provides for “a petition of judicial
11 review” after the Labor Commissioner issues his written decision, and only after
12 filing the petition permits “the court to order a trial de novo.” Plaintiffs does not
13 dispute that the entire administrative process outlined by NRS Chapter 607 would
14 become meaningless if Plaintiffs are permitted to simply skip these administrative
15 procedures and proceed to last step of trial de novo.

16 Contrary to Plaintiff’s claim, this Court did not hold, in *Nevada Power Co.*
17 *v. Eighth Judicial Dist. Court of Nevada ex rel. County of Clark*, 120 Nev. 948,
18 102 P.3d 578 (2004), that exhaustion was not required even though the PUC had
19 “original jurisdiction over the claims,” and therefore the court could refuse to
20 defer primary jurisdiction to the PUC. *See* Ans. at 28. To the contrary, this

1 Court explained that because the “PUC has original jurisdiction over the
2 regulation of utility rates and services,” then a “challenge to the reasonableness of
3 a rate or regulation fixed by the PUC must be presented first to the PUC before it
4 may be presented to the courts for judicial review.” *Nevada Power*, 120 Nev. at
5 959, 102 P.3d at 585–86. The Court, however, held that exhaustion was not
6 required because the complaint alleged consumer fraud claims, sounding in tort,
7 which were within the district court’s original jurisdiction. *Id.* at 959-60.

8 Admittedly, Plaintiffs are seeking to enforce the very wage laws that are
9 within the Labor commissioner’s original jurisdiction. As the Labor
10 Commissioner has original jurisdiction over these claims, Plaintiffs are required
11 to first present these claims to the Labor Commissioner, under the procedures set
12 forth in NRS Chapter 607, and then petition the courts for judicial review
13 pursuant to NRS 607.215. *See Baldonado*, 124 Nev. at 963, 194 P.3d at 104.
14 (holding “resolving labor law complaints is perhaps one of the Labor
15 Commissioner's most significant enforcement mechanisms” because “the Labor
16 Commissioner's expertise is optimized, and the parties then have an opportunity
17 to petition the district court for judicial review and, ultimately, appeal to this
18 court”).
19
20

1 **C. Legislative Mandated Administrative Remedies Must Still Be**
2 **Exhausted Even When this Court Has Implied a Private Right of**
3 **Action.**

4 Plaintiffs repeatedly insinuate that because this Court implied a private
5 right of action for wage claims in *Neville v. Eighth Judicial Dist. Court in & for*
6 *County of Clark*, 133 Nev. 777, 778, 406 P.3d 499, 501 (2017), that foreclosed
7 any exhaustion requirement. *See* Ans. at 19-20, 22-23. Plaintiffs, however, fail
8 to cite any authority holding that exhaustion is not required when a private right
9 of action is implied. To the contrary, the uncontested overwhelming weight of
10 authority provides, even when a statute implies a private right of action,
11 exhaustion of administrative remedies is required when an administrative remedy
12 is provided by the statute. *See Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d
13 483, 485-88. (Tex. 1991) (holding where a statute “establishes a comprehensive
14 administrative review system,” sets the “time for bringing a civil action” after
15 agency review is sought, provides for “trial de novo” upon seeking judicial
16 review, and “*does not provide for an unconditional private right of action*” then
17 the “exhaustion of administrative remedies is a mandatory prerequisite to filing a
18 civil action alleging a violation” of the statute); *Trujillo v. Santa Clara Cty.*, 775
19 F.2d 1359, 1362 (9th Cir. 1985) (explaining that even when California courts
20 have “implied a private cause of action,” the complainant must still have
“exhausted his administrative remedies”); *Stein v. Forest Pres. Dist. of Cook*

1 *Cty., Ill.*, 829 F. Supp. 251, 255, 256 (N.D. Ill. 1993) (holding, even after finding
2 an implied private cause of action for violation of the Cook County Civil Service
3 Act, the court held that the county employee was still required to “exhaust his
4 administrative remedies” because the “failure to exhaust administrative remedies
5 prior to filing a lawsuit can bar that action”).² Likewise, even though this Court
6 found an implied private right of action for wage claims under NRS Chapter 608,
7 this Court has also indisputably held that the Labor Commissioner has original
8 jurisdiction to “hear and resolve labor law complaints,” the Legislature has
9 provided the Labor Commissioner with an “adequate administrative enforcement
10 mechanism” to resolve such claims, and the Legislature has “require[d] the Labor
11 Commissioner to hear and decide complaints seeking enforcement of the labor
12 laws.” *Baldonado*, 124 Nev. at 960-64, 194 P.3d at 102-04. The enforcement
13 mechanism set forth in NRS 607.160 – 607.215, along with the regulations
14 adopted by the Labor Commissioner at NAC 607.075 – 607.525, enable the Labor
15 Commissioner to resolve all of their wage claims asserted under NRS 608.005 to
16 608.195. The district court’s ruling that Plaintiffs need not exhaust their
17 administrative remedies established by the Legislature before pursuing their

18
19 ² *See also* the ten (10) other cases cited in the Petition from jurisdictions
20 throughout the country equally holding that exhaustion of administrative remedies
is required even when the courts imply a private right of action. *See* Petition at 17
– 18, n.1.

1 implied cause of action therefore “contravene[s] the well-established rule that
2 administrative remedies must be exhausted prior to seeking judicial relief.” *First*
3 *American Title Co. of Nevada v. State*, 91 Nev. 804, 806, 543 P.2d 1344, 1345
4 (1975).

5 **D. Plaintiffs Misrepresent that *Neville* Addressed Exhaustion, Even**
6 **Though this Court Never Even Mentioned Exhaustion in *Neville*.**

7 Plaintiff repeatedly misrepresents that, in *Neville*, this Court rejected the
8 argument that the administrative remedies expressly provide by the legislature
9 need not be exhausted prior to seeking judicial relief. *See Ans.* at 15 - 20, 25-27.
10 The word “exhaustion,” much less the issue of exhaustion of administrative
11 remedies, was never mentioned by this Court in *Neville*. The Court, in *Neville*,
12 however, did reaffirm the holding in *Baldonado*, which provides: “The Nevada
13 Labor Commissioner, who is entrusted with the responsibility of enforcing
14 Nevada's labor laws, generally must administratively hear and decide complaints
15 that arise under those laws.” *See Neville*, 406 P.3d at 502 quoting *Baldonado*,
16 124 Nev. at 954, 194 P.3d at 98. While this Court did recognize an implied
17 private right of action in *Neville*, the Court did not address the exhaustion
18 perquisites required before filing such an action.

19 Rather than rely on the opinion in *Neville*, Plaintiffs rely on statements at
20 the *Neville* hearing made by the Honorable Justice Hardesty, which are taken out
of context. *See Ans.* at pp. 1-2 & n.1, p.16 & n.15, pp. 25 – 26 & nn. 22-24, p.36.

1 Even a cursory reading of these statements reveals that Judge Hardesty was
2 opining on the Labor Commissioner’s prosecutorial and investigative functions,
3 and made no statements concerning the Labor Commissioner’s mandatory
4 adjudicatory duties which establish the exhaustion requirement.

5 Plaintiffs do not dispute that their failure to exhaust administrative
6 remedies is also at odds with NRS 607.215, which provides that after the Labor
7 Commissioner “issue[s] a written decision, setting forth findings of fact and
8 conclusions of law developed at the hearing,” and “[u]pon a petition for judicial
9 review, the court may order trial de novo.” Under the express terms of NRS
10 607.215, the court may only order a “trial de novo” after the Labor Commissioner
11 conducts a hearing, issues a written decision, and a petition for judicial review is
12 filed by Plaintiff. *See In re Steven Daniel P.*, 129 Nev. 692, 696-97, 309 P.3d
13 1041, 1044 (2013) (holding that where a statute “includes preconditions” before
14 the “court may” act, this “plain language” mandates that the court may act “only
15 upon the [lower] court's determination that the requirements of [the statute] have
16 been met”).

17 **E. The Labor Commissioner Has Full Authority to Resolve All Wage**
18 **Claims and Therefore Exhaustion Would NOT Lead to Claim**
Splitting.

19 Contrary to Plaintiffs’ argument, requiring exhaustion would not lead to
20 claim splitting. *See Ans.* at 32 – 35. While Nevada law provides Plaintiffs with

1 the option to pursue minimum wage claims without exhaustion, the Labor
2 Commissioner has fully authority to hear such minimum wage claims. NRS
3 607.160(1)(a) expressly provides that the Labor Commissioner “[s]hall enforce
4 all labor laws of the State of Nevada.” In *MDC Restaurants, LLC v. The Eighth*
5 *Judicial Dist. Court of the State of Nevada in & for County of Clark*, 134 Nev.
6 315, 321, 419 P.3d 148, 153 (2018), this Court recognized that because “the
7 Labor Commissioner is tasked with enforcing the labor laws of this state” then
8 Labor Commissioner could consider minimum wage claims. Plaintiffs therefore
9 are free to bring all of their wage claims before the Labor Commissioner.

10 The fact that the Legislature has carved out an exception to the exhaustion
11 requirement for minimum wage claims, however, supports the requirement that
12 exhaustion is required for all other claims. In *Alexander v. Sandoval*, 532 U.S.
13 275, 290 (2001), expressly relied upon in *Baldonado*, the United States Supreme
14 Court held that the “express provision of one method of enforcing a substantive
15 rule suggests that [the “Legislature”] intended to preclude others.” By exempting
16 minimum wage claims from the exhaustion requirement, the Nevada Legislature
17 has demonstrated its intent to require exhaustion for all other wage claims
18 pursued under NRS Chapter 608.

1 **F. Exhaustion of Administrative Remedies with the Labor**
2 **Commissioner Is the Proper Method to Protect Workers.**

3 Plaintiffs’ argument that requiring exhaustion of administrative remedies
4 with the Labor Commissioner would somehow harm workers is absurd. Ans. at
5 35 – 36. In *Baldonado*, this Court found that the “Labor Commissioner is
6 charged with knowing and enforcing the labor laws; these responsibilities
7 acknowledge a special expertise as to those laws.” 124 Nev. at 963, 194 P.3d at
8 104. The Court recognized that “resolving labor law complaints is perhaps one
9 of the Labor Commissioner's most significant enforcement mechanisms” because
10 “the Labor Commissioner's expertise is optimized, and the parties then have an
11 opportunity to petition the district court for judicial review and, ultimately, appeal
12 to this court.” *Id.* The Court concluded that the Labor Commissioner’s
13 expertise is optimized when he renders “a written decision resolving the
14 complaint at issue, based on the facts and legal conclusion developed at the
15 hearing.” *Id.*

16 In *First American Title*, this Court further recognized that the “‘exhaustion
17 doctrine’ is sound judicial policy” because if “administrative remedies are
18 pursued to their fullest, judicial intervention may become unnecessary.” 91 Nev.
19 at 806, 543 P.2d at 1345. This Court reasoned that exhaustion promotes
20 efficiency because plaintiff would likely “have been granted the relief he now

1 seeks in the first instance by judicial intervention,” if administrative remedies had
2 been pursued. *Id.*

3 If Plaintiffs had pursued their administrative remedies, this matter would
4 likely have been resolved years ago. Only because Plaintiffs’ attorneys refused to
5 do so, this matter has languished. Accordingly, the protection of workers is
6 enhanced, *not harmed*, by the pursuit of administrative remedies before the Labor
7 Commissioner.

8 **V. CONCLUSION**

9 Based on the foregoing, this Court should grant Defendants’ petition and
10 mandate that the district court grant Defendants’ motion to dismiss Plaintiffs’
11 First, Third and Fourth Claims of Relief for failing to exhaust the administrative
12 remedies required by NRS Chapter 607.

13 **VI. CERTIFICATE OF COMPLIANCE**

14 I hereby certify that this brief complies with the requirements of Nev. R.
15 App. P. 32(c)(2), including the formatting requirements of Nev. R. App. P.
16 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style
17 requirements of Nev. R. App. P. 32(a)(6) because this brief has been prepared in a
18 proportionally spaced typeface using Microsoft Word 2016, font size 14-point,
19 Times New Roman. I also hereby certify that I have read the attached appellate
20 brief, and to the best of my knowledge, information, and belief, it is not frivolous

1 or interposed for any improper purpose. I further certify that this brief complies
2 with all applicable Nevada Rules of Appellate Procedure, except as otherwise
3 stated, in particular Nev. R. App. P. 28(e)(1), which requires every assertion in
4 the brief regarding matters in the record to be supported by a reference to the page
5 and volume number, if any, of the transcript or appendix where the matter relied
6 on is to be found. I understand that I may be subject to sanctions in the event that
7 the accompanying brief is not in conformity with the requirements of the Nevada
8 Rules of Appellate Procedure.

9 Dated this 11th day of September, 2019

10 CHRIS DAVIS, ESQ.

11 By: /s/ Chris Davis
12 H. Stan Johnson, Esq.
13 Nevada Bar No. 00265
14 Chris Davis, Esq.
15 Nevada Bar No. 06616

16 Attorney for Petitioners-Defendants
17
18
19
20

