IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD WALDEN JR., NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY on behalf of themselves and all others similarly situated,

Appellants,

v.

THE STATE OF NEVADA ex rel NEVADA DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 82030

JOINT APPENDIX VOLUME 3 OF 5

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DONALD WALDEN JR, NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY on behalf of themselves and all others similarly situated, Plaintiffs, vs. THE STATE OF NEVADA, *EX REL.* ITS NEVADA DEPARTMENT OF CORRECTIONS, and DOES 1-50, Defendants.	Case No.: 3:14-cv-00320-MMD-WGC

NDOC'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COLLECTIVE AND CLASS ACTION COMPLAINT

Defendant, the State of Nevada, ex rel. its Department of Corrections ("NDOC"), by and through its attorneys, Wilson Elser Moskowitz Edelman & Dicker LLP, submits its Motion to Dismiss Plaintiffs' First Amended Collective and Class Action Complaint ("FAC"). NDOC's Motion is brought pursuant to Fed. R. Civ. P. Rules 8(a) and 12(b)(6).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court should dismiss plaintiffs FAC with prejudice. **First**, even using a lawyer's head for figures, plaintiffs earned more than $7.25 per hour worked, accepting their allegation of 45 minutes of uncompensated work, since each of the respective plaintiffs earned more than $21 per hour. **Second**, plaintiffs pled no facts to establish a nexus between their naked assertions and assumptions of 45 minutes of uncompensated pre and post shift time per plaintiff and the unique jobs, differently sized facilities, locations within those dissimilar facilities, and different "tools" that were actually applicable to each plaintiff's employment. **Third**, Article 15, Section 16 of the Nevada Constitution does not apply to government employees, but only employees of private employers. **Fourth**, plaintiffs' NRS §284.180 claim lacks merit because they failed to exhaust their administrative remedies prior to filing suit. **Fifth**, plaintiffs' breach of contract claim deserves dismissal because employment with NDOC is statutory, not contractual.

II. PROCEDURAL HISTORY

Plaintiffs filed their initial complaint in May 2014. (ECF No. 1 at pg. 7.) This Court then granted conditional certification in March 2015. (ECF No. 45.) The Court, when viewing the initial complaint and the exhibits attached to plaintiffs motion for conditional certification, only considered whether plaintiffs and the opt-in class were similarly situated. (*Id*. at 3:20-21.)

NDOC moved for judgment on the pleadings on all causes of action alleged in plaintiffs' complaint. (ECF No. 86.) Plaintiffs had alleged they worked "upwards of 30-minutes of compensable work" before, and after "their regularly scheduled shifts." (ECF No. 94 at 4:1-3 (citing ECF No. 1 at pg. 11).) Thus, plaintiffs were alleging they worked an hour, but were not paid, each shift. (ECF No. 1 at 5, ¶¶17-18.)

This Court granted NDOC's motion. (ECF No. 94.) **First**, plaintiffs' FLSA cause of action based on NDOC's putative failure to pay the minimum wage for hours worked lacked merit because if plaintiffs were paid a high wage rate, their hourly rate would still be above the minimum wage. (*Id*. at 4:16-21.) **Second**, plaintiffs FLSA overtime claim lacked merit because they failed to allege the length of their workweek, the hours they worked for a given workweek, their regular rate of pay,

and the overtime owed for excess hours worked, but not compensated at the overtime rate. (*Id*. at 4:9-16.) The Court declined to address NDOC's remaining FLSA arguments and declined to exercise supplemental jurisdiction over plaintiffs' putative state law claims. (*Id*. at pgs. 4-5.)

III. PLAINTIFFS' AMENDED ALLEGATIONS

A. Plaintiffs Worked At Different Facilities, At Different Locations Within Those Facilities, Using Different Tools, And Performed Different Tasks.

Plaintiffs are Donald Walden, Nathan Echeverria, Aaron Dicus, Brent Everist, Travis Zufelt, Timothy Ridenour, and Daniel Tracy. (ECF No. 95 at pgs. 2-3.) Walden, Echeverria and Ridenhour worked at Southern Desert Correctional Center. (*Id*. at ¶44, 45, 49.) Dicus worked at High Desert State Prison and Southern Desert Correctional Center. (*Id*. at ¶46.) Everist works at High Desert State Prison. (*Id*. at ¶47.) Zufelt works at Northern Correctional Center. (*Id*. at ¶48.) Tracy has worked at High Desert State Prison, Women' Correctional Center, Southern Desert Correctional Center, and Ely State Prison. (*Id*. at ¶50.)[1] In sum, plaintiffs worked at five different prisons while employed with NDOC.

Walden alleges he worked as a search and escort officer in 2012 and as a senior officer for Unit 8 in 2011 at Southern Desert Correctional Center. (*Id*. at ¶¶44(a)-(b).) Echeverria alleges he worked in Unit 5 B in 2014, Visitation in 2012-2013, and Unit 7 A in 2011 at Southern Desert Correctional Center. (*Id*. at ¶¶45(a)-(d).) Dicus alleges he worked at Unit 5 A/B in 2017, Unit 6 C/D and Unit A/B in 2016, Unit 6 A/B in 2015, Unit 4 C/D at High Desert State Prison and Unit 1 in 2014, Unit 1 in 2013, and Unit 2 and Relief Post in 2012 at Southern Desert Correctional Center. (*Id*. at ¶¶46(a)-(g).) Everist alleges he worked at Unit 1 C/D Control in 2013-2014, Housing Unit 4 AB Floor in 2012, and Housing Unit 3 AB Control at High Desert State Prison. (*Id*. at ¶¶47(a)-(d).) Zufelt alleges he worked at Medical Transport Team in 2017, Culinary in 2016, B-Team Days Control in 2015, B-Team Days Central Control in 2014, Unit 3B-Team Nights in 2013, Graveyard

[1] Plaintiffs allege there are 19 different correctional facilities within Nevada. (*Id*. at ¶13 (citing NDOC Web site: http://doc.nv.gov/Facilities/Home/.) Yet, plaintiffs have only worked in five of prisons and none of the camps or transitional centers. Plaintiffs in their spurious class allegations ignore the vast differences in the size of these facilities, the scope of work performed by the correctional officers at those facilities, and the equipment used. Once the unique nature of each facility is examined, plaintiffs' class allegations will easily be shown in a forthcoming motion to be without merit.

S&E in 2012, Graveyard 8 Hours Unit 7B in 2011 at Northern Nevada Correctional Center. (*Id*. at ¶¶48(a)-(g).) Rednenour alleges he worked at Search and Escort B, days B Shift in 2013-2016, Unit 2 A Officer, days B shift in 2012, and swing shift in 2011 at Southern Desert Correctional Center. (*Id*. at 49(a)-(f).) Tracy alleges he worked at an undescribed location at undescribed tasks at the Women's Correctional Center in 2011, as K and Gym Officer from 2012-2015 at Southern Desert Correctional Center, and A Unit at Ely State Prison in 2016. (*Id*. at ¶¶50(a)-(f).)

B. Rather Than Plead Individualized Facts For A Given Work Week, Plaintiffs Ask The Court To Assume A Uniform Amount Of Uncompensated Time Regardless Of Facility, Location Within That Facility, Tools Required Per Task, Or Job Description.

Plaintiffs allege that NDOC required them to perform certain work activities before and after their scheduled shifts but failed to compensate them for additional tasks performed "off-the-clock" (*Id*. at ¶¶ 13-14.) The pre-shift and post-shift allegation is pled with insufficient facts to support the allegation by an individual plaintiff. (*Id*. at ¶¶19-22.)

Plaintiffs' pre-shift allegation consists of the following alleged tasks: **First**, plaintiffs allege they had to receive their assignments, pass uniform inspection, and collect tools; (*Id*. at ¶19); **Second**, plaintiffs had to proceed to their work station (*Id*.); and **Third**, plaintiffs had to be briefed by the officer they were relieving of duty. (*Id*.) Plaintiffs allege the pre-shift routine takes 30 minutes per shift. (*Id*. at ¶20.) Plaintiffs allege it takes 15 minutes to get to their shift location each day, regardless of where they are located. (*Id*. at ¶19.)

Plaintiffs' post-shift allegation consists of the following alleged uncompensated tasks: **First**, plaintiffs would have to de-brief the relieving officer (*Id*. at ¶21); **Second**, plaintiffs had to return to their office (*Id*.); and **Third**, plaintiffs had to return their tools used for the day (*Id*.) Plaintiffs allege the pre-shift routine takes 15 minutes per shift. (*Id*. at ¶20).[2] Despite working at different facilities, different areas within those facilities, at different tasks, and using different equipment, plaintiffs' claims form a lone allegation: "Plaintiff [insert name] spends an average of 45 minutes or more pre- and post-shift performing required work activities, as described above, off the clock and without

[2] Plaintiffs do not explain why they were alleging these pre and post shift tasks were alleged to take 1 hour in the original complaint, but now apparently take 45 minutes. *Compare* (ECF No. 1 at 5, ¶¶17-18) and (ECF No. 95 at ¶¶ 20 and 22).

compensation, each and every shift worked." (*Id*. at ¶¶44(c), 45(e), 46((f), 47(e), 48(h), 49(g), and 50(g).) Plaintiffs do not plead any facts to support this conclusion.

C. Plaintiffs' Limited Citation To Discovery Hurts, Rather Than Helps Their Allegations.

First, plaintiffs cite to NDOC Administrative Regulation 326. (*Id*. at ¶19.) This regulation requires that correctional officers to report to their supervisor upon arrival to see if overtime work is needed for the day. (*Id*.) No plaintiff pleads facts stating that this requirement takes any particular amount of time that is uncompensated. Moreover, no plaintiff pleads facts stating a supervisor refused any plaintiff overtime pay when requested.

Second, plaintiffs cite an unidentified operational procedure at an NDOC prison. (*Id*. at ¶28.) Plaintiffs do not explain the relevance of this operational procedure. Plaintiffs also do not allege that this operational procedure was in place at the facility they respectively worked. Finally, plaintiffs do not plead facts describing how long it took during any given week to comply with this procedure, even if the procedure were applicable at the facility a particular plaintiff was working.

Third, plaintiffs also cite to an email by "high ranking supervisors" to correctional officers requiring them to be at their post prior to their shift. (*Id*. at ¶29.) Plaintiffs fail to alert the Court that this email was written about High Desert State Prison (*See* Ex. A), where only Tracy, Dicus, and Everist worked. (*See* ECF No. 96 at ¶¶46, 47, and 50.) The email concerns the distance between operations at High Desert State Prison and the quad between Housing Units 9 and 12, a location where no plaintiff claims to have worked. (*Compare* Ex. A and ECF No. 96 at ¶¶46, 47, and 50.)[3]

Fourth, plaintiffs cite to the need to go to a common place to collect gear. (ECF no. 96 at ¶32(a).) Plaintiffs do not plead any individualized facts during a given week detailing how long it took an individual plaintiff to pick up their gear. Plaintiffs appear to assume that it takes the same time period for a gym officer at the Women's Correctional Center such as Tracy ((*Id*. at ¶¶50(a)-(f)) the same time to collect gear as a culinary worker such as Zufelt. (*Id*. at ¶¶48(a)-(g).)

[3] Ex. B, attached here is a satellite image from Google Maps of High Desert State Prison. This Court should take judicial notice of the satellite image as to the location of Housing Unites 9 and 10. *See U.S. v. Perez-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012).

Fifth, plaintiffs cite to a snippet of Warden Williams' deposition testimony to "clear and do everything." (*Id*. at ¶34.) Plaintiffs ignore that Warden Williams was testifying about Southern Desert Correctional Center. (Ex. C at pp. 12-13.) Warden Williams had not worked at any other correctional facility within NDOC, as he was previously employed in Illinois. (*Id*. at 13:14-15.) Plaintiffs ignore that Warden Williams testified that he had seen correctional officers "come in as short as ten minutes and go through the metal detector and check in to their post." (*Id*. at 134:12-14.) *Worse still*, Warden Williams was not testifying about the particular time it took any particular plaintiff in this case to report to their post or return from their post after the shift was over.

Sixth, plaintiffs cite to scheduling policies within NDOC regarding overtime. (ECF No. 95 at ¶¶39-42.) Plaintiffs describe these as unambiguous. (*Id*. at ¶39.) Yet, Plaintiffs ignore the absence of any allegation that they were denied overtime if they requested overtime compensation.

D. Plaintiffs Ignore That NDOC Facilities Vary Substantially In Size And Capacity.

Plaintiffs heavily rely on the time spent reporting to the shift and returning to their shift to support their respective FLSA causes action. Indeed, plaintiffs allege it "could take up to 15 minutes or more per employee per shift." (*Id* at ¶19.) This equates to 30 minutes of the 45 minutes of alleged uncompensated time for which plaintiffs seek compensation.

Plaintiffs ignore that the 5 NDOC facilities they worked at vary in size. High Desert State Prison has 1,576,000 square feet of space. (Ex. D, http://doc.nv.gov/Facilities/HDSP_Faciltiy/) It has a capacity of 4,176 inmates. (*Id*.). In contrast, Florence McClure Women's Correctional Center has a capacity of 950. (Ex. E, http://doc.nv.gov/Facilities/FMWCC_Facility/.) Even Southern Desert Correctional Center with a capacity of 2,149 is dwarfed by High Desert State Prison. (Ex. F, http://doc.nv.gov/Facilities/SDCC_Facility/.) In contrast to the size of High Desert State Prison and Southern Nevada Correctional Center, Northern Nevada Correctional Center has a 1,619 inmate capacity, and smaller still, Ely State Prison has a capacity of only 1,183 inmates. (Exs. G and H, http://doc.nv.gov/Facilities/NNCC_Facility/ and http://doc.nv.gov/Facilities/ESP_Facility/.)[4] (Exhibits D through H last visited on May 10, 2017.)

[4] NDOC respectfully requests that this Court take judicial notice of the information on NDOC's website. *Daniels–Hall v. National Educational Ass'n*, 629 F.3d 992, 998–99 (9th Cir.2010).

IV. LEGAL STANDARDS

To survive a motion to dismiss, a complaint need not contain "detailed factual allegations," however mere "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" is not sufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Each cause of action must include "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," meaning that the court can reasonably infer "that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation and internal quotation marks omitted). The Ninth Circuit, applying the pleading standards described in *Twombly* and *Iqbal*, has held that the plaintiff must allege non-conclusory facts that, together with reasonable inferences from those facts, are "plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). Most importantly, a complaint cannot survive dismissal "…if it tenders naked assertion[s] devoid of…"further factual enhancement…" *Ashcroft*, 556 U.S. at 678 (2009) (*quoting Bell Atlantic Corp.*, 550 U.S. at 557).

V. LEGAL DISCUSSION

Plaintiffs' first two causes of action should be dismissed. **First**, the minimum-wage claim must be dismissed because Plaintiffs failed to show that they were paid less than the federal minimum wage of $7.25 per hour, on average, over the course of an entire pay period. **Second**, the overtime claim must be dismissed for two independent reasons: (1) Plaintiffs failed to comply with *Landers*; and, (2) Plaintiffs failed to show that the alleged preliminary and postliminary "off-the-clock" job tasks are compensable.

A. Plaintiffs' Federal Law Claims Fail.

1. Plaintiffs Still Have Not Alleged Facts Necessary to State a Claim for Minimum Wage Violations Pursuant to Section 206 of FLSA.

The Court should dismiss Plaintiffs' First Cause of Action because Plaintiffs failed to allege a plausible minimum wage violation under the FLSA. The FLSA requires that employers pay employees a minimum wage of at least $7.25 per hour during any work week. 29 U.S.C. § 206(a); *Nye v. Ltd.*, 2-16-CV-00702-RFB-CWH, 2017 WL 1228408, at *2 (D. Nev. Apr. 2, 2017). An

employer violates this section only when an employee's total weekly wage "averaged across their total time worked" falls below the required minimum wage. *Adair v. City of Kirkland*, 185 F.3d 1055, 1063 (9th Cir. 1999) (*citing Hensley v. Macmillan Bloedel Containers, Inc.*, 786 F.2d 353, 357 (8th Cir. 1986)). This requirement is calculated by finding "the number of hours actually worked that week multiplied by the minimum hourly statutory requirement." *Hensley*, 786 F.3d at 357.

In this case, Plaintiffs' claim under Section 206 is flawed and cannot be saved even after considering multiple impermissible and incorrect assumptions regarding the Plaintiffs' individual and collective claims. Plaintiffs allege generally that each named Plaintiff worked for 45 minutes every workday (pre and postliminary, combined) without compensation.[5] Plaintiffs also claim that each named Plaintiff worked either a standard 40-hour work week or an alternative 80-hour per work period variable schedule.[6] As shown below, even if the Plaintiffs' allegations are taken as true, they are vague and fail to show that the named Plaintiffs were paid below minimum wage for any work:

Plaintiff	Wage	Days Per Work Period	# of Hours Alleged Unpaid Daily	Hours Per Work Schedule	Total Hours Alleged	Effective Wage for Total Alleged Time
Walden[7]	$ 23.00	10	0.75	80	87.5	**$21.03**
Echevarria	$ 23.50	10	0.75	80	87.5	**$21.49**
Dicus	$ 21.17	10	0.75	80	87.5	**$19.36**
Everist	$ 22.80	10	0.75	80	87.5	**$20.85**
Zufelt	$ 22.00	10	0.75	80	87.5	**$20.11**
Ridenour	$ 24.00	10	0.75	80	87.5	**$21.94**
Tracy	$ 26.00	10	0.75	80	87.5	**$23.77**

Plaintiffs' allegations show that not one of their hourly rates dipped below the federal minimum wage, even if the alleged uncompensated hours are included into their pay.[8] Pursuant to *Adair*, NDOC is not liable because the Plaintiffs cannot establish that they were paid below the minimum

[5] FAC at 14:1 – 3 (Donald Walden), 15:6 – 8 (Nathan Echevarria), 16:25 – 17:3 (Aaron Discus), 18:5 – 7 (Brent Everist), 20:2-5 (Travis Zufelt), 21:13 – 15 (Tim Redenour), 23:9-13 (Daniel Tracy). Plaintiffs generally allege that all "similarly situated" opt-in Plaintiffs have similar schedules and fail to differentiate amongst them and the named Plaintiffs.

[6] *Id.* at 13:18 – 26 (Donald Walden – 80 Hours Variable), 14:19 – 15:3 (Nathan Echevarria – 80 Hours Variable (most recently)), 15:25 – 16:23 (Aaron Discus – 40 Hours), 17:1 – 18:4 (Brent Everist – 40 Hours), 18:25 – 19:24 (Travis Zufelt – 40 Hours), 20:16 – 21:12 (Tim Redenour – 40 Hours), 22:8 – 23:6 (Daniel Tracy – 40 Hours).

[7] It should be noted that Mr. Walden alleges that he worked a 14-day 80 Hour Variable schedule. As such, this may slightly alter the amount of hours he worked each day on a week-to-week basis. Given that the named Plaintiffs' effective hourly rates are significantly in excess of the federal minimum wage, NDOC presumes that any variation in day-to-day hours has only a *de minimus* effect and will not change the overall result demonstrated herein.

[8] *See supra*, n.1

wage at any time. No other allegations within the FAC explain how Plaintiffs' average wages decrease at any time below the federal minimum wage. Nor does the FAC show that the opted-in Plaintiffs would succeed, either. Based solely upon the allegations contained in the FAC, Plaintiffs' First Cause of Action should be dismissed with prejudice as a matter of law.

2. The Court Should Dismiss the Plaintiffs' Second Cause of Action For Two Independent Reasons.

a. The Court Should Dismiss Plaintiffs' Overtime Claim Because Plaintiffs Have Still Not Complied with the Landers Pleading Standard.

The Court should dismiss Plaintiffs' Second Cause of Action because Plaintiffs' have not pled facts in compliance with *Landers v. Quality Communications, Inc.*, 771 F.3d 638 (9th Cir. 2015). As this Court correctly noted in its Order granting NDOC's Motion for Judgment on the Pleadings (ECF No. 94), Plaintiffs were required to plead in a manner consistent with *Landers*, 771 F.3d at 638. In *Landers*, the Ninth Circuit established that "at a minimum, a plaintiff asserting a violation of the FLSA overtime provisions must allege that she worked more than forty hours in a *given* workweek without being compensated for the hours worked in excess of the forty during *that* workweek." *Id.* at 646 (emphasis added). Further, "[a] plaintiff may establish a plausible claim by estimating the length of her average workweek *during the applicable time period* and the average rate at which she was paid, the amount of overtime wages she believes she is owed, or any other facts that will permit the court to find plausibility." *Id.* at 645 (*citing Pruell v. Caritas Christi*, 678 F.3d 10, 13 (1st Cir.2012)) (emphasis added).

Several courts within this District have analyzed these requirements and applied them consistently. While "plaintiffs in these types of cases cannot be expected to allege 'with mathematical precision,' the amount of overtime compensation owned by the employer, they should be able to specify *at least one workweek* in which they worked in excess of forty hours and were not paid overtime wages." *Levert v. Trump Ruffin Tower I, LLC*, 2:14-CV-01009-RCJ, 2015 WL 133792, at *3 (D. Nev. Jan. 9, 2015) (*citing Landers*, 771 F.3d at 646) (emphasis in original). "Plaintiffs bringing an FLSA overtime claim satisfy the pleading standard set forth in *Twombly*, *Iqbal*, and *Landers* when they allege that they: (1) work at least 40 hours a week "on the clock," and

(2) are required to perform specific tasks "off the clock" (i.e., without compensation) for a specific length of time each shift." *Reader v. HG Staffing, LLC*, 3-16-CV-00387-LRH-WGC, 2017 WL 843170, at *5 (D. Nev. Mar. 2, 2017).[9]

Here, not one individual plaintiff pled any facts to satisfy *Landers*. *Landers* addressed this issue when it held that a plaintiff must allege "that she worked more than forty hours in a *given* workweek." 771 F.3d at 644; *Levert*, 2015 WL 133792, at *3 (emphasis in original). Rather, each individual plaintiff asked this Court to accept unalleged facts in support of their claims for relief.

For example, plaintiffs unjustifiably ask this Court to assume it takes the same amount of time for each person to "muster," pick up their tools, and report to their post. The assumption that each of these tasks take the same amount of time regardless of profession, facility, location or other factors is unwarranted because no facts have been pled upon which to base such an assumption. For example, Walden was a search and escort officer in 2012 at Southern Desert Correctional Center (*Id.* at ¶¶44(a)-(b)), but Everist alleges he worked Housing Unit 3 AB Control at High Desert State Prison. (*Id.* at ¶¶47(a)-(d).) In contrast, Zufelt alleges he worked at Medical Transport Team in 2017 and Culinary in 2016 at Northern Nevada Correctional Center. (*Id.* at ¶¶48(a)-(g).) Tracy alleges he worked at the undescribed location at undescribed tasks at the Women's Correctional Center in 2011. (*Id.* at ¶¶50(a)-(f).) It is impossible to tell how long it took Walden, Everest, Zufelt, or Tracy to perform any of the tasks they claim is compensable. The tasks are different. The facilities are vastly different in size. The time to report to post for each job is impossible to even estimate, let alone compare by plaintiff. Moreover, it is impossible to compare the time it may take to debrief a worker in the culinary department with a correctional officer who works in a housing unit at High Desert State Prison. Plaintiffs certainly plead no facts to demonstrate any similarity between the two tasks, yet his lawsuit requests that we make the assumption that they are identical. It is actually beyond peradventure that each of these plaintiffs spent vastly differing amounts of time reporting to their post and returning, but plaintiffs invite this Court to assume it is 45 minutes.

[9] The *Reader* Court also held that a Plaintiff may also satisfy the pleading standard if the amount of compensated time is less than 40 hours per week but the alleged uncompensated time, when added, exceeds 40 hours. *Id.* at n. 6.

Landers, *Iqbal*, and *Twombly* prevent this Court from accepting plaintiffs' invitation to accept a complaint based on nothing more than assumption and speculation.

Plaintiffs cite to discovery that further weakens their assumptions. For example, basic geography shows that the Quad referred to in the High Desert State Prison is at the far edge of the prison, where none of the individual plaintiffs worked. Warden Williams testified that some correctional officers could make it to their post in 10 minutes. Individual plaintiffs had different uniforms applicable to their unique jobs, whether working in the gym, the culinary portion, or a housing unit. The point is that because each plaintiff has a different job, in a different facility, in a different part of the facility, and uses different tools to perform those jobs, this Court should not and cannot accept plaintiffs' naked assumption that it took each plaintiff 30 minutes to report to their shift and 15 minutes to return from their shift each day. Plaintiffs are required by Rule 8(a) to plead facts. They did not. To allow this practice would run an "end around" the intent of the decision and would nullify the very reason why *Landers* included a pleading standard in the first instance.

Also, Plaintiffs do not allege that a given plaintiff "work[ed] at least 40 hours a week 'on the clock,'" that NDOC required them to work "off the clock … for a specific length of time each shift," or even an approximation of time in each category specific to the week in question. For these reasons, the Court should recognize that Plaintiffs' half-hearted and contrived assumptions fail to meet their burden under *Landers*.

b. Plaintiffs' Have Failed to Plead Facts Sufficient to Demonstrate that Alleged Preliminary and Postliminary Work Tasks Are Compensable Under FLSA.

Independently of Plaintiffs' pleading inadequacies, the Court should dismiss Plaintiffs' Second Cause of Action because they fail to allege how the various job activities identified in their Complaint are "work" (as defined by FLSA), "integral and indispensible" to a "principal activity", or "intrinsic" to the discharge of the Plaintiffs' duties as prison guards. The Portal-to-Portal Act exempts certain activities, so that an employee's time spent on those activities is not compensated and does not accrue toward the overtime limit. 29 U.S.C. § 254. These exempted activities include "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" and "activities which are preliminary to or

postliminary" to the "principal activity or activities" of employment. *Id.* § 254(a); *Young v. Beard*, 2:11-CV-02491-KJM-AC, 2015 WL 1021278, at *7 (E.D. Cal. Mar. 9, 2015) (*appeal dismissed* (June 30, 2015)). At times, preliminary activities are compensable if they are an "integral and indispensable part" of an employer's "principal activities." *Steiner v. Mitchell*, 350 U.S. 247, 256, 76 S.Ct. 330, 100 L.Ed. 267 (1956).

For its part, the Ninth Circuit requires a "three-stage inquiry." *Bamonte v. City of Mesa*, 598 F.3d 1217, 1224 (9th Cir.2010) (*citing Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 – 03 (9th Cir.2003)). First, the activity must be "work." *Id.* Second, it must be "integral and indispensable" to the principal work performed. *Id.* And third, an activity is not compensable if it is *de minimus*. *Id.*

Here, Plaintiffs allege that they are required to partake in the following activities without compensation:

Preliminary	**Postliminary**
Roll Call	Equipment Turn-in
Uniform Inspection	Pass Down/Information Dispensation
Obtain Assignments	
Gear Collection	
Pass Down/Information Collection	

In a motion to dismiss posture, Plaintiffs must allege facts to qualify the above activities as "work" under the FLSA, and that these activities are "integral" and "indispensable" to the plaintiffs' discharge of their "principal" job activities. *Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513, 518 (2014).

i. The Allegations Fail To Show That The Activities Are "Work"

The second cause of action should be dismissed because Plaintiffs fail to allege facts necessary to qualify the activities as "work." The FLSA itself does not define the term "work." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 875 (2014). However, the United States Supreme Court has defined "work" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." *See Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598, 64 S.Ct. 698, 88 L.Ed.

949 (1944). This definition has two parts: "controlled or required by the employer," and "pursued necessarily and primarily for the benefit of the employer." *Bamonte*, 598 F.3d at 1224.

In this case, Plaintiffs allege that these activities are required by NDOC Regulations as the sole basis for why they should be considered compensable work. These tasks are "controlled by the employer" (i.e., they are required tasks) and "required by the employer" (i.e., that the officers are required to accomplish some variation of the tasks the Plaintiffs' have alleged).

At the same time, Plaintiffs' do not allege that NDOC requires *when* each officer is required to perform the above mentioned tasks. For example, Plaintiffs' allege that they were required to engage in the above activities after arriving to work and are required to incorporate travel time into their arrival to work so that they can check into "Operations" and be at their assigned post on time.[10]

However, Plaintiffs do not allege any facts to show that NDOC required them to do these things "off-the-clock." Instead, Plaintiffs allege that supervising officers (who are, themselves, eligible to become a part of this collective action) direct Plaintiffs to be at their posts on time and to incorporate their travel from the parking lot into their overall travel time. Plaintiffs do not allege any facts to demonstrate that NDOC ***forced them*** to be late to their assigned posts nor that NDOC is setting unrealistic expectations for the Plaintiffs. ***Nor do Plaintiffs' allege differences in the time when Plaintiffs are required to report to the prison vs. when they are required to report to their assigned posts for the day.*** Instead, Plaintiffs look to this Court to "assume" that these times are identical. In this regard, Plaintiffs have not sufficiently alleged that NDOC is "controlling" or "requiring" that they work "off-the-clock."

Similarly, NDOC does not "benefit" from Plaintiffs doing the above tasks "off-the-clock," nor is such activity compensable. Legally speaking, employees that arrive early for their own convenience or the convenience of fellow employees do not incur compensable time just because they are conducting incidental job activities. *Lindow v. United States*, 738 F.2d 1057, 1061 (9th Cir.1984) (*citing Blum v. Great Lakes Carbon Corp.*, 418 F.2d 283, 287 (5th Cir.1969) and *Jackson v. Air Reduction Co.*, 402 F.2d 521, 524 (6th Cir.1968)).

[10] First Amended Complaint, *supra*, n. 1, 8:18 – 23.

Plaintiffs also do not sufficiently allege that NDOC extracts additional benefits from its officers performing incidental job tasks "off-the-clock." The benefit NDOC derives from its officers is the safety and security of the prison—these are the officers' principal job tasks. Plaintiffs are prison guards; their job is to guard prisons and prisoners. Thus, NDOC derives little benefit, if any, from incidental job tasks being completed outside of normally scheduled shift times. Presumably, NDOC'S respective prisons still have officers on duty (separate from the Plaintiffs in this matter) whose job it is to guard the safety and security of the prison, whether the incidental "off-the-clock" job tasks are performed or not. For this reason, Plaintiffs have not alleged what tangible benefit NDOC supposedly receives from these tasks being completed "off-the-clock" and the Court may not presume what such a benefit might be.

ii. The Alleged Preliminary and Postliminary Job Duties are Neither Intrinsic Nor Integral and Indispensible to the Plaintiffs' Principal Job Duties.

The Court should also not consider the tasks articulated by the Plaintiffs to meet the standards for "intrinsic" and/or "integral or indispensible" because Plaintiffs have failed to plead plausible supporting allegations. Simply stated, it is not enough that a job task be "work" under the FLSA; Plaintiffs must also allege that a job task is "integral and indispensible" and "intrinsic" to the discharge of a "principal activity" for it to be compensable. An "integral and indispensable" duty is one that is "necessary to the principal work performed and done for the benefit of the employer." *Alvarez*, 339 F.3d at 902–03. "[A]n activity is not integral and indispensable to an employee's principal activities unless it is an *intrinsic* element of those activities and one with which the employee cannot dispense if he is to perform those activities." *Integrity Staffing*, 135 S. Ct. at 518 (emphasis added). Courts have held a number of preliminary activities are integral and indispensable. The most common of these are putting on, removing, and sanitizing protective equipment. *See, e.g., Alvarez*, 339 F.3d at 902–03. Other compensable activities include showering and changing clothes to remove toxic chemicals and sharpening knives at a meat packing plant. *See Integrity Staffing*, 135 S.Ct. at 518 (further citation omitted).

Yet, the variety of non-compensable activities is much broader. The United States Supreme Court has held that warehouse workers' time spent waiting to undergo an antitheft security screening

and undergoing those screenings before leaving the workplace each day was ***not compensable*** under the FLSA. *Id*. at 518–19.[11] Non-compensable activities also include, for example:

- Commuting and "transportation of light equipment," *see, e.g., Dooley v. Liberty Mut. Ins. Co.*, 307 F. Supp. 2d 234, 245–47 (D. Mass. 2004);
- Checking in and out and waiting in line to check in and out, *Bernal v. Trueblue, Inc.*, 730 F. Supp. 2d 736, 741–45 (W.D. Mich. 2010);
- Waiting for paychecks, *Vega v. Gasper*, 36 F.3d 417, 425 (5th Cir. 1994);
- Placing personal items in lockers or reviewing a schedule, *Perez v. Banana Republic, LLC*, No. 14–01132, 2014 WL 2918421, at *5–6 (N.D. Cal. June 26, 2014);
- Inventory and safety inspections en route to work locations or home, *Colella v. City of New York*, 986 F. Supp. 2d 320, 342–44 (S.D.N.Y. 2013);
- And, *perhaps most applicable here*, polishing shoes, boots and duty belts, cleaning radios and traffic vests, and oiling handcuffs, *Musticchi v. City of Little Rock, Ark.*, 734 F. Supp. 2d 621, 630–32 (E.D. Ark. 2010).

Here, the Plaintiffs' are prison guards. Their principal job duty is to guard convicts under the Nevada Department of Corrections' custody and prevent their escape. Contrary to Plaintiffs' assertions, a correctional officer's principal duties are not to sit through briefings, check equipment in and out, and walk around their facility. Those activities are, at best, incidental to their principal job task. The analysis must then shift to whether: 1) these tasks are "intrinsic elements" of guarding a prison, and 2) are duties that a prison cannot be guarded without. Plaintiffs' allegations are not compensable under the Portal-to-Portal Act as clarified in *Integrity Staffing* because they fail to allege in any capacity *how* the alleged preliminary and postliminary job activities are "intrinsic" to the job of guarding a prison. The Court may not presume the facts necessary to establish the sufficiency of the Plaintiffs' allegations. Still, without them, Plaintiffs' allegations fail to meet legal sufficiency and are not "plausible" as defined in *Iqbal* and *Twombly* as a matter of law.

B. Plaintiffs' State Law Claims Fail.

The Court should dismiss Plaintiffs' three state law claims—causes of action numbers 3, 4, and 5—because each one suffers from an incurable procedural defect and each one fails to include minimum factual grounds required to provide fair notice of the claim.

- **Plaintiffs' third cause of action**—state law claim for failure to pay minimum wages under the Nevada Constitution—must be dismissed because:
  (1) the Nevada Constitution does not govern the wages of government employees (NRS Chapter 284 does); and

[11] NDOC notes and accepts that Plaintiffs are not alleging that passing through security on the way into, or out of, any NDOC facility is compensable.

(2) Plaintiffs fail to state sufficient factual grounds required to provide fair notice of such a claim.

- **Plaintiffs' <u>fourth</u> cause of action**—breach of NRS 284.180—must be dismissed because:
  (1) Plaintiffs failed to exhaust their administrative remedies under NRS Chapter 284 prior to filing suit; and
  (2) Plaintiffs fail to state factual grounds required to provide fair notice.
- **Plaintiffs' <u>fifth</u> cause of action**—common law breach of contract—against NDOC—must be dismissed because:
  (1) Employment with the State of Nevada is governed by statute (NRS Chapter 284), not a written agreement; and
  (2) Even if employment with the State of Nevada and its employees was governed by contract (which NDOC denies), Plaintiffs failed to allege any facts showing that any such employment agreement exists.

Under Nevada law, Plaintiffs' only potential claim here falls under NRS 284, which requires an exhaustion of administrative remedies that Plaintiffs failed to allege. Therefore, the Court should dismiss, or decline to exercise jurisdiction over, Plaintiffs' three State law causes of action.

1. <u>This Court Should Dismiss Plaintiffs' Third Cause Of Action—A State Law Claim For Failure To Pay Minimum Wages Under The Nevada Constitution—For Failure To State A Claim.</u>

This Court should dismiss Plaintiffs' third cause of action—a state law claim for failure to pay minimum wages under Article 15, Section 16 of the Nevada Constitution—because the State is not considered an "employer" such that Section 16 has no application. Article 15, Section 16 of the Nevada Constitution establishes a minimum wage that must be paid by private employers to employees, but does not apply to the government. It states, in pertinent part, as follows:

> A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits…

Nev. Const. Art. 15, § 16 (A). Section (C) defines who an "employee" and "employer" are for purposes of Section 16's application and states:

> As used in this section, "employee" means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days. ***"Employer" means any individual, proprietorship, partnership, joint venture,***

> ***corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.***

Id. at § 16 (C). Thus, for purposes of Article 15, Section 16 of the Nevada Constitution, the State is not an "employer" such that Plaintiffs can maintain their Third Cause of Action against NDOC for failure to pay minimum wages in violation of the Nevada Constitution.

The State of Nevada has established its own statutory scheme that governs the employer/employee relationship between the government and its employees in the State Personnel System pursuant to NRS 284.

By way of background, the State Personnel System was specifically set up to:

(1) Provide all citizens a fair and equal opportunity for ***public service***;
(2) Establish conditions of service which will attract officers and employees of character and ability;
(3) ***Establish uniform job and salary classifications;*** and
(4) Increase the efficiency and economy of the agencies in the Executive Department of the State Government by the improvement of methods of personnel administration.

NRS 284.010. The State Personnel System further establishes compensation for classified and unclassified employees.

See NRS 284.148. Specifically, NRS 284.180 establishes a pay plan to set rates applicable to all positions in classified service. NRS 284.180 provides, in relevant part, as follows:

> 2. Credit for overtime work directed or approved by the head of an agency or the representative of the head of the agency must be earned at the rate of time and one-half, except for those employees described in ***NRS 284.148***.
> 3. Except as otherwise provided in subsections 4, 6, 7 and 9, overtime is considered time worked in excess of:
> (a) Eight hours in 1 calendar day;
> (b) Eight hours in any 16-hour period; or
> (c) A 40-hour week.
> * * *
> 6. For employees who choose and are approved for a variable workday, overtime will be considered only after working 40 hours in 1 week.
> * * *
> 8. An agency may experiment with innovative workweeks upon the approval of the head of the agency and after majority consent of the affected employees. The affected employees are eligible for overtime only after working 40 hours in a workweek.
> * * *
> 10. All overtime must be approved in advance by the appointing authority or the designee of the appointing authority...

NRS 284.172 requires the Administrator to prepare and maintain an index categorizing all positions that are classified, including positions that require certification by Peace Officers' Standards and Training Commission pursuant to NRS 289.150 to 289.360, inclusive. NRS 284.171. Pursuant to NRS 289.150[12] and 289.220[13] correctional officers are defined as peace officers.

Because the relationship between NDOC and its employees, including its correctional officers, is governed by the provisions set forth in NRS Chapter 284, not by the Nevada Constitution, Plaintiff's Third Cause of Action has no legal basis. Accordingly, this Court should dismiss Plaintiffs' Third Cause of Action–failure to pay wages in violation of the Nevada State Constitution—for failure to state a claim for relief.

Likewise, Plaintiff's Third Cause of Action fails to state a claim for relief because NDOC does not "enter into contracts of employment" such that NDOC cannot fall within the definition of an "employer" under the State Constitution. Nev. Const. Art. 15, § 16 (C). Instead, the terms of public service are fixed by statute, such that an employee has no right to file a breach of contract claim with respect to employment. *See Gibson v. Office of the Att'y Gen.*, 561 F.3d 920, 929 (9th Cir. 2009).

Plaintiffs misleadingly allege in their amended complaint that "there is a written employment agreement at will" in an attempt to bring NDOC within the parameters of an "employer" subject to Article 15, Section 16 of the Nevada Constitution (*see* ECF No. 95 ¶ 81). However, the so-called "agreement" incorporated into Plaintiffs' FAC is the "Nevada Department of Corrections Variable Work Schedule" (*Id.* at ¶ 95), that is actually entitled the "Nevada Department of Corrections Variable Work Schedule **Request**" (Ex. I, the "Request"). Plaintiffs propose that the Request

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[12] NRS 289.150 provides that the following persons have the powers of a peace officer:
1. Sheriffs of counties and …, their deputies and correctional officers
2. Marshals, … and correctional officers of cities and towns.….

[13] NRS 289.220 further provides:
1. The Director of the Department of Corrections, the Inspector General of the Department, a person employed by the Department …and any officer or employee of the Department so designated by the Director have the powers of a peace officer when performing duties prescribed … include, but are not limited to, pursuit and return of escaped offenders, transportation and escort of offenders and the general exercise of control over offenders within or outside the confines of the institutions and facilities of the Department.
2. A person appointed pursuant to NRS 211.115 to administer detention facilities or a jail, and his or her subordinate jailers, corrections officers and other employees whose duties involve law enforcement have the powers of a peace officer.

somehow overrides NRS 248 and constitutes an "employment agreement" between NDOC and its employees. Instead, the Request merely sets forth a correction officer's preference to work a five-day, 40 hour week versus a 14-day, 80 hour variable schedule, as authorized by NRS 284.180.

Thus, despite Plaintiffs' attempts at "sleight of hand" in their pleading, the fact is that NDOC's correctional officers complete this form with their desired work schedule. Yet, in no way does this process constitute NDOC "entering into contracts of employment" with its correctional officers, nor does it subject NDOC to being deemed an "employer" as define by Article 15(C), Section 16 of the Nevada Constitution.

Moreover, as discussed below, NDOC's Variable Work Schedule Request, also references the provisions set forth NRS 284.180, and states that "overtime will be considered only after working 80 hours biweekly," further supporting that the provisions of NRS Chapter 284 govern the employment relationship between NDOC and its employees- not the Nevada Constitution. *See* Ex. I.

In summary, the State of Nevada Personnel System as set forth in NRS Chapter 284 (and not a contract or the State Constitution) governs the relationship between NDOC and its employees. Thus, this Court is compelled to dismiss Plaintiff's third cause of action (Failure to Pay Minimum Wages in Violation of the Nevada Constitution) for failure to state a claim for relief.

2. This Court Should Dismiss Plaintiffs' Fourth Cause Of Action (Breach Of NRS 284.180) Because Plaintiffs Failed To Exhaust Their Administrative Remedies Prior To Filing Suit.

Plaintiffs' fourth cause of action must also be dismissed because Plaintiffs failed to allege that any Plaintiff exhausted his or her administrative remedy prior to filing suit. NRS 284.384 sets forth a statutory process allowing claimants to file a grievance and provides that the Commission may set forth a procedure for a state employee to address "grievances" regarding employment with the government. NRS 284.384. For purposes of this statute, a grievable event, or "grievance" is:

> "any act, omission or occurrence which an employee who has attained permanent status feels constitutes an injustice relating to any condition arising out of the relationship between an employer and an employee, including, but not limited to, ***compensation***, ***working hours***, working conditions, membership in an organization of employees or the interpretation of any law, regulation or disagreement."

NRS 284.384(6).

The process further dictates that if the employee is still not satisfied after filing the grievance, he or she can file an appeal to the Employee Management Committee to issue a final decision. NRS 284.284(4). Further, NRS 233B.130 (Nevada's Administrative Procedure Act) sets forth the procedure for an individual to obtain judicial review of that agency's actions once a final decision is entered. NRS 233B.130. Specifically, it provides that any petition for judicial review must be filed within 30 days of the final decision of the agency. NRS 233B.130(2)(d). Where an individual fails to exhaust its administrative remedies, the Nevada Supreme Court has also held a claim is unripe for judicial review. *City of Henderson v. Kilgore*, 122 Nev. 331, 336 (2006).

Here, Plaintiffs fail to allege anywhere in Plaintiffs' Fourth Cause of Action (Breach of NRS 284.180), or anywhere in the FAC, that any Plaintiff exhausted their administrative remedies prior to filing suit. Accordingly, Plaintiffs fail to state a claim for relief because they failed to allege that they complied with NRS 284.384 by filing a grievance with NDOC regarding a claim they were required to work overtime without pay. (*See, e.g.*, ECF 95.)

Plaintiffs also failed to allege that they filed appeals with the Employee Management Committee for a final decision regarding their grievance per NRS 284.284(4). By failing to file a grievance as provided for in NRS Chapter 284, Plaintiffs failed to exhaust their administrative remedies prior to bring this action and asserting their Fourth Cause of Action (Breach of NRS 284.180). Accordingly, this Court's dismissal of Plaintiffs Fourth Cause of Action is proper for failure to state a claim for relief.

Moreover, even if Plaintiffs had exhausted their administrative remedies under NRS Chapter 284 (which they did not), the proper forum for judicial review related to their claims would be Nevada State court, and not federal court.

3. This Court Should Dismiss Plaintiffs' Fifth Cause Of Action—Breach Of Contract Claim Against NDOC—Because Employment With The State Of Nevada Is Governed By NRS 284 (discussed above), Not A Written Agreement.

The Court should dismiss Plaintiffs' Breach of Contract Claim (Fifth Cause of Action) because the employment relationship between the State of Nevada and its employees is governed by statute-NRS Chapter 284 (discussed above) not contract.

In Plaintiffs' FAC, they allege that NDOC had an agreement with Plaintiffs under the NDOC Variable Work Schedule to pay overtime for all hours worked over either the selected 40-hour work week or the 80-hour work week (ECF No. 95, ¶ 94.) Plaintiffs allege that NDOC violated this agreement by not paying them for overtime worked, violating state and federal law. *Id*. at ¶¶ 96-97.

In actuality, the "employment agreement" Plaintiffs are referring to is a standard NDOC document called "Nevada Department of Corrections Variable Work Schedule Request," discussed above. *See* Ex. I. The document simply gives the employee the choice of working either a 40 hour work week over the course of 5 days or an 80 hour work schedule over the course of 14 days. *Id*. If an employee elects the 40 hour schedule the form states:

> I hereby choose and request approval for a variable workday schedule. I understand that by doing so, I may with supervisory approval, adjust my work schedule in a week so I work more than 8 hours a day, ***providing I do not exceed 40 hours in a workweek without supervisory approval***."

If an employee elects an 80 hour schedule over a 14 day period the form states:

> I hereby choose and request approval for a variable biweekly work schedule. I understand that by doing so I may, with supervisory approval, adjust my work schedule during the 14 day biweekly work period. ***I also under that this variable schedule is an exemption to the 40 hour seven day, overtime rule under the Fair Labor Standards Act.***

Id. The form goes on to state:

> Overtime will be paid under Nevada Revised Statute 284.180. Overtime will be considered only after working 80 hours biweekly.

Id. This form in not an "employment agreement" between NDOC and its correctional officers as Plaintiffs contend, nor does it contain any indicia of an employment contract whatsoever. For good reason, state employees are forbidden from entering into private contracts with the state. *See* NRS NRS §281.230(1). Rather, the form gives officers the option of choosing either a 40-hour work week over the course of five days or an 80-hour work schedule over the course of 14 days, complying with the provisions set forth in NRS 284 that govern a classified employees rate of pay.

Consistent with this conclusion, the Ninth Circuit has held that because the terms of public service are fixed by statute, an employee has no right to file a breach of contract claim alleging they

were denied certain rights with respect to employment. *See Gibson v. Office of the Att'y Gen*., 561 F.3d 920, 929 (9th Cir. 2009).

In summary, the Nevada Department of Corrections Variable Work Schedule Request is in no way a "written employment agreement" between NDOC and the correctional officers, and the Ninth Circuit has recognized that a government employees' terms of public service are governed by statute and not contract. Accordingly, Plaintiffs' Fifth Cause of Action must be dismissed.

4. Dismissal Of The Three State Law Claims Is Proper Because Plaintiffs Failed To Allege Sufficient Facts To Demonstrate The Elements Of Each Cause Of Action.

Even if the Court decided to exercise jurisdiction over Plaintiffs' Third, Fourth, and Fifth Causes of Action (Plaintiffs' state law claims), each of those claims should be dismissed because Plaintiffs failed to allege adequate factual grounds showing their entitlement to relief.

a. This Court Should Dismiss Plaintiffs' Third Cause Of Action (Failure To Pay Wages In Violation Of The Constitution) Because Plaintiffs Failed To Allege Sufficient Facts.

This Court should dismiss Plaintiffs' Third Cause of Action because their FAC fails to allege sufficient facts to satisfy basic pleading requirements and put NDOC sufficiently on notice of their claim. Article 15, Section 16 of the Nevada Constitution establishes a minimum wage that must be paid to private employees, but does not apply to the government. It provides that a private employer pay a wage to each employee of not less than five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits. Nev. Const. Art. 15, § 16 (A).

With respect to its Third Cause of Action Plaintiffs only allege that Article 15 Section 16 of the Nevada Constitution sets forth the requirements for the minimum wage requirements in the State of Nevada (ECF 95 at ¶ 80) and that there is a "written agreement of employment at will, and for an hourly rate of pay." *Id*. at ¶ 81. Plaintiffs' FAC fails to allege sufficient facts setting forth that NDOC constitutes an "employer" under the State Constitution such that it is even subject to the provisions of Article 15 Section 16. (*See, e.g*. ECF 95 at ¶¶ 80-85.) Likewise, it fails to allege that the NDOC's correctional officers are considered "employees" under the State Constitution. The amended complaint also fails to allege specific facts to enable NDOC to determine exactly what

written agreement Plaintiffs are referring when alleging that there is a "written agreement at will, for an hourly rate of pay." *Id.* at ¶ 81. Because Plaintiffs have not pled any of the critical facts required to place NDOC on notice of its Third Cause of Action, this Court should dismiss Plaintiffs' claim.

b. This Court Should Dismiss Plaintiffs' Fourth Cause Of Action (Breach Of NRS 284.180) Because Plaintiffs Have Failed To Allege Sufficient Facts To Support The Elements Of This Claim.

This Court should also dismiss Plaintiffs' Fourth Cause of Action because here, too, Plaintiffs' FAC fails to allege sufficient facts to support this cause of action to provide NDOC with sufficient notice of their claim.

In Plaintiffs' FAC, they fail to allege that each of the named Plaintiffs are subject to the provisions of NRS 284.180. Yet, NRS 284.180 is applicable only to positions of classified service. NRS 284.180(1). Nowhere in its Fourth Cause of Action do Plaintiffs allege that all of the named employees were classified employees subject to the provisions of NRS 284.180 and that these employees do not fall within the statute's exceptions (ECF 95 at ¶¶ 86-92).

Likewise, Plaintiffs' FAC fails to set forth sufficient facts alleging that Plaintiffs were ever approved to work overtime such that they are entitled to any alleged compensation for overtime under this statute. The provisions of NRS 284.180(1) mandate that overtime is approved. Yet, nowhere in the FAC do Plaintiffs allege that they complied, or even attempted to obtain approved overtime for the alleged time they worked in excess of either their 40-hour 5-day a weeks shifts or their alternative 80-hour, two-week shift. *See, e.g., Id.*

Because Plaintiffs have failed to allege specific facts enabling NDOC to determine NRS 284.180(1) applicability to each named Plaintiff, it is proper for this Court to grant NDOC's Motion and dismiss Plaintiffs' Fourth Cause of Action.

c. This Court Should Dismiss Plaintiffs' Fifth Cause Of Action (Breach Of Contract) Because Plaintiffs Have Failed To Allege Sufficient Facts.

Plaintiffs' breach of contract action should be dismissed because their FAC fails to allege sufficient facts to put NDOT on notice of what agreement it purportedly breached. The only agreement referenced in Plaintiffs' amended complaint is the Nevada Department of Corrections Variable Work Schedule **Request**. *See* Ex. I. As discussed above, this document is a form that sets

forth a correction officer's preference to work a five-day, 40 hour week versus a 14-day, 80 hour variable schedule. It is not any type of employment agreement as Plaintiffs allege.

For purpose of this cause of action, NDOC should not have to be in the position of having to guess what agreement Plaintiffs contend that NDOC breached. Because Plaintiffs have failed to set forth adequate facts identifying the agreement NDOC allegedly breached, Plaintiffs Fifth Cause of Action should be dismissed.

VI. CONCLUSION

This Court should dismiss plaintiffs' FAC with prejudice. Plaintiffs failed to plead any facts, unique to their personal employment, which could state a claim under the FLSA or state law. Instead, plaintiffs invited this Court to indulge in speculation and assumption in violation of Landers' requirement that they plead particular facts particular to that employee, to permit the Court to find plausibility that the particular employee has an FLSA claim. *Id*. at 645. As such, this Court should dismiss plaintiffs' FAC with prejudice. Plaintiffs have not and cannot meet their burden under *Landers*.

DATED: May 10, 2017.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

BY: */s/Richard I. Dreitzer*
Richard I. Dreitzer NBN 6624
J. Scott Burris NBN 10529
Donald P. Paradiso NBN 12845
Wilson Elser Moskowitz Edelman & Dicker LLP
300 South 4th Street, 11th Floor
Las Vegas, NV 89101-6014
Attorneys for Defendant, The State of Nevada, ex rel. its Department of Corrections

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP and that on May 10, 2017 I electronically filed and served a true and correct copy of the foregoing **NDOC'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COLLECTIVE AND CLASS ACTION COMPLAINT** to all parties on file with the CM/ECF.

Mark R. Thierman, Esq.
Joshua D. Buck, Esq.
Leah L. Jones, Esq.
THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
Tel: 775-284-1500
Fax: 775-703-5027
Attorneys for Plaintiffs

/s/ Naomi E. Sudranski
An Employee of
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

Exhibits to Defendant's Motion to Dismiss Plaintiffs' First Amended Collective and Class Action Complaint

TABLE OF CONTENTS

EXHIBIT A

Email from Lieutenant to Correctional Officers
at High Desert State Prison

Nathan Echeverria - Fwd: 9/12 quad brief

From: Aaron Dicus
To: Nathan Echeverria
Date: 5/10/2014 8:34 AM
Subject: Fwd: 9/12 quad brief
Attachments: Night Time Yard Schedule 05-06-14.pdf

>>> Brandon Badger 5/8/2014 7:43 AM >>>

Senior Correctional Officer
Brandon Badger
Nevada Department of Corrections
HDSP
>>> Keith McKeehan 5/7/2014 11:37 AM >>>
Good morning,

Morning feeding
Grave staff should have the food already in the warmers to be ready for the 5am shift. Day shift needs to get the porters working and start serving trays no later than 0530 hrs. Unit 11 has been doing this religiously for some time. I know the rest of us can get it done. This ensures that the carts are loaded and ready to go by the time culinary staff picks up the dirties at 0700 hrs.

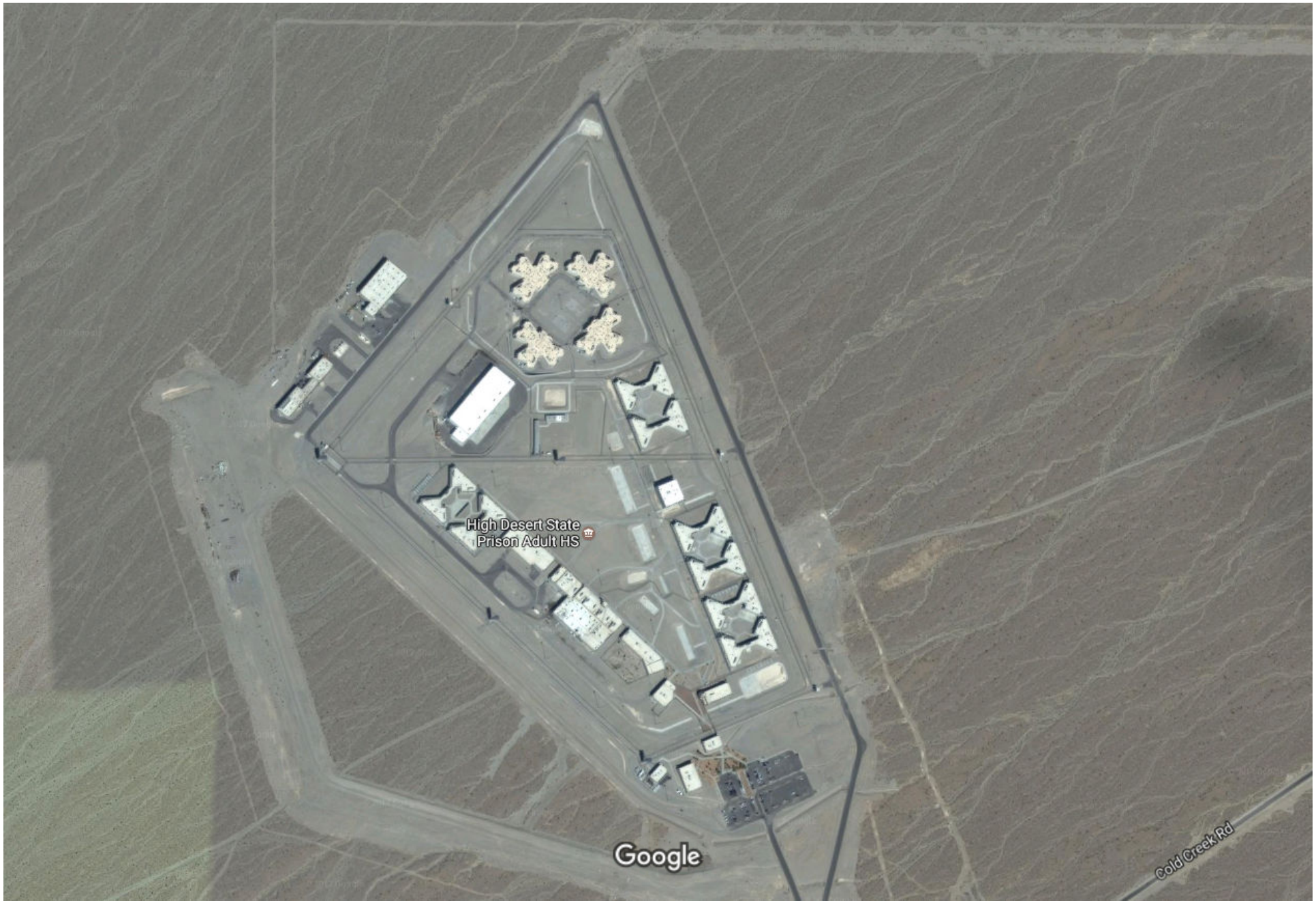
Tardy
A few people need to be reminded. You need to arrive on your post by the start of your shift (OP 032). It is approx 10-15 minute walk from Operations to 9/12 quad. You need to incorporate this walk time in your travel to work to ensure you arrive on time.

Night yard
See attached night yard schedule. Night yard begins on Memorial Day and continues thru Labor Day.

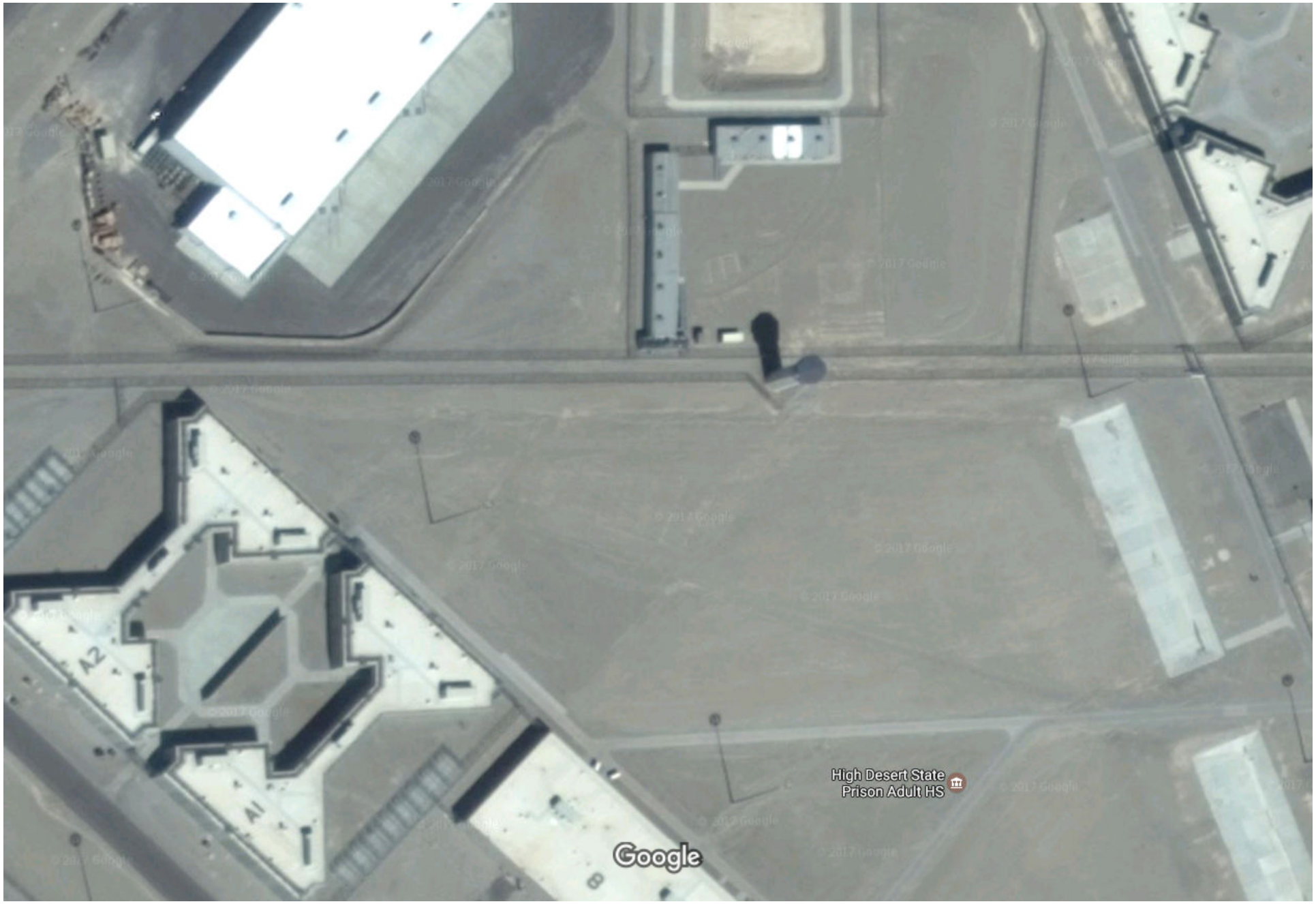
Be safe.
Lt. McKeehan

EXHIBIT B

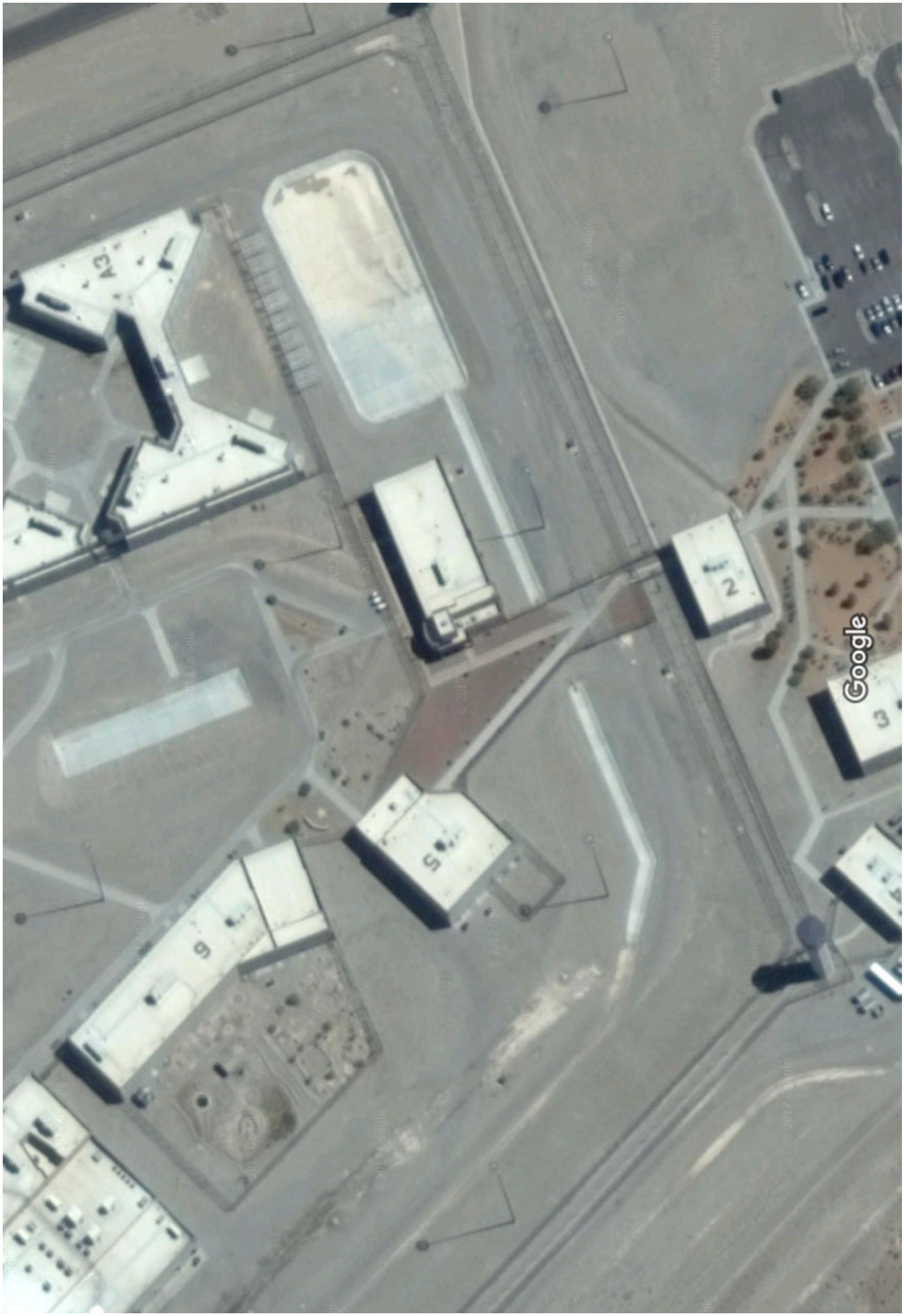
Satellite images from Google Maps of High Desert State Prison



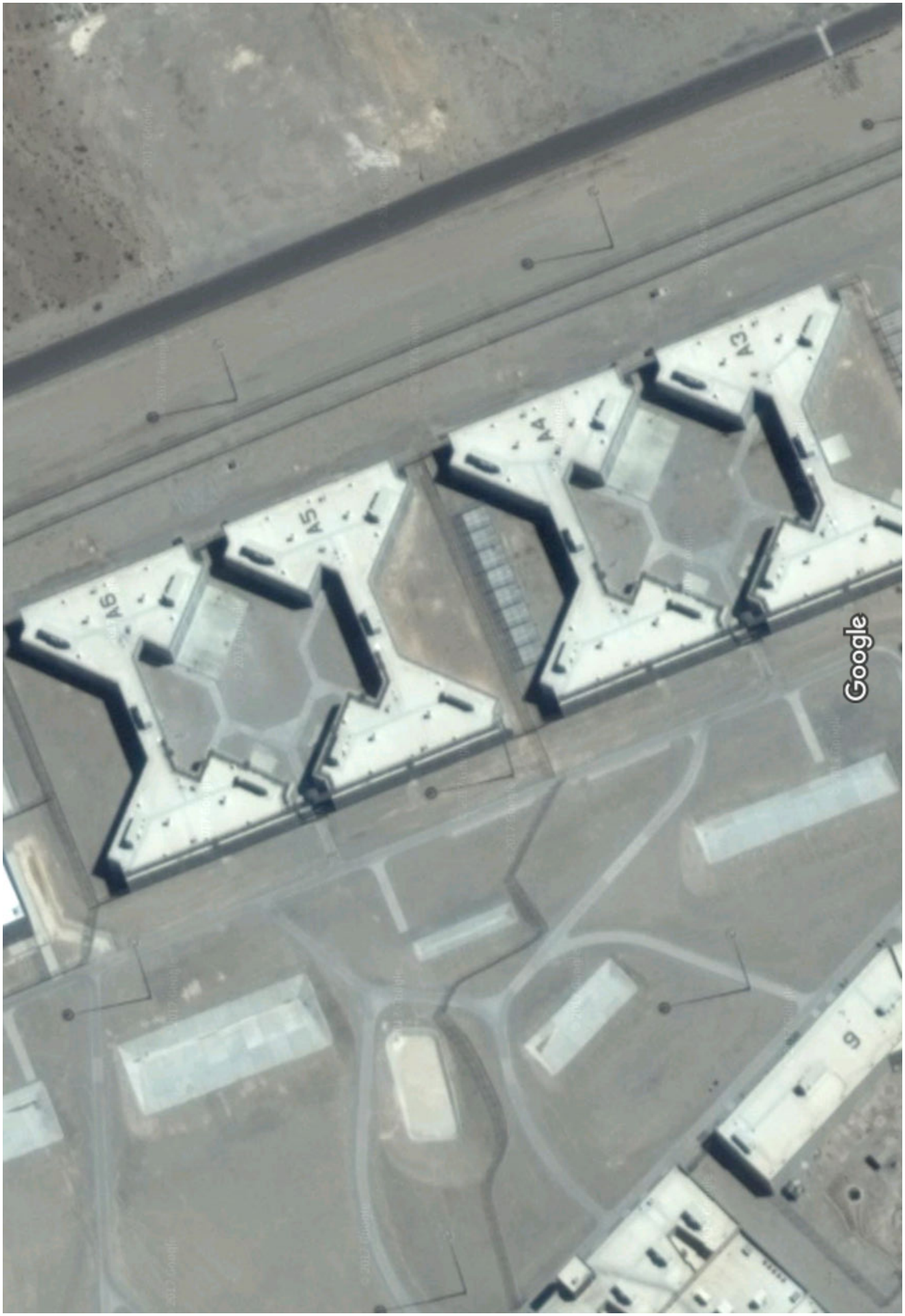
Imagery ©2017 Google, DigitalGlobe, Map data ©2017 Google 500 ft

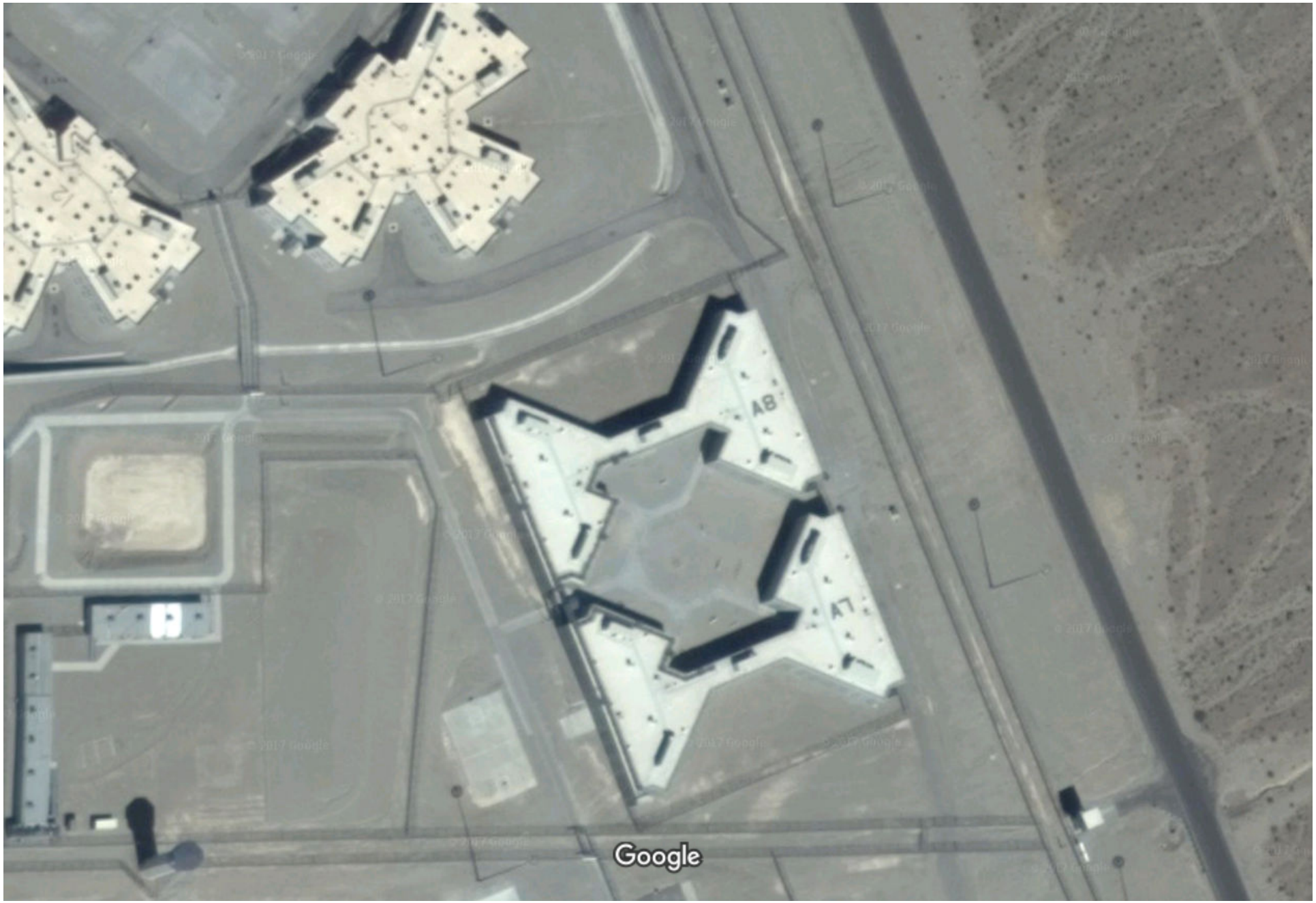


Imagery ©2017 DigitalGlobe, Map data ©2017 Google 100 ft



Imagery ©2017 DigitalGlobe, Map data ©2017 Google 100 ft





Imagery ©2017 DigitalGlobe, Map data ©2017 Google 100 ft

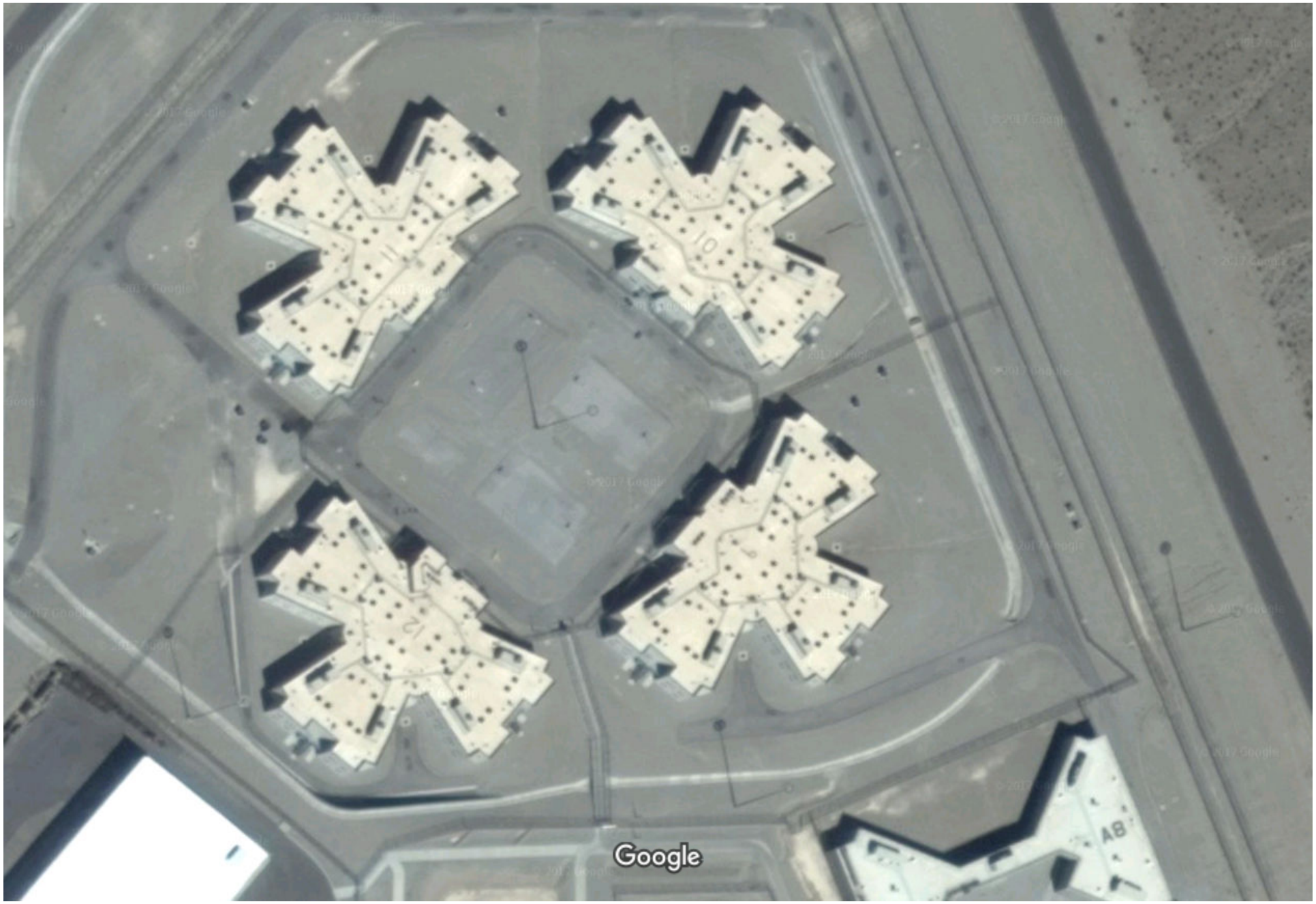

Google
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EXHIBIT C

Excerpts from the deposition transcript of Brian Williams

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DONALD WALDEN, JR., NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY on behalf of themselves and all other similarly situated,

Plaintiffs,

vs.

STATE OF NEVADA, EX. REL. ITS DEPARTMENT OF CORRECTIONS, and DOES 1-50,

Defendant(s).

CASE NO. 3:14-cv-00320-LRH-WGC

DEPOSITION OF BRIAN WILLIAMS

Taken at Esquire Deposition Solutions
at 2300 West Sahara Avenue
Las Vegas, Nevada 89102

On Thursday, April 16, 2015
at 9:05 a.m.

Reported by: Jualitta Stewart, CCR No. 807, RPR

APPEARANCES:

For the Plaintiffs: JOSHUA D. BUCK, ESQ.
Thierman Buck
7287 Lakeside Drive
Reno, Nevada 89511
(775) 284-1500

For the Defendants: JANET E. TRAUT, ESQ.
Bureau of Litigation
5420 Kiezke Lane
Suite 202
Reno, Nevada 89511
(775) 850-4107

--o0o--

I N D E X

--o0o--

E X H I B I T S

--o0o--

Las Vegas, NEVADA;

Thursday, April 16, 2015; 9:05 A.M.

BRIAN WILLIAMS,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. BUCK:

Q. Good morning, Mr. Williams.

Can you spell -- state and spell your name for the record.

A. Brian E. Williams, Senior. B-r-i-a-n; E, period; Williams, W-i-l-l-i-a-m-s; Senior.

Q. Mr. Williams, have you ever been deposed before?

A. Yes.

Q. How many times?

A. About three times.

Q. And so you're fairly familiar with the process that we're going through today?

A. Similar, yes.

Q. In those prior depositions, you were probably told about ground rules and things like that, about how the deposition is going to proceed.

Do you remember those?

Q. So you are no stranger to lawsuits or to having to testify in court, then?
A. No, I'm not.
Q. What about other cases? Have you ever been a plaintiff in a lawsuit -- in a lawsuit that you have brought against somebody?
A. No.
Q. Have you ever been involved in a lawsuit other than as head warden of the SDCC?
A. No.
Q. Has a lawsuit been filed against you because of, you know, a traffic accident?
A. No.
Q. Or anything like that?
A. No.
Q. So the only lawsuits that you have been involved in where you have been named as a party have been as a result of you being the warden at SDCC?
A. Correct.
Q. I want to talk a bit about your background. Okay?
A. Okay.
Q. As we've already gathered, you're currently the warden of SDCC, correct?

A. Correct.
Q. How long have you held that position?
A. For nine years now.
Q. In those nine years, you have been the head warden at the facility?
A. Yes.
Q. Prior to that, where were you employed?
A. Before I became warden?
Q. Yes.
A. I was associate warden of programs at Southern Desert Correctional Center for about a year and three or four months.
Q. And prior to that position?
A. I worked in the Illinois Department of Corrections.
Q. Are you from Illinois?
A. No, I'm from California.
Q. And what did you do in the Illinois Department of Corrections? What was your job title?
A. I worked there for about -- approximately 11 plus years. And it ranged from an executive to with the deputy director's office, a shift supervisor over our operational center, a leisure time service specialist, a clinical services supervisor. It varied.

comes in about ten minutes before his shift. And he comes in, okay, you're Tower 2.

And he gets to Tower -- he leaves that OPs building, and he is on his post before -- right at the start of his shift or a little before the start of his shift. As a matter of fact, his shift supervisor couldn't believe he got there. And so she called, and he answered the phone. So it was, like, oh, you did make it there.

So how do they do it, I don't know. I guess I'm getting old, can't move as fast, but -- yeah, they come in between 30 minutes. I have seen them come in as short as ten minutes and go through the metal detector and check in to their post.

Q. Because, I mean, they're expected to be there at the time of their shift?

A. At the start of their shift, yes.

Q. And if they aren't, I mean, again, you're talking maybe kind of counseling first, like, hey, man, you got to get there on time, or is there a written warning or anything like that?

A. Sometimes there is a warning. Most likely it's going to be a performance card or something saying, hey, you need to get on your post, if that relieving officer complains. Like, look,

REPORTER'S DECLARATION

STATE OF NEVADA)
) ss
COUNTY OF CLARK)

I, Jualitta Stewart, a duly commissioned Notary Public, Clark County, State of Nevada, do hereby certify:

I reported the taking of the deposition of the witness, BRIAN WILLIAMS, commencing on Thursday, April 16, 2015, at the hour of 9:05 a.m.

That prior to being examined, the witness was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth.

That I thereafter transcribed my said shorthand notes into typewriting and that the transcript is a complete, true, and accurate transcription of said shorthand notes.

I certify that I am not a relative or employee of any party involved in said action, nor a person financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in my office in the County of Clark, State of Nevada, this 28th day of April, 2015.

Jualitta Stewart

JUALITTA STEWART, RPR, CCR No. 807

EXHIBIT D

Facility information regarding

High Desert State Prison

State of Nevada
Department of Corrections

HIGH DESERT STATE PRISON (HDSP)

P.O. Box 650
Indian Springs, Nevada 89070-0650
22010 Cold Creek Road
Indian Springs, Nevada 89070
(702) 879-6789

Administrative Staff

Brian E. Williams Sr., Warden
Jerry Howell, Associate Warden
Jennifer Nash, Associate Warden

Perry Russell, Associate Warden
Bruce Stroud, Associate Warden

Visiting Information

Visit HDSP

Historical

The High Desert State Prison is the largest major institution in the Department of Corrections. It is the first institution in what will become a large Southern Nevada prison complex. High Desert was designed to incorporate much of the best technology available to corrections to provide for officer safety and the management and control of inmates. The complex totals approximately 1,576,000 square feet of space. The institution opened September 1, 2000 and became the reception center for Southern Nevada.

Staffing

High Desert State Prison is administered by the Warden and 4 Associate Wardens. Command Staff consists of 10 Lieutenants and 13 Sergeants. There are approx 400 security staff and 67 support staff.

Capacity

New construction was completed in 2009 to add 1,344 beds to the original 2,671. Total capacity is approximately 4,176.

Programs: Vocational Training, Educational Opportunities, and Treatment Services

High Desert State Prison offers educational assistance to inmates who want to obtain their GED or High School diploma as well as some college courses. Vocational training includes Automotive & Mechanics Training, Heating and Air Conditioning, and Carpentry.

Prison Industries

The Prison Industries building complex is comprised of one building of approximately 65,000 square feet. The Prison Industries building houses six work bays of approximately 10,000 square feet. Each of the bays has camera surveillance capabilities and a dining area for the workers.

EXHIBIT E

Facility information regarding

Florence McClure Women's Correction Center

FLORENCE MCCLURE WOMEN'S CORRECTIONAL CENTER (FMWCC)

4370 Smiley Road
Las Vegas, Nevada 89115-1808
(702) 668-7200

Administrative Staff

Dwight Neven, Warden
Gary Piccinini, Associate Warden
Gabriela Garcia, Associate Warden
Tammy Otero, ASO

Visiting Information

Visit FMWCC

Historical

The Nevada Department of Corrections selected the private corrections contractor Corrections Corporation of America to design, build, and operate a correctional facility for women in Las Vegas. The Florence McClure Women's Correctional Center opened in September 1997. On October 1, 2004, the Nevada Department of Corrections assumed control of the institution.

Staffing

Florence McClure Women's Correctional Center currently has 171 staff members:

- Administration 4
- Caseworkers 7
- Professionals 21
- Protective Services 120
- Administrative Support 7
- Medical 23
- Service-Maintenance Workers 7

Capacity

Florence McClure Women's Correctional Center's total capacity is 950.

Programs: Vocational Training, Educational Opportunities, and Treatment Services

Florence McClure Women's Correctional Center offers a wide range of programs for all of the inmate population which include but are not limited to: Anger & Aggression, Clark County Parenting, Commitment to Change I, II & III, employment Skills, Healthy Steps to Freedom, Seeking Safety I, II & III, Sex Offenders Treatment program, Straight Ahead, Survivors Overcoming Abuse and Rape, Thinking for a Change, Turning Point and Victim Impact. The Toastmasters Program and Alcoholics Anonymous are also available.

STARS/New Light

STARS/New Light is a dedicated 120 bed intensive in-house substance abuse program. The Therapeutic Community (TC) is a structured environment that helps participants learn strategies to avoid substance abuse, re-structure their thinking, and regulate their emotions while also developing social skills necessary to maintain healthy relationships.

Clark County School District

The primary goal of the Education Program is to provide inmate students with institutional activities, both academic and vocational, which lead toward the attainment of an Adult High School Diploma.

The secondary goal is to prepare students with the academic skills to pass the Hi-Set (High School Equivalency)

Re-Entry

The Re-Entry Program goal is to assist the Re-Entry participant with the life style, basic employment and behavioral modification skills to re-enter society as a productive member.

Pups on Parole

The Pups on Parole Program works with Heaven Can Wait Animal Society to rescue dogs from a shelter, bring them to the program and train the inmates to train the dog to be ready for adoption in the community. Inmates are also trained to be dog handlers.

New Path Cosmetology Class/Vocational Class

The mission of the New Path Cosmetology Class is to recruit, teach and train each inmate that is approved for this program, to master the art and sciences of the cosmetology industry

Prison Industries

Prison Industries currently employs 15 to 80 inmates.

EXHIBIT F

Facility information regarding

Southern Desert Correction Center

SOUTHERN DESERT CORRECTIONAL CENTER (SDCC)

P.O. Box 208
Indian Springs, Nevada 89070-0208
20825 Cold Creek Road
Indian Springs, Nevada 89070
(702) 879-3800

Administrative Staff

Jo Gentry, Warden
Frank Dreesen, Associate Warden
Minor Adams, Associate Warden

Visiting Information

Visit SDCC

Historical

Located in Clark County, just north of Las Vegas, Southern Desert Correctional Center opened in February 1982.The department's fourth major institution has seven 102-cell housing units, one of which housed federal prisoners until the state took it over in 1987. Each 60-square foot cell housed one inmate at that time. A new 200-cell housing unit opened in 1989, and two 240-bed dormitory-style housing units were added in March 2008, bringing the population capacity from 714 in 1982 to its present capacity of 2,149.

Staffing

In addition to our staff of 198 Protective Service staff, Southern Desert Correctional Center employs a number of professional and skilled staff:

- 38 Program Staff (including Education Principal, AA and Braille, Psychologist, TRUST and Re-Entry)
- 12 Skilled Maintenance Personnel
- 4 Warehouse Employees
- 4 Correctional Cooks
- 1 Laundry/Dry Cleaning Specialist
- 1 Recreation Specialist
- 9 Administrative/Clerical
- 1 Institutional Chaplain

Capacity

Southern Desert Correctional Center houses mostly medium custody general population inmates, along with two separate specialized programming units. The total capacity for Southern Desert Correctional Center is approximately 2,149 inmates.

Programs: Vocational Training, Educational Opportunities, and Treatment Services

Southern Desert Correctional Center offers a wide range of programs for the inmate population and an opportunity pursue a GED, high school diploma or a college degree. Southern Desert offers the most programs of any of the facilities located in Nevada, to include: Anger Management, Stress Management, Fitness and Wellness, Inside/Out Dads, Domestic Violence, Toastmasters, Gang Awareness, Conflict Resolution, Victim Empathy, Commitment to Change, SOS Help for Emotions, Thinking for Change, relationships, Sex Offender Treatment, Stress and Anxiety management. Additionally, Southern Desert offers “New Beginnings” a re-entry program, Forklift Certification and OSHA Certification in cooperation with the local Teamsters Union. SDCC offers “TRUST” a therapeutic community and “Re-Entry” a unit to prepare inmates for reintegration back into the community. Recently, "Photovoltaic Solar Panel Program" was added as a component to the Re-Entry Program. Religious services and activities for all denominations are available.

Southern Desert also has its own medical and mental health staff serving the inmate population.

Prison Industries

Prison industries at SDCC offers card sorting and the Silver State automotive restoration and repair.

EXHIBIT G

Facility information regarding

Northern Nevada Correctional Center

State of Nevada
Department of Corrections

NV gov Agencies Jobs About Nevada
ADA Americans with Disabilities Act

HOME | INMATE INFO | VICTIMS' INFO | FACILITIES | MEETINGS | NEWS | ABOUT | CONTACT US | ARCHIVE

NORTHERN NEVADA CORRECTIONAL CENTER (NNCC)

P.O. Box 7000
Carson City, Nevada 89702
1721 E. Snyder Ave.
Carson City, Nevada 89701
(775) 887-9297

Administrative Staff

Isidro Baca, Warden
Ron Schreckengost, Associate Warden
Brian Ward, Associate Warden

Visiting Information

Visit NNCC

Historical

Northern Nevada Correctional Center (NNCC) opened in 1964 with three housing units. From that date until 2008, seven additional housing units were added. NNCC is a medium custody facility. NNCC also is the Intake Center for the Northern region. The Regional Medical Facility for the Nevada is located here. This includes an in-patient medical and mental health unit. In addition, there is the MIC (Medical Intermediate Care) and SCU (Structured Care Unit) units for those inmates whose medical and mental health situations are stable but which require additional staff monitoring. NNCC also has the Regional Warehouse which is the distribution center for the facilities in Carson City and Reno.

Staffing

NNCC has a total of 373 staff members which includes custody, program, medical and mental health staff as well as support staff.

Capacity

The total bed capacity at NNCC is 1,619 inmates.

Programs: Vocational Training, Educational Opportunities, and Treatment Services

Current vocational programs are auto mechanics/auto shop, computer and dry cleaning. Educational services are conducted by Carson School District staff and include high school diploma, GED, Literacy programs and English as a Second Language. College courses are available and are provided through Western Nevada Community College. OASIS is a 9 to 12 month drug and alcohol rehabilitation program which contains 170 inmate participants. SSLP (Senior Structured Living Program) is available to those inmates 60 and over and has 120 inmates participating. The New Beginnings program is offered to prepare inmates for reintegration into society. A wide range of self-help and treatment programs are available and are administered by medical, mental health and program staff.

Prison Industries

Silver State Industries includes a wood shop, metal shop, paint shop and upholstery. They manufacture a variety of products for governmental agencies and private entities. The Print Shop and Bookbindery is now located at the Northern Nevada Correctional Center.

Select Language ▼

EXHIBIT H

Facility information regarding

Ely State Prison

ELY STATE PRISON (ESP)

P.O. Box 1989
4569 North State Rt.
Ely, Nevada 89301
(775) 289-8800

Visiting Information

Visit ESP

Administrative Staff

Timothy Filson, Warden
Mike Byrne, Associate Warden
William Gittere, Associate Warden

Historical

Ely State Prison opened in July 1989 and is the designated maximum-security prison for the State of Nevada. The facility is located approximately nine miles north of Ely in White Pine County. The prison was built in two phases: Phase I was completed and opened in August 1989, and Phase II was completed in November 1990. The original design was for 1,054 inmates, but the capacity has subsequently been increased to 1,183 inmates.

Staffing

Ely State Prison currently has 406 employee positions. The institution is considered a major employer in the region, and staff are significantly involved in community activities. Staff are proud of having a safe, secure, and sanitary institution and strive every day to complete the mission of the Nevada Department of Corrections: NDOC will improve public safety by ensuring a safe and humane environment that incorporates proven rehabilitation initiatives that prepare individuals for successful reintegration into our communities.

Capacity

Ely State Prison's total capacity is 1,183 inmates.

Programs: Vocational Training, Educational Opportunities, and Treatment Services

The programs offered at Ely State Prison offer vocational training, educational opportunities and treatment services. These programs include:

Certificate Only Programs:
Anger Management II: Continuing to Cage your rage
Anxiety
Feelings
Criminal Thinking/Criminal Behavior
Victim Awareness (Empathy)
Starting Over
Life Skills Series
Nine to Five Beats Ten to Life
TRY: Treatment Readiness for You
The Con Game
Values for Responsible Living
Learning to live Without Violence
The Adult Relapse Prevention Workbook
Domestic Violence Awareness
Domestic Violence Prevention

Merit Credit Programs:
High School Diploma
ServeSafe
Commitment to Change I-III
Financial Literacy

EXHIBIT I

Nevada Department of Corrections Variable Work Schedule Request

NEVADA DEPARTMENT OF CORRECTIONS
VARIABLE WORK SCHEDULE REQUEST

X **40 HOUR VARIABLE (INNOVATIVE) WORK SCHEDULE:** NRS 284.180, subsection 6, states: "For employees who choose and are approved for a variable workday, overtime will be considered only after working 40 hours in one week."

I hereby choose and request approval for a variable workday schedule. I understand that by doing so, I may with supervisory approval, adjust my work schedule in a week so I work more than 8 hours a day, provided I do not exceed 40 hours in a workweek without supervisory approval.

This variable work schedule agreement will be in effect until rescinded in writing by both the employee and the supervisor.

____ **80 HOUR VARIABLE (INNOVATIVE) WORK SCHEDULE:** Under section 7(k) of the Fair Labor Standards Act and NRS 284.180, employees involved in law enforcement and fire protection may choose and be approved for a variable 80-hour schedule within a biweekly pay period.

I hereby choose and request approval for a variable biweekly work schedule. I understand that by doing so I may, with supervisory approval, adjust my work schedule during the 14 day biweekly work period. I also understand that this variable schedule is an exemption to the 40 hour seven day, overtime rule under the Fair Labor Standards Act.

*This variable work schedule agreement will remain in effect for **Custody staff** who bid for shifts that require a variable schedule (ie., 12-hour shifts) until the next shift bidding cycle or a change must be approved mutually by the Warden and the employee.*

Overtime will be paid under the Nevada Revised Statute 284.180. Overtime will be considered only after working 80 hours biweekly.

Agreed to on this 18 day of November in the year 2008

Employees Printed Name: Brent Everist

Employee ID # 35854 Budget Account 3762

Employees Signature: [signature] Date 11/18/2008

Employee's Shift: 8:00 A.M. to 4:00 p.m. RDO's: Thur - Fri

Approved By: [signature] 1/8/09
Supervisor's Signature Date

Note: Each time an employee changes their schedule, a new form must be completed to identify the shift and the RDO's (regular days off).

Distribution: Copy-NDOC Personnel File
Copy-Supervisor

DOC-1043 (rev 01/08)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DONALD WALDEN JR., *et al.*, Plaintiffs, v. THE STATE OF NEVADA, *ex rel.* ITS NEVADA DEPARTMENT OF CORRECTIONS, *et al.*, Defendants.	Case No. 3:14-cv-00320-MMD-WGC ORDER

Defendant State of Nevada, Department of Corrections, removed this action pursuant to 28 U.S.C. § 1331 because the complaint asserts claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et. seq*. (ECF No. 1.) However, in reviewing the Motion to Dismiss (ECF No. 99) and the related briefs, the Court finds that the doctrine of sovereign immunity may apply to the FLSA claims against the State of Nevada as brought in federal court. While FLSA confers subject matter jurisdiction on this Court, the Supreme Court has found that the statute does not waive a state's sovereign immunity from suit in federal court. *See Employees of Dep't of Public Health & Welfare of Missouri v. Dep't of Public Health & Welfare of Missouri*, 411 U.S. 279, 283 (1973) (finding that FLSA generally applied to the state of Missouri but that the state's immunity to a private suit barred recovery in federal court); *see also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996) (finding that Congress lacks the power under Article I of the Constitution to abrogate the States' sovereign immunity from suits commenced or prosecuted in the

federal courts). Similarly, the Ninth Circuit has held that "[f]ederal courts lack jurisdiction over FLSA cases brought against States in the absence of a waiver of immunity." *Quillin v. State of Oregon*, 127 F.3d 1136, 1139 (9th Cir. 1997). A waiver of sovereign immunity will be found "only where stated by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). Under NRS § 41.031(3), the state of Nevada has explicitly refused to waive its sovereign immunity in suits brought by state citizens in federal court. Thus, it appears that this Court is barred from adjudicating the FLSA claims and this case should be remanded.

Accordingly, the parties are directed to file supplemental briefs of up to five (5) pages in length to address why the Court should not remand this action. The supplemental briefs are due within ten (10) days of this order.

DATED THIS 1st day of March 2018.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DONALD WALDEN JR, NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THE STATE OF NEVADA, *EX REL.* ITS NEVADA DEPARTMENT OF CORRECTIONS, and DOES 1-50,

Defendants.

Case No.: 3:14-cv-00320-MMD-WGC

PLAINTIFFS' SUPPLEMENTAL BRIEF AS TO THE REASONS THAT THE COURT SHOULD NOT REMAND THIS ACTION RE ECF NO. 147

Pursuant to this Court's Order (ECF No. 147), Plaintiffs DONALD WALDEN JR, NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY on behalf of themselves and all others similarly situated, through their attorneys at Thierman Buck LLP, hereby submit this supplemental brief as to why the Court should not remand this action.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action should not be remanded to state court because Defendant has waived substantive and jurisdictional immunity. First, Defendant THE STATE OF NEVADA, *EX REL.* ITS NEVADA DEPARTMENT OF CORRECTIONS ("Defendant" or "NDOC") has substantively waived its sovereign immunity by statute from liability for unpaid wages under both federal and state law (*i.e.*, waiver of "substantive immunity"). *See* NRS 41.031(1). Second, Defendant has procedurally waived its sovereign immunity from being sued in federal court by choosing to remove this action from state court (*i.e.*, waiver of "jurisdictional immunity"). *See Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004).

II. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs DONALD WALDEN JR, NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY, on behalf of themselves and all others similarly situated ("Plaintiffs"), filed this collective and class action case in the First Judicial District Court of the state of Nevada in Carson City on May 12, 2014. *See* ECF No. 1, pp. 7-21. Plaintiffs asserted claims for unpaid wages under both federal law, pursuant to the Fair Labor Standards Act ("FLSA"), and state law, pursuant to the Nevada Constitution, NRS Chapter 284, and a breach of contract theory. Defendant THE STATE OF NEVADA, *EX REL.* ITS NEVADA DEPARTMENT OF CORRECTIONS ("Defendant" or "NDOC")) removed the action to this Court on June 17, 2014. *See* ECF No. 1. Defendants then filed their Answer to Plaintiffs' Complaint on June 24, 2014. *See* ECF No. 3.

III. DISCUSSION

A. The State of Nevada and All Political Subdivisions Of the State Have Substantively Waived Their Immunity From Liability by Statute

NRS 41.031(1) provides that the State of Nevada and all political subdivisions of the state waive their immunity from liability:

> The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations,

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> except as otherwise provided in NRS 41.032 to 41.038, inclusive, 485.318, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of NRS 41.010 or the limitations of NRS 41.032 to 41.036, inclusive. The State of Nevada further waives the immunity from liability and action of all political subdivisions of the State, and their liability must be determined in the same manner, except as otherwise provided in NRS 41.032 to 41.038, inclusive, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive.

The few exceptions and limitations from liability provided by subdivision 1 are not applicable in a suit for wages and other associated relief. There is likewise no issue with compliance with the procedural requirements for asserting a claim against the State of one of its political subdivisions.[1] The text of NRS 41.031(1) clearly states that Defendants have waived their rights to the action brought by Plaintiffs and their "liability [shall be] determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations[.]" This includes all actions, including those brought under federal law in state court.

Here, Plaintiffs have filed claims arising from federal law and state law. The federal law claims are brought pursuant to the FLSA, which provides concurrent jurisdiction over its

[1] NRS 41.031(2) sets forth the following requirements:

> An action may be brought under this section against the State of Nevada or any political subdivision of the State. In any action against the State of Nevada, the action must be brought in the name of the State of Nevada on relation of the particular department, commission, board or other agency of the State whose actions are the basis for the suit. An action against the State of Nevada must be filed in the county where the cause or some part thereof arose or in Carson City. In an action against the State of Nevada, the summons and a copy of the complaint must be served upon:
>
> (a) The Attorney General, or a person designated by the Attorney General, at the Office of the Attorney General in Carson City; and
> (b) The person serving in the office of administrative head of the named agency.

Each of these requirements have been met here. The action was filed against the State of Nevada and the Nevada Department of Corrections; it was originally filed in Carson City, Nevada; the summons and a copy of the complaint were served on the Attorney General and James Cox, the Director of the NDOC. *See* Plaintiffs' Complaint (ECF No. 1); Declaration of Tamara Toles, at ¶¶ 5-6, Exhibit A (Affidavit of Service on the Attorney General) and Exhibit B (Affidavit of Service on the Director of the NDOC).

enforcement: "An action to recover [such liability] may be maintained against any employer (***including a public agency***) in any Federal ***or State court*** of competent jurisdiction...." 29 U.S.C. § 216(b) (emphasis supplied). Since an FLSA action can be (and was) filed in state court of competent jurisdiction, Defendant cannot now claim immunity from such claims pursuant to their express waiver under NRS 41.031. The same is true for Plaintiff's claims arising under state law.

B. Defendant Has Waived Its Immunity From Being Sued In Federal Court By Removal Pursuant To *Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004)

Removal waives sovereign "jurisdictional immunity" in this Circuit. *See Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004) (holding that the state waived Eleventh Amendment immunity by removing action, and waiver applied to both state and federal claims and applied to claims asserted after removal); *see also Bd. of Regents of the Univ. of Wis. Sys. v. Phx. Int'l Software, Inc.*, 653 F.3d 448, 463–64 (7th Cir. 2011) (recognizing that removal waives sovereign immunity). In *Embury* the state (California) tried to claim immunity from the federal claims—which formed the anchor for federal court jurisdiction (as is the case here)—while conceding that it had no immunity from pendent state law claims. *Embury*, 361 F.3d at 564. Under this circumstance, the Ninth Circuit recognized that it would be absurd for a state to allow a federal court to adjudicate state law claims "where federal jurisdiction cannot even be obtained but for federal claims asserted in the same case," yet object to federal court jurisdiction over the federal claims. *Id.* Thus, the *Embury* Court held, removal constituted a waiver of immunity for all claims.

Here, even though NRS 41.031 provides that the state reserved its jurisdictional immunity from being sued in federal court, Defendant has waived this defense by removing the action to this Court.

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IV. CONCLUSION

For the reasons set forth above, the Court should not remand this action to state court. Alternatively, even if the Court were so inclined to remand the action to state court, it must remand the action in its entirety, together with all claims and all party-plaintiffs who have opted-in to the action.

Dated: March 2, 2018.

THIERMAN BUCK LLP

By: */s/Joshua D. Buck*
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DONALD WALDEN JR, NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THE STATE OF NEVADA, *EX REL.* ITS DEPARTMENT OF CORRECTIONS, and DOES 1-50,

Defendants.

Case No.: 3:14-cv-00320-MMD-WGC

DECLARATION OF TAMARA TOLES IN SUPPORT OF PLAINTIFFS' SUPPLEMENTAL BRIEF AS TO THE REASONS THAT THE COURT SHOULD NOT REMAND THIS ACTION RE ECF NO. 147

I, Tamara Toles, hereby declare and state as follows:

1. The following declaration is based upon my own personal observation and knowledge, and if called upon to testify regarding the things contained herein, I could competently so testify.

2. I am a paralegal with Thierman Buck, LLP.

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3. I am submitting this declaration in support of Plaintiffs' Supplemental Brief as to the Reasons That the Court Should Not Remand this Action re ECF No. 147.

4. As part of my job duties, I am required to serve summons and complaints via personal service through a process service company.

5. On May 16, 2014, Reno Carson Messenger Service personally served the summons and complaint on a representative authorized to accept service on behalf of the Office of the Attorney General. A true and correct copy of the Affidavit of Service is attached hereto as Exhibit A.

6. On May 19, 2014, Reno Carson Messenger Service personally served the summons and complaint on a representative authorized to accept service on behalf of James Cox, Director of the Nevada Department of Corrections. A true and correct copy of the Affidavit of Service is attached hereto as Exhibit B.

I have read the forgoing declaration consisting of this page and one (1) other and declare under penalty of perjury under the laws of the United States of America and the State of Nevada that the foregoing is true and correct.

Executed on March 2, 2018, in Reno, Nevada.

/s/Tamara Toles
Tamara Toles

EXHIBIT A

Affidavit of Service
Office of the Attorney General

EXHIBIT A

IN THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF CARSON CITY, STATE OF NEVADA

RECEIVED
2014 MAY 22 PM 1:16
ALAN GLOVER
BY C. COOPER CLERK

DONALD WALDEN JR., ET AL

Plaintiff,

vs.

THE STATE OF NEVADA, NEVADA DEPARTMENT OF CORRECTIONS

Defendant

Case No:14OC000891B

AFFIDAVIT OF SERVICE

STATE OF NEVADA
COUNTY OF CARSON CITY ss.:

WADE MORLAN, being duly sworn says: That at all times herein affiant was and is a citizen of the United States over 18 years of age, not a party to nor interested in the proceedings in which this affidavit is made.

The affidant received copy(ies) of the **SUMMONS; COLLECTIVE AND CLASS ACTION COMPLAINT; AFFIRMATION; CIVIL COVER SHEET**, on **05/16/2014** and served the same on **05/16/2014** at **2:45 PM** by delivering and leaving a copy with:

AMANDA WHITE, OF THE OFFICE OF THE ATTORNEY GENERAL who stated he/she is authorized to accept service on behalf of **THE STATE OF NEVADA, NEVADA DEAPRTMENT OF CORRECTIONS.**

Service address:100 N. CARSON ST NEVADA ATTORNEY GENERAL'S OFFICE CARSON CITY, NV 89705

A description of **AMANDA WHITE** is as follows:

Sex	Color of skin/race	Color of hair	Age	Height	Weight
Female	**Caucasian**	**Blonde**	**20-30**	**5ft 5in**	**141-150lbs**
Other Features:					

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Sworn to and subscribed before me on
05/19/2014
by WADE MORLAN

Notary Public

JOHNNO LAZETICH
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 04-88542-2 - Expires January 28, 2016

X

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49275

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

Gregory Smith
Chief of Staff

TO: Wayne Howle, Solicitor General, BGA Entered into DB _____ DB No. _____

DATE RECEIVED: 5/16/14 REVIEWER: A. White

CASE NAME: Donald Warden JR et al v. State of Nevada, Department of Corrections

CASE NUMBER: 14DC00051B COURT: 1st JD Carson city

RECEIVED FROM:

Process Server: Wade Morlan / Rams
(Name and Company of process server)

ProLaw: _____

DOCUMENT(S) RECEIVED: Summons

DOCUMENTS RECEIVED FOR: _____

NOTICE

NRS 41.031(2) provides in part that, in any action against the State of Nevada, the action must be brought in the name of the State of Nevada on relation of the particular department, commission, board or other agency of the state whose actions are the basis for the suit. In an action against the State of Nevada, the summons and a copy of the complaint must be served upon the Attorney General, at the Office of the Attorney General in Carson City and upon the person serving in the office of administrative head of the named agency. **Service on the Attorney General or designee does not constitute service on any individual or administrative head.**

This Receipt acknowledges that the documents described herein have been received by the Nevada Attorney General or the designee authorized by NRS 41.031(2)(a). This Receipt does not ensure that any party, person or agency has been properly served, nor does it waive any legal requirement for service.

Receipt of a subpoena by the Office of the Attorney General does not constitute valid service of the subpoena upon any individual or upon any state agency, except the Office of the Attorney General. **Receipt of summons and complaint or any other process by the Attorney General or designee does not constitute service upon any individual, nor does it constitute service upon the administrative head of an agency pursuant to NRS 41.031(2)(b).**

Int. AW Copy given to person delivering document(s)? Yes L

Telephone 775-684-1100 • Fax 775-684-1108 • www.ag.state.nv.us • E-mail aginfo@ag.state.nv.us

EXHIBIT B

Affidavit of Service
James Cox, Director
Nevada Department of Corrections

EXHIBIT B

REC'D & FILED

2014 MAY 22 PM 1:16

AL GLOVER
BY _____ CLERK
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF CARSON CITY, STATE OF NEVADA

DONALD WALDEN JR., ET AL

Plaintiff,

Case No:14OC000891B

vs.

THE STATE OF NEVADA, NEVADA DEPARTMENT OF CORRECTIONS

Defendant

AFFIDAVIT OF SERVICE

STATE OF NEVADA
COUNTY OF CARSON CITY ss.:

WADE MORLAN, being duly sworn says: That at all times herein affiant was and is a citizen of the United States over 18 years of age, not a party to nor interested in the proceedings in which this affidavit is made.

The affidant received copy(ies) of the **SUMMONS; COLLECTIVE AND CLASS ACTION COMPLAINT; AFFIRMATION; CIVIL COVER SHEET**, on **05/16/2014** and served the same on **05/19/2014** at **8:43** AM by delivering and leaving a copy with:

NANCY SAUNDERS, who stated he/she is authorized to accept service on behalf of **JAMES COX, DIRECTOR ON BEHALF OF THE STATE OF NEVADA, NEVADA DEPARTMENT OF CORRECTIONS.**

Service address:5500 SNYDER AVE. Carson City, NV 89701

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Sworn to and subscribed before me on
05/19/2014
by WADE MORLAN

Notary Public

JOHNNO LAZETICH
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 04-89542-2 - Expires January 28, 2016

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DONALD WALDEN, JR., et al., etc., Plaintiffs, v. THE STATE OF NEVADA, EX REL. NEVADA DEPARTMENT OF CORRECTIONS, and DOES 1-50, Defendants.	CASE NO: 3:14-cv-00320-MMD-WGC **DEFENDANT STATE OF NEVADA *EX REL.* DEPARTMENT OF CORRECTIONS' SUPPLEMENTAL BRIEF DEMONSTRATING IT ENJOYS SOVEREIGN IMMUNITY FROM PLAINTIFFS' SUIT**

Defendant, the State of Nevada, ex rel. Nevada Department of Corrections (**NDOC**) responds to the Court's request for supplemental briefing. (ECF No. 147). The Court correctly diagnosed that sovereign immunity bars Plaintiffs' Fair Labor Standards Act (**FLSA**) claims. The Court should dismiss the FLSA claims with prejudice and remand this matter to state court.

I. INTRODUCTION

The Court should dismiss Plaintiffs' FLSA claims with prejudice and remand this action to state court. The Court correctly noted that subject matter jurisdiction is lacking due to sovereign immunity from the FLSA claims. **First**, NDOC did not waive Eleventh Amendment immunity to suits in federal court. Removal of this case does not alter that result, as Plaintiffs incorrectly contend

(ECF No. 149 at 4). **Second**, Nevada, on NDOC's behalf, has not waived its sovereign immunity to FLSA claims by enacting N.R.S. § 41.031(1). State precedent interprets N.R.S. § 41.031(1)'s immunity waiver as a waiver of tort liability. A broad waiver of sovereign immunity is inconsistent with Nevada's discretionary immunity statute. Applying N.R.S. § 41.031(1) to this case would nullify Nevada's multi-layered administrative scheme for resolving employee compensation disputes. Therefore, the Court should dismiss the FLSA claims and remand this action.

II. LEGAL ARGUMENT

As a general proposition, the FLSA applies to the states. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985). In its Answer, NDOC acknowledged the FLSA's applicability. (ECF No. 3 at ¶ 30). However, there is a critical distinction between acknowledging *Garcia's* holding and conceding that state employees can privately enforce the FLSA. Nevada, throughout this litigation, has asserted that NDOC is "immune from liability as a matter of law." (*Id.* at 6:18, ¶ 3).

Sovereign immunity protects a state's treasury from private suit. *See Hess v. Port Auth. Trans–Hudson Corp.*, 513 U.S. 30, 39–40 (1994). There are two types of sovereign immunity. **First**, the Eleventh Amendment's text prohibits a private party from suing a state in federal court. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). Congress, in enacting the FLSA, could not strip states of their Eleventh Amendment immunity to suit in federal court. *Quillin v. Oregon*, 127 F.3d 1136, 1138 (9th Cir. 1997). **Second**, states enjoy sovereign immunity based on the structure and history of the United States Constitution. *Alden v. Maine*, 527 U.S. 706, 713 (1999). This later type of sovereign immunity bars civil actions, even those under the FLSA, against non-consenting states in their own courts. *Alden*, supra.

NDOC has immunity from Plaintiffs' FLSA claims. NDOC has neither consented to Plaintiffs' FLSA claims being tried in this Court nor waived its sovereign immunity to those claims.

A. NDOC did not waive its Eleventh Amendment Immunity to suits in Federal Court.

This Court correctly determined that Nevada's legislature expressly stated Nevada has not waived its Eleventh Amendment immunity. (ECF No. 147 at 2:6-9). The key provision of Nevada statutory law provides that "[t]he State of Nevada does not waive its immunity from suit conferred

by Amendment XI of the Constitution of the United States." N.R.S. § 41.031(3). Thus, under *Seminole Tribe* and *Quillin*, the Eleventh Amendment bars Plaintiffs' FLSA claims against NDOC.

Contrary to what Plaintiffs argue (ECF No. 149 at 4), the Ninth Circuit's opinion in *Embury v. King*, 361 F.3d 562 (9th Cir. 2004),[1] does not alter the conclusion that Eleventh Amendment immunity applies to this case. In *Embury*, the court expressly declined to reach the very question at issue here: "whether a removing State defendant remains immunized from federal claims that Congress failed to apply to the States through unequivocal and valid abrogation of their Eleventh Amendment immunity." *Id.* at 566 n.20. Following *Embury*, the Ninth Circuit has declined to reach the issue. *See Indep. Living Ctr. of S. Cal., Inc. v. Maxwell–Jolly*, 572 F.3d 644, 662 n.20 (9th Cir. 2009), *vacated on other grounds sub. nom Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606 (2012); *Bank of Lake Tahoe v. Bank of Am.*, 318 F.3d 914, 917 (9th Cir. 2003). Nevertheless, the federal circuits that have addressed the issue hold that removal of a case with federal claims for which the State has immunity and has not consented to suit in state court does not amount to a waiver of sovereign immunity. *See generally Beaulieu v. Vermont*, 807 F.3d 478, 485-89 (2d Cir. 2015) (reaching that conclusion and explaining that the Ninth Circuit in *Embury* did not "even consider the question"); *see also Stewart v. North Carolina*, 393 F.3d 484, 490 (4th Cir. 2005) ("…North Carolina, having not already consented to suit in its own courts, did not waive sovereign immunity by voluntarily removing the action to federal court for resolution of the immunity question.").

Furthermore, no court has subject matter jurisdiction over a state employee's compensation dispute where he ignores Nevada's administrative remedies. In 2018, Nevada's Supreme Court reiterated well-established law that failure to timely use the administrative process is a jurisdictional bar to suit. *K-Kel v. State ex. rel. Dep't of Taxation*, ___ P.3d ___, 2018 WL 1101700, *2 (Nev. Mar. 1, 2018). NDOC in this litigation has always argued that Plaintiffs must timely use the

[1] In *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002), the court held that a state waives its immunity from suit for claims as to which the state has waived its underlying sovereign immunity in state court. To the extent that *Embury* extends the waiver-by-removal rule to claims beyond those for which the state waived its sovereign immunity in state court, NDOC reserves its right to argue that *Embury* should be overruled. However, as stated above, it is not necessary to reach this issue where a state is immune from federal claims in state court. *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell–Jolly*, supra.

administrative process to grieve their compensation dispute. The State is not an employer under Nevada's Constitutional Minimum Wage Amendment. (ECF No. 99 at 16-17). The terms of public service are fixed by statute, not contract. (*Id*. at 18:10-15). Plaintiffs must first grieve and seek administrative review of their compensation dispute. (*Id*. at 19-20). All of these arguments fold into the same conclusion. As a result, Plaintiffs are jurisdictionally barred from litigating their compensation theories in any court.

B. Nevada did not waive its sovereign immunity to FLSA claims in *any* court.

Independent of the Eleventh Amendment's text, Nevada has sovereign immunity from FLSA claims in any court, absent consent. In *Alden*, state employed probation officers sued Maine in state court after *Seminole Tribe*. 527 U.S. at 711. The United States Supreme Court held that Maine was immune from state employee FLSA civil actions. Congress does not have the power to subject non-consenting states to suits in their own courts. *Id*. at 752. The reason that Congress lacks this power does not derive from the Eleventh Amendment's text, but from the "Constitution's structure, its history, and the authoritative interpretations by [the United States Supreme Court]…" *Id*. at 713. Nevada has not waived its sovereign immunity from private FLSA claims. None of Plaintiffs' arguments alter that conclusion.

First, Nevada has not granted Plaintiffs a private right of action to sue for unpaid compensation under the FLSA under its own law. Plaintiffs cite N.R.S. § 284.180 (ECF No. 95 at ¶87), but that law does not create a private right of action. Plaintiffs rely instead on N.R.S. § 248.195. (ECF No. 105 at 23:1-8). However, this statute has nothing to do with the FLSA. It creates a right of action for improperly employed people who were not paid because Nevada's Administrator refused to certify payroll. N.R.S. § 284.195(1). N.R.S. § 284.195(1), properly understood, punishes the appointing authority for improperly hiring someone in the first place by creating a right of action against them, which is why the appointing authority is not reimbursed for sums paid by virtue of such actions. N.R.S. § 284.195(2).

Second, Nevada only adopted discreet portions of the FLSA, which have nothing to do with compensation disputes. Nevada's adoption of those portions of the FLSA was only "[f]or purposes of NAC 284.523 to 284.598." N.A.C. § 284.581(1)(b). None of these sections authorizes a private

right of action, let alone a private right of action for overtime compensation. Moreover, even if Nevada had adopted by reference FLSA provisions related to overtime compensation (which it did not) that would not waive sovereign immunity. Copying federal standards into state law does not transform state law into federal law any more than copying the Federal Rules of Civil Procedure turns state procedural law into federal procedural rights. *See, e.g., Mueller v. Thompson*, 133 F.3d 1063, 1064-65 (7th Cir. 1998) (Eleventh Amendment immunity barred FLSA claim in federal court, even where Wisconsin law allowed overtime suits).

To the contrary, employees must grieve their compensation dispute with their supervisor (N.A.C. § 284.678), then to the head of the employee's department (N.A.C. § 284.686), then to the highest administrative level (N.A.C. § 284.690), and then to the Employee-Management Committee (N.A.C. § 284.695). Nevada adopted this multi-level grievance procedure to avoid lawsuits over compensation such as Plaintiffs.'

Third, Nevada did not waive its sovereign immunity from FLSA suits concerning compensation by enacting N.R.S. § 41.031(1). This provision was just interpreted by Nevada's Supreme Court where it wrote that "[l]ike most states, Nevada has waived traditional sovereign immunity from tort liability with some exceptions." *Franchise Tax Bd. of Cal. v. Hyatt*, 407 P.3d 717, 728 (Nev. 2017). There is no indication that Nevada's legislature intended, by enacting N.R.S. § 41.031(1), to nullify its comprehensive state employee grievance procedure through a waiver of immunity for tort liability.

Moreover, allowing a private right of action for FLSA overtime or compensation claims would nullify Nevada's discretionary immunity. N.R.S. § 41.032(2). Plaintiffs' FLSA allegations seek compensation for tasks within the discretion of NDOC such as uniform inspection, picking up certain equipment, and receiving updates from co-workers or supervisors. Consistent with discretionary immunity from suit, state employees who believe that time spent working through these discretionary tasks must go through the grievance process.

III. CONCLUSION

The parties, or the court, can raise sovereign immunity at any time because it goes to subject matter jurisdiction. This Court correctly diagnosed that it lacks subject matter jurisdiction because

sovereign immunity bars FLSA claims against NDOC in any court. Accordingly, NDOC respectfully submits that the Court should dismiss the FLSA claims with prejudice and remand this action.

DATED this 12th day of March, 2018.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP and that on the 12th day of March, 2018, I electronically filed and served a true and correct copy of the foregoing **DEFENDANT STATE OF NEVADA EX REL. DEPARTMENT OF CORRECTIONS' SUPPLEMENTAL BRIEF DEMONSTRATING IT ENJOYS SOVEREIGN IMMUNITY FROM PLAINTIFFS' SUIT** to all parties on file with the CM/ECF:

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DONALD WALDEN JR., *et al.,* Plaintiffs, v. STATE OF NEVADA, *ex rel*. NEVADA DEPARTMENT OF CORRECTIONS, and DOES 1-50, Defendants.	Case No. 3:14-cv-00320-MMD-WGC ORDER

I. SUMMARY

This action concerns alleged failures to compensate Nevada Department of Corrections ("NDOC") employees under federal and state law. This Order addresses two motions that are currently pending before the Court: (1) Defendant State of Nevada *ex rel.* NDOC's Motion to Strike Plaintiffs' Third, Fourth, and Fifth Causes of Action in the First Amended Complaint ("Motion to Strike") (ECF No. 98); and, (2) Defendant's Motion to Dismiss Plaintiffs' First Amended Collective and Class Action Complaint ("Motion to Dismiss") (ECF No. 99). Plaintiffs filed responses to both motions (ECF Nos. 104, 105) and Defendant replied (ECF Nos. 111, 112).

For the reasons discussed herein, the Motion to Strike is denied and the Motion to Dismiss is granted in part and denied in part.

II. JURISDICTION

The Court issued an order on March 1, 2018, asking the parties to file supplemental briefs to address whether the State of Nevada has waived its sovereign

immunity as to the Fair Labor Standards Act ("FLSA") claims in this action.[1] (ECF No. 147.) After reviewing the supplemental briefs (ECF Nos. 149, 158), the Court is convinced that Nevada has waived its sovereign immunity in this Court. The Supreme Court has held that a state's removal of suit to federal court constitutes a waiver of its Eleventh Amendment immunity. *Lapides v. Bd. Of Regents of Univ. Sys. Of Georgia*, 535 U.S. 613, 616 (2002). Here, the State of Nevada removed this action from state court. Therefore, it has waived its sovereign immunity.

III. BACKGROUND

A. Relevant Procedural History

This action was initiated May 12, 2014, in the First Judicial District Court of the State of Nevada in and for Carson City. (ECF No. 1 at 7-21 (Exh. A).) It was timely removed on June 17, 2014, on the basis of federal question jurisdiction, 28 U.S.C. § 1331. (ECF No. 1 at 2.) The Court granted conditional certification of the class in March 2015. (ECF No. 45.) On April 13, 2016, Defendant filed a motion for judgment on the pleadings (ECF No. 86), which this Court granted in part on March 20, 2017. (ECF No. 94.) In that order, the Court dismissed the FLSA claims with leave to amend and correct the deficiencies with those claims as identified in light of the Ninth Circuit's recent decision in *Landers v. Quality Commc'n, Inc.*, 771 F.3d 638 (9th Cir. 2014), *as amended* (Jan. 26, 2015), *cert. denied*, 135 S. Ct. 1845 (2015). (ECF No. 94 at 4-5.) In *Landers*, the court stated that "at a minimum, a plaintiff asserting a violation of the FLSA overtime provisions must allege that she worked more than forty hours in a given workweek without being compensated for the hours worked in excess," and may estimate "the length of her average workweek during the applicable period and the average rate at which she was paid, the amount of overtime wages she believes she is owed, or any other facts that will permit the court to find plausibility." 771 F.3d at 645. The Court did not address Defendant's arguments concerning Plaintiff's state law claims in light of the

[1]This Court has federal question jurisdiction over those claims and therefore is able to exercise supplemental jurisdiction over the three remaining state law claims.

fact that it no longer had jurisdiction to consider those claims once the FLSA claims were dismissed, and so the Court dismissed the state law claims without prejudice. (*Id*. at 5.) Plaintiffs filed their First Amended Complaint ("FAC") on April 19, 2017. (ECF No. 95)

B. Relevant Facts

The following facts are taken from the FAC (ECF No. 95) unless otherwise indicated.

Plaintiffs are individuals who were or are employed with NDOC as non-exempt hourly correctional officers. Plaintiffs are or have been employed at various NDOC facilities including Southern Desert Correctional Center ("SDCC"), High Desert State Prison ("HDSP"), Northern Nevada Correctional Center ("NNCC"), Ely State Prison ("ESP"), and Women's Correctional Center ("WCC"). For all relevant times, NDOC maintained a time recording system for employees referred to as NEATS, which recorded only exceptions to scheduled work hours as well as any workweeks in which a plaintiff or class member worked less or more than the scheduled work times. (ECF No. 95 at ¶ 16.)

Generally, Plaintiffs were required to and did work a forty-hour workweek. If Plaintiffs worked "an alternative variable workweek schedule," they were required to work and did work eighty hours in a two-week period. (ECF No. 95 at ¶ 15.) As a matter of policy, Plaintiffs were only compensated for regularly scheduled shift times *at their work stations*. However, Plaintiffs were required to perform tasks before and after their shifts (commonly referred to as "preliminary" and "postliminary" activities). They claim that they were not compensated for these activities. As for preliminary activities, Plaintiffs identify the following activities: (1) reporting to the supervisor or sergeant on duty to check in; (2) receiving assignments for the day; (3) having their uniforms inspected; (4) collecting any and all tools needed for daily assignments, such as radios, keys, weapons, tear gas, handcuffs; (5) proceeding to their designated work stations; and (6) receiving debriefing from the outgoing correctional officer. Plaintiffs refer to the

first four activities as "muster." (ECF No. 95 at ¶ 31.) Plaintiffs contend that traveling to their designated work stations could take up to fifteen minutes or more per employee per shift. Plaintiffs also state that only after receiving briefing/instructions from the prior correctional officer at their work stations did a plaintiff's scheduled shift time begins. As to postliminary activities, Plaintiffs were required to conduct mandatory debriefing with the oncoming correctional officer then return to the main office to return various tools they had attained for the day and drop off or complete paperwork.

Plaintiffs estimate that on average they performed "upwards to 30-minutes of compensable work before their regularly scheduled shifts, each and every shift worked, for which they were not paid" and "upwards to 15 minutes of compensable work after their regularly scheduled shifts, each and every shift worked, for which they were not paid." (ECF No. 95 at ¶¶ 20, 22.) The FAC identifies at least one workweek where each Plaintiff worked over forty hours in a workweek or over eighty hours in a work period and were not paid overtime for pre- and post-shift activities. Specifically:

- Walden alleges he worked 3.75 hours of overtime at an average hourly rate of $23.50 and is owed $132.19 for each workweek during the pay period between January 7 through January 20, 2013;
- Echeverria alleges he worked 3.75 hours of overtime at an average hourly rate of $23.50 and is owed $132.19 for each workweek during the pay period between September 30 and October 13, 2013;
- Dicus alleges he worked 3.75 hours of overtime at an average hourly rate of $21.17 and is owed $119.110 for each workweek during the pay period between January 16 and January 29, 2017;
- Everist alleges he worked 3.75 hours of overtime at an average hourly rate of $22.80 and is owed $128.25[2] for each workweek during the pay period between January 20 and February 2, 2014;
- Zufelt alleges he worked 3.75 hours of overtime at an average hourly rate of $22.00 and is owed $123.75 for each workweek during the pay period between March 26 and April 9, 2017;

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[2]This number appear to be based on an average hourly rate of $25.65. (ECF No. 95 at ¶ 47(e).) It is unclear whether the actual average hourly rate of pay for Everist was $22.80 or $25.65.

- Redenour alleges he worked 5.25 hours of overtime at an average hourly rate of $24.00 and is owed $189 for the pay period between November 26 and December 9, 2012; and,
- Tracy alleges he worked 3.75 hours of overtime at an average hourly rate of $26.00 and is owed $146.25 for each workweek during the pay period between March 17 through March 30, 2014.

(ECF No. 95 at ¶¶ 44(c), 45(e), 46(f),[3] 47(e), 48(h), 49(g), 50(g).) Each Plaintiff also identifies how much they believe they are owed in overtime per year worked. Specifically:

- Walden alleges he is owed $6,345.60 per year worked based on .75 hours of overtime per shift and 240 shifts per year;
- Echeverria alleges he is owed $6,345.60 per year worked based on .75 hours of overtime per shift and 240 shifts per year;
- Dicus alleges he is owed $ 5,716.80 per year worked based on .75 hours of overtime per shift and 240 shifts per year;
- Everist alleges he is owed $6,156.00 per year worked based on .75 hours of overtime per shift and 240 shifts per year;
- Zufelt alleges he is owed $5,940.00 per year worked based on .75 hours of overtime per shift and 240 shifts per year;
- Redenour alleges he is owed $6,480.00 per year worked based on .75 hours of overtime per shift and 240 shifts per year; and,
- Tracy alleges he is owed $7,020.00 per year worked based on .75 hours of overtime per shift and 240 shifts per year.

(ECF No. 95 at ¶¶ 44(c), 45(e), 46(f), 47(e), 48(h), 49(g), 50(g).)

The FAC contains five claims for relief: (1) failure to pay wages in violation of FLSA; (2) failure to pay overtime wages in violation of FLSA; (3) failure to pay wages in violation of the Nevada Constitution's Minimum Wage Amendment ("MWA"); (4) failure to pay overtime wages in violation of NRS § 284.180; and (5) breach of contract.

IV. MOTION TO STRIKE (ECF No. 98)

Defendant moves to strike the FAC's state law claims pursuant to Fed. R. Civ. P. 12(f) because the claims are "redundant, immaterial, and impertinent" and because

[3]There are two paragraphs labelled "46(f)" in the FAC.

Plaintiffs "provide no basis for ignoring the Court's prior order." (ECF No. 98 at 4.) Plaintiffs respond that the "Court's prior order did not dismiss Plaintiffs' state law claims with prejudice so there is no issue with re-pleading those claims" and that the arguments in the Motion to Strike are redundant based on Defendant's Motion to Dismiss. (ECF No. 104 at 1, 3.) The Court agrees with Plaintiffs.

Under Rule 12(f), the Court may "strike from any pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." While the Court may strike redundant, immaterial, or impertinent matters in a pleading, it cannot strike a claim for relief. *See Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010) ("Were we to read Rule 12(f) in a manner that allowed litigants to use it as a means to dismiss some or all of a pleading . . . , we would be creating redundancies within the Federal Rules of Civil Procedure[] because a Rule 12(b)(6) motion . . . already serves such a purpose.") Thus, generally Rule 12(f) is the improper vehicle for dismissing or removing certain claims from a complaint.

Moreover, Defendant's contention that Plaintiffs did not comply with the Court's prior order is unavailing. In its prior order, the Court specifically dismissed the two state law claims without prejudice because it no longer had jurisdiction to consider Defendant's arguments relating to these claims once the Court dismissed the federal law claims. (*See* ECF No. 94 at 5.) Thus, Plaintiffs were not barred from reasserting their state law claims or asserting new ones, and nothing in the Court's prior order supports Defendant's reading that Plaintiffs were barred from doing so.

The Motion to Strike is therefore denied.

V. MOTION TO DISMISS (ECF No. 99)

Defendant makes five arguments in support of dismissing the FAC: (1) accepting Plaintiffs' allegations as true, each earned more than $7.25 per hour and therefore the FAC fails to state a violation of the FLSA's minimum wage requirement; (2) Plaintiffs failed to plead any facts to establish a nexus between assertions that they were uncompensated for 45 minutes of pre- and post-shift activities, especially in light of the

uniqueness of their jobs, the different size of the NDOC facilities, and the different tools each had to use for their positions; (3) the MWA does not apply to government employees; (4) Plaintiffs' NRS § 284.180 claim lacks merit because Plaintiffs failed to exhaust their administrative remedies prior to filing suit; and (5) Plaintiffs' breach of contract claim should be dismissed because Plaintiffs' employment with NDOC is statutory, not contractual, and no actual contract is identified as having been breached. (ECF No. 99 at 2.)

A. Legal Standard

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555.) "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, a district court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id*. at 678-79. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id*. at 678. Second, a district court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint alleges facts that allow a court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint does not

permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged—but it has not show[n]—that the pleader is entitled to relief." *Id.* at 679 (internal quotation marks omitted). When the claims in a complaint have not crossed the line from conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570. A complaint must contain either direct or inferential allegations concerning "all the material elements necessary to sustain recovery under *some* viable legal theory." *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1989) (emphasis in original)).

The Court takes judicial notice of the NDOC Variable Work Schedule Request form. (ECF No. 95-5). The document is incorporated by reference in the FAC and attached to it, and there is no dispute about its authenticity. *See Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) (considering documents outside the pleadings on a motion to dismiss "where the complaint necessarily relies upon [the] document or the contents of the document are alleged in a complaint, the document's authenticity is not in question and there are no disputed issues as to the document's relevance").

B. Straight Time Claim

In responding to Defendant's contention that the FAC fails to state a violation of the FLSA's minimum wage requirement, Plaintiffs point out that their first claim is not a minimum wage claim; rather, it is a straight time claim. (ECF No. 105 a 17.) Defendant does not address whether a "straight time" claim should be dismissed in its reply and instead states that "Plaintiffs are improperly seeking to amend their complaint via their opposition," as the Court's prior order granting leave to amend did not include language permitting a new "straight time claim." (ECF No. 112 at 4.) However, in light of Plaintiffs' clarification that they are asserting a failure to pay wages claim, the Court will permit the

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claim to proceed.[4] Defendant's Motion to Dismiss is therefore denied as to Plaintiffs' first claim.

C. Overtime Claim

As to the overtime claim, Defendant makes two independent arguments: first, the FAC's allegations regarding Defendant's failure to pay overtime does not meet the specificity requirements of *Landers*; and second, the facts as alleged are insufficient to demonstrate that the pre- and post-shift tasks are compensable under the FLSA. (ECF No. 99 at 9-15.) The Court disagrees and finds that this claim should proceed.

1. *Landers*

In *Landers*, the Ninth Circuit stated that "at a minimum, a plaintiff asserting a violation of the FLSA overtime provisions must allege that she worked more than forty hours in a given workweek without being compensated for the hours worked in excess of forty during that week," and that a "plaintiff may establish a plausible claim by estimating the length of her average workweek during the applicable period and the average rate at which she was paid, the amount of overtime wages she believes she is owed, or any other facts that will permit the court to find plausibility." *Landers*, 771 F.3d at 645. Defendant states that "not one individual plaintiff [in this action] pled any facts to satisfy *Landers*," yet goes on to argue about the plausibility of the factual allegations in the FAC. For example, Defendant states that "plaintiffs unjustifiably ask this Court to assume it takes the same amount of time for each person to . . . pick up their tools[] and report to their post . . . regardless of profession, facility, location or other factors." (ECF No. 99 at 10.) However, at the motion to dismiss stage, the Court is required to accept all well-pled factual allegations as true. Thus, to the extent any of those factual allegations appear to lack plausibility, Defendants are asking this Court to look beyond

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[4]To the extent the parties argue about whether this failure to pay wages claim encompasses a gap time claim (*see* ECF No. 105 at 18-20; *see also* ECF No. 112 at 8-9), this requires the Court to assess the actual evidence in this case, which it will not do at the motion to dismiss stage.

the pleadings,[5] which it will not do at this stage.[6] Plaintiffs remedied the previous deficiencies in their complaint by identifying the applicable time period, identifying a given workweek with the hours above forty hours for which each Plaintiff was not compensated, and the amount each Plaintiff believes they are owed in overtime wages for each year worked. This is sufficient to satisfy *Landers*.

The Motion to Dismiss is therefore denied as to Plaintiff's claim for failure to pay wages in violation of the FLSA.

2. Pre- and Post-Shift Activities as Compensable Work

"It is axiomatic, under the FLSA, that employers must pay employees for all hours worked." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003), *aff'd on other grounds sub nom. IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (citations and internal quotation marks omitted). The Ninth Circuit requires a "three-stage inquiry" to determine if certain activities are compensable under the FLSA. *Bamonte v. City of Mesa*, 598 F.3d 1217, 1224 (9th Cir. 2010). First, the activity must be considered "work"; second, the activity must be "integral and indispensable" to the principal work performed; and, third, the activity must not be *de minimus*. *Id*. (citing to *Alvarez*, 339 F.3d at 902-03). The Portal-to-Portal Act "narrowed the coverage of the FLSA slightly by excepting two

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[5]In fact, Defendant attached various exhibits to its motion to dismiss in support of its contention that the alleged facts are not accurate or plausible. The Court need not consider these exhibits at the dismissal stage unless it is able to take judicial notice of them.

[6]Therefore, despite the fact that two of the exhibits attached to the FAC deal with specific prisons (ECF Nos. 95-3, 95-4), the FAC appears to use them as examples or as support in an attempt to buttress the factual allegations in the FAC. For instance, Operational Procedure 320, which applies to SDCC, appears to be used as an example (ECF No. 95 at ¶ 39), while the testimony of Warden Williams appears to have been used to support the contention that, in order to complete preliminary tasks, correctional officers would need more than ten minutes if not thirty minutes to do so (*id*. at ¶ 34). Defendant takes issue with the use of Williams' testimony as a misrepresentation in the FAC since he was the warden of SDCC only (*see* ECF No. 99 at 6); however, the Court does not assume the veracity of Williams' statements or assume their applicability to all class representatives in this case. Moreover, Williams' own observation does not establish that these activities were required; rather, the FAC's mere contention that these activities were required by NDOC and must be completed before the start of Plaintiffs' shifts (see, e.g., ECF No. 95 at ¶¶ 14, 18) is a factual allegation the Court must assume to be true for purposes of ruling on Defendant's Motion to Dismiss.

activities that had been treated as compensable under [prior Supreme Court] cases: walking on the employer's premises to and from the actual place of performance of the principal activity of the employee, and activities that are 'preliminary or postliminary' to that principal activity." *IBP*, 546 U.S. at 27. However, the Supreme Court has held that a preliminary or postliminary activity is compensable if it is integral and indispensable to an employee's principal activities, meaning "if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." *Integrity Staffing Sol., Inc. v. Busk*, 135 S. Ct. 513, 517 (2014).

Defendant first argues that the FAC's allegations fail to show that Plaintiffs' pre- and post-shift activities are "work" under the FLSA. While the FLSA does not define the term "work," the Supreme Court has defined work as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." *See Armour & Co. v. Wantock,* 323 U.S. 126, 132 (1944). Defendant argues that Plaintiffs: "do not allege that NDOC requires *when* each officer is required to perform" the identified activities or that NDOC required them to do these activities "off-the-clock"; do not allege in the FAC that there are "differences in the time when Plaintiffs are required to report to the prison [versus] when they are required to report to their assigned posts for the day"; "arrive early for their own convenience or the convenience of fellow employees"; and fail to allege sufficient facts to show that NDOC derives any benefits from these activities because "[p]resumably, NDOC's respective prisons still have officers on duty." (ECF No. 99 at 12-14.) However, the Court is able to reasonably infer from the allegations in the FAC that NDOC required these activities to be performed "without compensation" and therefore off the clock; that these activities were required to be performed before the start of regularly scheduled shifts and after the end of regularly scheduled shifts; and that Plaintiffs arrived early to complete these preliminary tasks because NDOC required them to do so. (*See, e.g.*, ECF No. 95 at ¶¶ 19-22.) Moreover, if the Court assumes as true that NDOC requires Plaintiffs to perform these tasks, it is reasonable to infer that

NDOC derives some benefit from these activities, ostensibly by ensuring that incoming correctional officers are prepared to deal with any safety or security issues that may arise during their shifts.[7] (*See* ECF No. 95 at ¶ 31 ("Officers were required to report to their shift supervisor because correctional officers' assignments can change from day to day based on the needs of the institution" and other things "such as security issues, lockdown situations, changes in rules, and inmate problems"); *see also id*. at ¶ 33 (both supervisor and outgoing officer briefings were necessary because they were the source for security information for both the entire facility and the specific post); *see also* ECF No. 99 at 14 (Defendant admitting that the "benefit NDOC derives from its officers is the safety and security of the prison").)

Defendant next argues that the FAC fails to identify how the pre- and post-shift activities are intrinsic to the job of guarding a prison and that the Court may not "presume the facts necessary to establish the sufficiency of Plaintiffs' allegations." (ECF No. 99 at 15.) However, the Court is able to reasonably infer from the factual allegations in the FAC as well as from common sense why these activities are "an intrinsic element" of a correctional officer's principal activities and "ones with which the employee cannot dispense if he is to perform his principal activities." *See Busk*, 135 S. Ct. at 517. As to the purported requisite preliminary activities of check-in and receipt of assignments, "a law enforcement entity cannot ensure the safety of the population it oversees without (1) knowing who is present at a given time and (2) dispatching those that are present to attend to the greatest need." (ECF No. 105 at 12.) Moreover, "a correctional officer simply cannot perform his required job duties without first knowing where to go (whether to the exercise yard or to transport an inmate) nor can he perform his job effectively without knowing whether there is any potential dangerous situation developing amongst the inmates (such as a gang related issue or hunger strike)." (ECF No. 105 at 14.) The

[7]For example, by briefing an incoming officer so that he is aware of any inmates on the officer's block that have been having behavioral or disciplinary issues, or by ensuring that incoming officers have proper tools to communicate with other officers and protect the prison during their shift.

activities of check-in and receipt of assignments are therefore necessary to perform the officer's principal duties of safeguarding the prison during his shift.

As to the preliminary activity of retrieving tools and gear, correctional officers need specific items in order to perform assigned duties, for instance, handcuffs to transport inmates or tear gas to quell a potential riot. (*See* ECF No. 105 at 14.) Retrieving tools and gear, as described in the FAC (ECF No. 95 at ¶ 32), is distinguishable from the example Defendant identifies in its motion of "polishing shoes, boots and duty belts, cleaning radios and traffics vests, and oiling handcuffs." (ECF No. 99 at 15 (citing *Musticchi v. City of Little Rock*, *Ark.*, 734 F. Supp. 2d 621, 630-32 (E.D. Ark. 2010)).) As alleged, Plaintiffs are not cleaning gear; they are retrieving gear that is "necessary and required to complete their daily job tasks"—tasks which they are informed of only once they arrive at the prison and receive a work assignment from their supervisor. (*See* ECF No. 95 at ¶ 32.) As alleged, this activity is therefore indispensable to the officer's principal duties.

As to the preliminary activity of uniform inspection, the FAC contends that "if [a correctional officer's] uniform was not up to standards" then the officer "could not proceed to their post[]." (ECF No. 95 at ¶ 31(b).) Defendant argues that because a uniform can be put on at home, this activity is not compensable under FLSA. (ECF No. 112 at 7 (citing *Balestrieri v. Menlo Park Fire Protection Dist.*, 800 F.3d 1094, 1100 (9th Cir. 2015)).) However, Plaintiffs do not contend that it is putting on a uniform at work that is compensable; rather, they state that uniform inspection by an officer's shift supervisor is a component of "muster" and is therefore compensable because it is required. (*See* ECF No. 95 at ¶ 31(b).) While the time spent by a supervisor visually inspecting an officer's uniform may itself be *de minimus*, it is a purported component of "muster" and therefore part of a continuous workday activity that is integral to the officer's principal duty of ensuring the safety of the prison and monitoring its inmates.

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As to the preliminary activity of walking from check-in, receipt of assignment, and tool collection to an officer's assigned post for the day, this activity is compensable under the "continuous workday doctrine." *See IBP, Inc.*, 546 U.S. at 37 ("[D]uring a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded [from the Portal-to-Portal Act's travel exemption], and as a result is covered by FLSA.")

As to the postliminary activity of outgoing correctional officers briefing incoming officers, this is similarly necessary to the safety and security of the prison, and is an integral part of the officers' principal duties. (ECF No. 106 at 16-17.) Finally, as to the postliminary activities of walking back to and returning any tools or gear taken by an officer, the allegations in the FAC permit the Court to reasonably infer that Plaintiffs were not allowed to take these tools and gear home with them and so were required to return them. As Plaintiffs are purportedly required to take these tools and gear before starting their shifts in order to perform their assigned duties, the postliminary activity of returning tools or gear is also indispensable to their principal duties during their shifts.

Defendant also argues that these activities are *de minimus* and again asserts that the factual allegations in the FAC are implausible (*see, e.g.*, ECF No. 112 at 6, 7 ("surely de-briefing and returning tools must take less than a minute as plaintiffs must walk back the same way they came" and "[t]here is no factual basis for this Court to even attempt to estimate such time for 'walking to post' since plaintiffs admit in their complaint they all worked at different facilities and in different locations in those facilities")). The Court, however, does not quibble about the plausibility of facts when doing so would require this Court to look at evidence outside the pleadings. What is sufficient at this stage of the litigation is that there is a scope of activities that employees must perform, that these activities are integral and indispensable to their positions as prison guards, and that the factual allegations are that these activities generally take 45 minutes to perform "off the clock." The Court therefore finds that the FAC's allegations

permit this Court to make the reasonable inference that these activities, as alleged, are not *de minimis*.

Defendant's Motion to Dismiss is therefore denied as to Plaintiff's claim for violation of the FLSA's overtime provision.

D. Minimum Wage Amendment Claim

It is unclear from the plain language of the MWA whether "other entity" applies to the state government. The MWA states in relevant part that an "employer" is any "other entity that may employ individuals." Nev. Const., art. 15, § 16, cl. 7. Defendant contends that the MWA does not apply to it because NRS Chapter 284 governs the relationship between the State of Nevada and its employees. (*See* ECF No. 99 at 17-19.) Plaintiffs respond that the state government is not identified as one of the entities exempt from the MWA and that the MWA superseded NRS Chapter 284. (*See* ECF No. 105 at 20-23.) Resolution of this matter requires the Court to interpret state law; therefore, the Court questions whether certification of the issue to the Nevada Supreme Court is warranted.

The Court therefore denies Defendant's Motion to Dismiss as to this claim without prejudice and directs supplemental briefing as to whether this issue should be certified and the effect of certification on the remaining claims in this action.

E. NRS § 284.180 Claim

Defendant argues that Plaintiff has failed to plead facts demonstrating they have exhausted the administrative requirements of NRS Chapter 284. (ECF No. 99 at 19-20.) Specifically, this process requires that claimants first file a grievance regarding issues of compensation or working hours, that they then appeal the decision regarding their grievance to the Employee Management Committee ("EMC"), and that, if still unsatisfied, they obtain judicial review of EMC's decision by filing a petition within 30 days. *See* NRS §§ 284.384, 233B.130(2)(d). Plaintiffs respond that they do not need to exhaust the administrative process and have a "direct private right of action to enforce

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the overtime provisions contained in NRS [§] 284.180" (ECF No. 105 at 23) because NRS § 284.195 provides:

> Any person employed or appointed contrary to the provisions of this chapter and the rules and regulations thereunder whose payroll or account is refused certification shall have an action against the appointing authority employing or appointing or attempting to employ or appoint the person for the amount due by reason of such employment or purported employment, and the costs of such action.

However, Plaintiffs are wrong. NRS § 284.195 applies where an "employee" has been appointed to a position of employment by an "appointing authority" where the appointment of the employee is "contrary to law and regulation" and payroll certification does not occur. That unlawfully appointed "employee" then may sue the "appointing authority" and not the State of Nevada, *see* NRS § 284.190(2) & (3), for the amount that "employee" is owed based on any work she performed, and she may initiate a private right of action without going through the administrative grievance process normally required of state employees.

Failure to exhaust state administrative remedies is claim-dispositive and, therefore, state law applies in determining whether a claim for violation of NRS § 284.180 is justiciable in this Court. *See Hanna v. Plumer*, 380 U.S. 460, 467 (1965) ("The Erie rule is rooted in part in a realization that it would be unfair for the character of result of a litigation materially to differ because the suit had been brought in a federal court."). Because the Nevada Supreme Court has found that such a claim is not ripe for judicial review unless all state administrative remedies have been exhausted, *see City of Henderson v. Kilgore*, 131 P.3d 11, 14-15 (Nev. 2006), this Court will follow Nevada's lead and will not address the claim.

Therefore, the claim for violation of NRS § 284.180 is dismissed without prejudice.

F. Breach of Contract

Defendant argues in relevant part that NDOC's Variable Work Schedule Request form ("Variable Request Form") is not an employment agreement and is instead a

document simply giving employees the choice of working either a forty-hour workweek over the course of five days or an eighty-hour workweek over the course of fourteen days. (ECF No. 99 at 20-21; *see also* ECF No. 95-5 at 2.) Plaintiffs state that "Plaintiffs' breach of contract claim is premised upon the determination that the pre- and post-shift work is compensable under federal and state law." (ECF No. 105 at 23.) They go on to state that the "agreements were those that correctional officers would be compensated overtime when they worked over 40 hours in a workweek or over 80 hours in a biweekly pay period, depending on the variable work schedule the employee chose." (*Id.*) Based on the FAC, this "agreement" appears to be the Variable Request Form. (*See* ECF No. 95 at ¶ 95 ("Defendant had an agreement with Plaintiffs and with every Class Member under the Nevada Department of Corrections Variable Work Schedule to pay overtime").)

The Variable Request Form, however, is clearly an agreement to work a variable schedule in a workweek, not an agreement or contract to pay overtime. To the extent the Variable Request Form states that overtime will be paid under NRS § 284.180, this is merely a statement of what the law requires of Defendant. The Court therefore finds that the Variable Request Form is not a contract to pay overtime wages to Plaintiffs. The Court therefore dismisses the breach of contract claim.

VI. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of Defendant's motions.

It is therefore ordered that Defendant's Motion to Strike (ECF No. 98) is denied.

It is further ordered that Defendant's Motion to Dismiss (ECF No. 99) is granted in part and denied in part. It is granted as to Plaintiffs' claim for violation of NRS § 284.180 and Plaintiffs' claim for breach of contract. It is denied as to Plaintiff's remaining

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claims and is denied without prejudice as to Plaintiffs' claim for violation of the Minimum Wage Amendment.

It is further ordered that the parties are to file supplemental briefs of no more than five (5) pages each within seven (7) days of this order to explain if certification of the question whether the Minimum Wage Amendment applies to state government employees is warranted and what effect certification would have on the remaining claims in this action.

DATED THIS 26th of March 2018.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DONALD WALDEN JR, NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY on behalf of themselves and all others similarly situated, Plaintiffs, vs. THE STATE OF NEVADA, EX REL. ITS NEVADA DEPARTMENT OF CORRECTIONS, and DOES 1-50, Defendant.	Case No.: 3:14-cv-00320-MMD-WGC **JOINT RESPONSE TO CERTIFICATION OF NEVADA MINIMUM WAGE AMENDMENT ISSUE (ECF NO. 166) AND STIPULATION TO DISMISS RELATED CAUSE OF ACTION**

Defendant State of Nevada, ex rel. its Department of Corrections ("NDOC"), and Plaintiffs, Donald Walden Jr., Nathan Echeverria, Aaron Dicus, Brent Everist, Travis Zufelt, Timothy Ridenour, and Daniel Tracy, on behalf of themselves and all others allegedly similarly situated ("Plaintiffs") (collectively referred to as "the Parties"), by and through their respective counsel of record, hereby state the following:

1. Both NDOC and Plaintiffs have reviewed this Court's Order of March 26, 2018 (ECF No. 166) and the Court's order that the parties address the issue of whether "…certification of the question whether Nevada's Minimum Wage Amendment applies to state government employees is

warranted and what effect certification would have on the remaining claims in this action…" (ECF No. 166, pg. 18.)

2. Having discussed the issue, both NDOC and the Plaintiffs agree to dismiss this cause of action within Plaintiff's First Amended Complaint (i.e., Plaintiff's Third Cause of Action – Failure to Pay Minimum Wages in Violation of the Nevada Constitution, ECF No. 95, pgs. 31-32) without prejudice.

3. In light of this stipulation, both NDOC and the Plaintiffs agree that any further consideration of whether to certify this question has been rendered moot.

Dated this 2nd day of April, 2018.

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ORDER

IT IS SO ORDERED.

DATED this _____ day of April, 2018.

_____
UNITED STATES DISTRICT JUDGE

RICHARD I. DREITZER, ESQ.
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DONALD WALDEN JR, NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY on behalf of themselves and all others similarly situated, Plaintiffs, vs. THE STATE OF NEVADA, EX REL. ITS NEVADA DEPARTMENT OF CORRECTIONS, and DOES 1-50, Defendant.	Case No.: 3:14-cv-00320-MMD-WGC **JOINT RESPONSE TO CERTIFICATION OF NEVADA MINIMUM WAGE AMENDMENT ISSUE (ECF NO. 166) AND STIPULATION TO DISMISS RELATED CAUSE OF ACTION**

Defendant State of Nevada, ex rel. its Department of Corrections ("NDOC"), and Plaintiffs, Donald Walden Jr., Nathan Echeverria, Aaron Dicus, Brent Everist, Travis Zufelt, Timothy Ridenour, and Daniel Tracy, on behalf of themselves and all others allegedly similarly situated ("Plaintiffs") (collectively referred to as "the Parties"), by and through their respective counsel of record, hereby state the following:

1. Both NDOC and Plaintiffs have reviewed this Court's Order of March 26, 2018 (ECF No. 166) and the Court's order that the parties address the issue of whether "…certification of the question whether Nevada's Minimum Wage Amendment applies to state government employees is

warranted and what effect certification would have on the remaining claims in this action…" (ECF No. 166, pg. 18.)

2. Having discussed the issue, both NDOC and the Plaintiffs agree to dismiss this cause of action within Plaintiff's First Amended Complaint (i.e., Plaintiff's Third Cause of Action – Failure to Pay Minimum Wages in Violation of the Nevada Constitution, ECF No. 95, pgs. 31-32) without prejudice.

3. In light of this stipulation, both NDOC and the Plaintiffs agree that any further consideration of whether to certify this question has been rendered moot.

Dated this 2nd day of April, 2018.

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ORDER

IT IS SO ORDERED.

DATED this 2nd day of April, 2018.

UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DONALD WALDEN JR, NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THE STATE OF NEVADA, *EX REL.* ITS NEVADA DEPARTMENT OF CORRECTIONS, and DOES 1-50,

Defendant.

Case No.: 3:14-cv-00320-MMD-WGC

PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S MARCH 26, 2018, ORDER WITH RESPECT TO THE NRS 284.180 OVERTIME CLAIM PURSUANT TO FRCP 59(e) AND 60(b) (ECF NO. 166)

Plaintiffs DONALD WALDEN JR, NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY ("Plaintiffs") on behalf of themselves and all others similarly situated, hereby respectfully request that the Court reconsider its March 26, 2018, Order Granting, In Part, Defendant's Motion to Dismiss with respect to Plaintiffs' overtime claim under NRS 284.180. (ECF No. 166). This Motion is brought pursuant to Rule 59(e) and 60(b) of the Federal Rules of Civil Procedure. Rule 59(a)(1)(b) states that: "The court may, on motion, grant a new trial on all or some of the issues--and to any party--as follows: . . . after a nonjury trial, for any reason for which a rehearing has heretofore been

granted in a suit in equity in federal court." Rule 60(b) allows a district judge to provide relief from a final judgment if the moving party can show(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud ..., misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) ***any other reason that justifies relief.***" (Emphasis added).

The Court dismissed Plaintiffs' Overtime Claim under NRS 284.180 (Fourth Cause of Action), without prejudice, for failing to exhaust their administrative remedies. (ECF No. 166, at pp. 15-16). As set forth more fully in the following Memorandum of Points and Authorities, any such requirement to exhaust administrative remedies would be futile, as demonstrated by past grievances submitted by Correctional Officers employed by Defendant and who are party plaintiffs in this action.

This motion is based on the pleadings and papers on file, the Memorandum of Points and Authorities, the Declaration of Opt-In Plaintiff James Kelly, all papers on file in this action, and any oral argument that may be heard.

DATED: April 9, 2018

Respectfully Submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

Rule 59(e) motion is the proper vehicle for seeking reconsideration of a summary judgment ruling. *Stephenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808, 811 (9th Cir.1981), overruled on other grounds, *Puchall v. Houghton, Cluck, Coughlin & Riley (In re Washington Pub. Power Supply Sys. Sec. Lit.),* 823 F.2d 1349 (9th Cir.1987) (en banc), *Tripati v. Henman*, 845 F.2d 205, 206 (9th Cir. 1988). A motion to "alter or amend" a judgment under Rule 59(e) seeks "a substantive change of mind by the court." *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir.1983). Federal courts have determined that there are four grounds for granting a Rule 59(e) motion: (1) the motion is necessary to correct manifest errors of law or fact upon which the judgment is based; (2) the moving party presents newly discovered or previously unavailable evidence; (3) the motion is necessary to prevent manifest injustice; or (4) there is an intervening change in controlling law. *Turner v. Burlington Northern Santa Fe R. Co.*, 338 F.3d 1058 (9th Cir.2003). *Turner v. High Desert State Prison,* 2:13-CV-01752-GMN, 2014 WL 321070 (D. Nev. Jan. 29, 2014). The motion under Rule 60(b) is simply derivative of the motion under Rule 59.

I. REQUIRING PLAITIFFS TO EXHAUST THEIR ADMINISTRATIVE REMEDIES WOULD BE FUTILE BECAUSE A PARTY PLAINTIFF HAS ALREADY ATTEMPTED TO DO SO AND THE ADMINISTRATIVE AGENCY REFUSED TO TAKE JURISDICTION OVER HIS GRIEVANCE

When an attempt to exhaust administrative remedies would be futile or the administrative process is inadequate, a party may be excused from a requirement to exhaust an administrative remedy. *Malecon Tobacco, LLC v. State ex rel. Dep't of Taxation,* 118 Nev. 837, 839, 59 P.3d 474, 476 (2002) (holding that administrative exhaustion is not required when it is futile); *see also Fernandez v. Chertoff,* 471 F.3d 45, 58 (2d Cir.2006) (holding that administrative exhaustion may be excused if "the agency cannot provide effective relief"). Though Prem and the remaining real parties in interest treat them as a singleconcept, futility and inadequacy are separate exceptions to the administrative exhaustion requirement. *Randolph–*

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Sheppard Vendors of Am. v. Weinberger, 795 F.2d 90, 107 (D.C.Cir.1986). Futility occurs when "the agency will almost certainly deny any relief either because it has a preconceived position on, or lacks jurisdiction over, the matter." *Id.* Inadequacy occurs when "the agency has expressed a willingness to act, but the relief it will provide through its action will not be sufficient to right the wrong." *Id.*

Requiring Plaintiffs to exhaust their administrative remedies in order to continue to pursue their NRS 284.180 claim in this Court would be futile because COs have already exhausted their administrative remedies and the agency has refused jurisdiction over the wage claim. Opt-In Plaintiff James Kelly filed a grievance to be paid for the pre and post shift time at issue in this action on February 13, 2013. *See* Declaration of James Kelly ("Kelly Dec."), at ¶ 4, Exhibit A. In his grievance, he stated: "I have been working for the department in unpaid status for several years. I came to realize that my employer is required to pay me for time that I have actively engaged in department business." *Id.* at p. 1. He then attached a detailed account of the activites that he believed he should be paid for and relevant legal citations. *See Id.* at pp. 4-9.

NDOC's first step response was as follows:

> In response to your recent request for a review of pay records and work schedules, you allege that you are entitled to receive back pay. This allegation is based on your belief that you have been working for the NDOC in unpaid status for several years. However, you have provided no documentation to support this. All State employees have the ability to access their time sheets in NEATS. Officers commencd entereing their own timesheets in NEATS in 2007. You can self-audit and then provide appropriate documentation to support your claim if it is valid.
>
> **Your grievance is denied.**

Id. at p. 2.

CO Kelly appealed to the second step. His comments in support of the second step appeal were as follows:

> The Department of Corrections has been enriched by my labor for years. I arrive for work and commnence to engage in activities that

> enrich the Deparment, and/or in activities that ae required of me by my employer, and I have not been compensated. These activities are explained in my attached statement. It is clear that the WHD of the FLSA considers these activities compensable. I am not the final auditor of my timesheet. I have placed overtime that I have earned on my timesheet in the past, only to have it removed without my consent. I have had to file grievances to get that overtime back. This is what I am currently engaged in, now that I have a clear definition fo what is compensable to me. Federla law is clear on what I shall be compensated for, and I would suggest that you read the attached fact sheets, and that you comply with the Federal law as defined in these fact sheets. It is not work requested, but it is work suffered or permitted as defined by the Fact Sheet.

NDOC's second step response was callous and curt, to say the least:

> You were answered correctly at the first step of your grievance. You have made a general statement about work you claimed to have done. You have not provided any information in regards to specific dates and times where you worked and were not compensated. It would be your responsibility to do this research and provide the information.

Id. at p. 2.

NDOC's similarly frustrated CO Kelly's attempt at convincing NDOC that they need to compensate him for the pre- and post-shift activities that he was performing. In response, NDOC simply identified its policy that it only pays to the shift and when a CO is at his or her assigned post: "It is the employees responsibility to accurately report on their own time sheet the time they come to work and arrive on their post assignment and begin work and the time they leave their post assignment and end their work shift each work day." *Id*. at p. 3.

CO Kelly appealed NDOC's determination to the Employee-Management Committee ("EMC"). *See* Kelly Dec. at ¶ 5, Exhibit B. The EMC rejected CO Kelly's grievance on the grounds that a wage claim that is based on federal law guidance "does not fall within [the EMC's] jurisdiction." *Id*. at p. 1. CO Kelly's grievance was lost along with his back overtime wages owed.

As is demonstrated by the EMC's refusal to take jurisdiction over this claim, any future grievance submitted by Plaintiffs and on behalf of all Opt-Ins (including Mr. Kelly) would be

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futile because the agency has already refused to take jurisdiction that is based on federal legal theories. While Plaintiffs' claim under NRS 284.180 is based on a Nevada state statute, the interpretation of whether COs are owed overtime under that statute is certainly guided by whether COs have a claim under the FLSA. There are no state interpretations of NRS 608.180 or what should be deemed "compensable work" under Nevada's administrative regulations. As a result, federal regulations construing the FLSA would most certainly be consulted and will govern the grievance. Since this Court has already ruled the Plantiffs have stated a valid claim for compensation for the pre and post shift activities at issue under federal law, the EMC will not, and cannot, take jurisdiction over the interpretation of these federal principals.

II. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court reconsider its decision to dismiss, without prejudice, Plaintiffs' overtime claim under NRS 284.180 (ECF No. 166) for failure to exhaust administrative remedies and re-instate that claim in this action.

DATED: April 9, 2018

Respectfully Submitted,

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/s/Joshua D. Buck

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DONALD WALDEN JR, NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY on behalf of themselves and all others similarly situated, Plaintiffs, vs. THE STATE OF NEVADA, EX REL. ITS NEVADA DEPARTMENT OF CORRECTIONS, and DOES 1-50, Defendant.	Case No.: 3:14-cv-00320-MMD-WGC **DEFENDANT'S ANSWER TO FIRST AMENDED AND CLASS ACTION COMPLAINT (ECF NO. 95)**

Defendant State of Nevada, ex rel. its Department of Corrections ("NDOC") or ("Defendant"), by and through its attorneys, Adam Paul Laxalt, Attorney General of the State of Nevada, Theresa M. Haar, Senior Deputy Attorney General, and Richard I. Dreitzer, Esq., David S. Kahn, Esq. and James T. Tucker, Esq of the law firm of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, hereby answer Plaintiffs' First Amended Collective and Class Action Complaint ("FAC") (ECF No. 95), as follows:

Pursuant to Rule 8(b) of the Federal Rules of Civil Procedure, Defendant denies each and every allegation of every matter, fact and/or thing against it contained in the FAC, unless otherwise admitted or qualified.

JURISDICTION AND VENUE

1. Answering Paragraphs 1 and 3 of Plaintiffs' FAC on file herein, NDOC denies each and every allegation contained therein.

2. Answering Paragraph 2 of Plaintiffs' FAC on file herein, NDOC admits each and every allegation contained therein.

PARTIES

3. Answering Paragraph 4 of Plaintiffs' FAC on file herein, NDOC admits that Plaintiff, Donald Walden, Jr. was in the classified state service pursuant to NRS 284.150 during his employment. NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

4. Answering Paragraph 5 of Plaintiffs' FAC on file herein, NDOC admits that Plaintiff, Nathan Echeverria was in the classified state service pursuant to NRS 284.150 during his employment. NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

5. Answering Paragraph 6 of Plaintiffs' FAC on file herein, NDOC admits that Plaintiff, Aaron Dicus was in the classified state service pursuant to NRS 284.150 during his employment. NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

6. Answering Paragraph 7 of Plaintiffs' FAC on file herein, NDOC admits that Plaintiff, Brent Everist was in the classified state service pursuant to NRS 284.150 during his employment. NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

7. Answering Paragraph 8 of Plaintiffs' FAC on file herein, NDOC admits that Plaintiff, Travis Zufelt was in the classified state service pursuant to NRS 284.150 during his employment. NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

8. Answering Paragraph 9 of Plaintiffs' FAC on file herein, NDOC admits that Plaintiff, Timothy Ridenour was in the classified state service pursuant to NRS 284.150 during his employment. NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

9. Answering Paragraph 10 of Plaintiffs' FAC on file herein, NDOC admits that Plaintiff, Daniel Tracy was in the classified state service pursuant to NRS 284.150 during his employment. NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

10. Answering Paragraph 11 of Plaintiffs' FAC on file herein, NDOC denies each and every allegation contained therein.

11. Answering Paragraph 12 of Plaintiffs' FAC on file herein, NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

FACTUAL ALLEGATIONS

12. Answering Paragraph 13 of Plaintiffs' FAC on file herein, NDOC admits that Plaintiffs were in the classified state service pursuant to NRS 284.150 during their employment and that the facilities which comprise the NDOC system are set forth at http://doc.nv.gov/Facilities/Home/ but is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained in this Paragraph, and on that basis, denies the same.

13. Answering Paragraph 14 of Plaintiffs' FAC on file herein, NDOC admits that Plaintiffs were in the classified state service pursuant to NRS 284.150 during their employment but denies each and every remaining allegation contained therein.

14. Answering Paragraphs 15, 17 and 18 of Plaintiffs' FAC on file herein, NDOC denies each and every allegation contained therein.

15. Answering Paragraph 16 of Plaintiffs' FAC on file herein, NDOC admits that, at all times relevant hereto, it utilized the NEATS ("Nevada Employee Action and Timekeeping System") in recording the hours worked by the Plaintiffs and that this is an "exception time reporting" system but denies each and every remaining allegation contained therein.

16. Answering Paragraphs 19, 20, 21, 22 and 24 of Plaintiffs' FAC on file herein, NDOC denies each and every allegation contained therein.

17. Answering Paragraph 23 of Plaintiffs' FAC on file herein, NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

18. Answering Paragraph 25 of Plaintiffs' FAC on file herein, NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

19. Answering Paragraph 26 of Plaintiffs' FAC on file herein, NDOC denies each and every allegation contained therein.

20. Answering Paragraph 27 of Plaintiffs' FAC on file herein, NDOC admits that Administrative Regulation 326 speaks for itself, but is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained in this Paragraph, and on that basis, denies the same.

21. Answering Paragraph 28 of Plaintiffs' FAC on file herein, NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

22. Answering Paragraph 29 of Plaintiffs' FAC on file herein, NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

23. Answering Paragraphs 30, 31, 31(a), 31(c), 32, 32(a), 33 and 33(a) of Plaintiffs' FAC on file herein, NDOC denies each and every allegation contained therein.

24. Answering Paragraph 31(b) of Plaintiffs' FAC on file herein, NDOC admits that Administrative Regulation 350 speaks for itself, but denies each and every remaining allegation contained therein.

25. Answering Paragraphs 34 and 35 of Plaintiffs' FAC on file herein, NDOC denies each and every allegation contained therein.

26. Answering Paragraphs 36, 36(a), 36(b) and 37 of Plaintiffs' FAC on file herein, NDOC denies each and every allegation contained therein.

27. Answering Paragraph 38 of Plaintiffs' FAC on file herein, NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

28. Answering Paragraph 39 of Plaintiffs' FAC on file herein, NDOC admits that Operational Procedure 320 speaks for itself, but denies each and every remaining allegation contained therein.

29. Answering Paragraph 40 of Plaintiffs' FAC on file herein, NDOC admits that Administrative Regulation 320 speaks for itself, but denies each and every remaining allegation contained therein.

30. Answering Paragraphs 41 and 42 of Plaintiffs' FAC on file herein, NDOC denies each and every allegation contained therein.

31. Answering Paragraph 43 of Plaintiffs' FAC on file herein, NDOC admits that, at all times relevant hereto, it utilized the NEATS ("Nevada Employee Action and Timekeeping System") in recording the hours worked by the Plaintiffs, that this is an "exception time reporting" system and that each of the Plaintiffs have signed a "Nevada Department of Corrections Variable Work Schedule Request" form, but is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained in this Paragraph, and on that basis, denies the same.

32. Answering Paragraph 44, 44(a), 44(b) and 44(c) of Plaintiffs' FAC on file herein, NDOC admits that Plaintiff, Donald Walden, Jr. was in the classified state service pursuant to NRS 284.150 during his employment. NDOC is without sufficient knowledge or information upon which

to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

33. Answering Paragraph 45, 45(a), 45(b), 45(c), 45(d) and 45(e) of Plaintiffs' FAC on file herein, NDOC admits that Plaintiff, Nathan Echeverria was in the classified state service pursuant to NRS 284.150 during his employment. NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

34. Answering Paragraph 46, 46(a), 46(b), 46(c), 46(d), 46(e), 46(f), 46(g), 46(h) and 46(f*)(erroneously named as a second "f" subparagraph) of Plaintiffs' FAC on file herein, NDOC admits that Plaintiff, Aaron Dicus was in the classified state service pursuant to NRS 284.150 during his employment. NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

35. Answering Paragraph 47, 47(a), 47(b), 47(c), 47(d) and 47(e) of Plaintiffs' FAC on file herein, NDOC admits that Plaintiff, Brent Everist was in the classified state service pursuant to NRS 284.150 during his employment. NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

36. Answering Paragraph 48, 48(a), 48(b), 48(c), 48(d), 48(e), 48(f), 48(g) and 48(h) of Plaintiffs' FAC on file herein, NDOC admits that Plaintiff, Travis Zufelt was in the classified state service pursuant to NRS 284.150 during his employment. NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

37. Answering Paragraph 49, 49(a), 49(b), 49(c), 49(d), 49(e), 49(f) and 49(g) of Plaintiffs' FAC on file herein, NDOC admits that Plaintiff, Timothy Ridenour was in the classified state service pursuant to NRS 284.150 during his employment. NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

38. Answering Paragraph 50, 50(a), 50(b), 50(c), 50(d), 50(e), 50(f) and 50(g) of Plaintiffs' FAC on file herein, NDOC admits that Plaintiff, Daniel Tracy was in the classified state service pursuant to NRS 284.150 during his employment. NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

COLLECTIVE AND CLASS ALLEGATIONS

39. Answering Paragraph 51 of Plaintiffs' FAC on file herein, NDOC repeats, realleges and incorporates their responses to Paragraphs 1 through 50, inclusive, above, as though fully set forth herein.

40. Answering Paragraph 52 of Plaintiffs' FAC on file herein, NDOC admits that a conditional class has been certified in this matter. NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

41. Answering Paragraph 53 of Plaintiffs' FAC on file herein, NDOC admits each and every allegation contained therein.

42. Answering Paragraphs 54 and 55 of Plaintiffs' FAC on file herein, NDOC denies each and every allegation contained therein.

43. Answering Paragraph 56 of Plaintiffs' FAC on file herein, NDOC admits each and every allegation contained therein, but denies that this is a contract matter.

44. Answering Paragraph 57 of Plaintiffs' FAC on file herein, NDOC is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and on that basis, denies the same.

45. Answering Paragraphs 58, 58(a), 58(b), 58(c), 58(d), 58(e) and 58(f) of Plaintiffs' FAC on file herein, NDOC denies each and every allegation contained therein.

46. Answering Paragraphs 59, 59(a), 59(b), 59(c), 59(d), and 59(e) of Plaintiffs' FAC on file herein, NDOC denies each and every allegation contained therein.

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FIRST CLAIM FOR RELIEF

(Failure to Pay Wages in Violation of the FLSA, 29 U.S.C. §201, *et seq*.)

47. Answering Paragraph 60 of Plaintiffs' FAC on file herein, NDOC repeats, realleges and incorporates its responses to Paragraphs 1 through 59, inclusive, above, as though fully set forth herein.

48. Answering Paragraph 61 of Plaintiffs' FAC on file herein, NDOC admits that 29 U.S.C. §206 addresses the concept of employee pay rates, but lacks sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained in this Paragraph, and thus denies the same.

49. Answering Paragraph 62 of Plaintiffs' FAC on file herein, NDOC denies each and every allegation contained therein. *See*, 29 U.S.C. §203(e)(2)(c).

50. Answering Paragraph 63 of Plaintiffs' FAC on file herein, NDOC admits that the Fair Labor Standards Act (FLSA) applies generally to state employees, but lacks sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained in this Paragraph, and thus denies the same.

51. Answering Paragraph 64 of Plaintiffs' FAC on file herein, NDOC lacks sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and thus denies the same.

52. Answering Paragraphs 65, 66 and 67 of Plaintiffs' FAC on file herein, NDOC denies each and every allegation contained therein.

53. Answering Paragraph 68 of Plaintiffs' FAC on file herein, NDOC denies that Plaintiffs are entitled to any of the relief requested and therefore denies each and every allegation contained therein.

SECOND CLAIM FOR RELIEF

(Failure to Pay Overtime Wages in Violation of the FLSA, 29 U.S.C. §207)

54. Answering Paragraph 69 of Plaintiffs' FAC on file herein, NDOC repeats, realleges and incorporates its responses to Paragraphs 1 through 68, inclusive, above, as though fully set forth herein.

55. Answering Paragraph 70 of Plaintiffs' FAC on file herein, NDOC admits that 29 U.S.C. §207(a)(1) speaks for itself but lacks sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and thus denies the same.

56. Answering Paragraph 71 of Plaintiffs' FAC on file herein, NDOC admits that 29 U.S.C. §207(k) speaks for itself but lacks sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and thus denies the same.

57. Answering Paragraph 72 of Plaintiffs' FAC on file herein, NDOC lacks sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and thus denies the same.

58. Answering Paragraphs 73, 74, 75, 76 and 77 of Plaintiffs' FAC on file herein, NDOC denies each and every allegation contained therein.

59. Answering Paragraph 78 of Plaintiffs' FAC on file herein, NDOC denies that Plaintiffs are entitled to any of the relief requested and therefore denies each and every allegation contained therein.

PRAYER FOR RELIEF

NDOC affirmatively alleges that Plaintiffs are not entitled to any of the relief requested in this matter.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' FAC fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

NDOC, at all relevant times, acted in good faith toward Plaintiffs. Therefore, Defendant is entitled to qualified good faith immunity from damages.

THIRD AFFIRMATIVE DEFENSE

The State of Nevada (and by extension, NDOC) did not waive and has not waived its sovereign immunity in any respect, whether its Eleventh Amendment immunity to suits brought

against it in federal court, or its sovereign immunity to claims brought against it under the Fair Labor Standards Act (FLSA) in any court.

FOURTH AFFIRMATIVE DEFENSE

NDOC, at all relevant times, acted in accordance with applicable law and prison procedures that are constitutionally required.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' damages, if any, are the result of their own intentional and/or negligent actions and they are solely responsible for the matters alleged.

SIXTH AFFIRMATIVE DEFENSE

The negligence of the Plaintiffs caused or contributed to any injuries or damages which Plaintiffs may have sustained, and the negligence of NDOC, if any, requires that the damages of Plaintiffs be denied or diminished in proportion to the amount of negligence attributable to Plaintiffs.

SEVENTH AFFIRMATIVE DEFENSE

The Plaintiffs have failed to mitigate their losses and damages, if any there were.

EIGHTH AFFIRMATIVE DEFENSE

Any and all claims which occurred prior to two (2) years of the filing of Plaintiffs' original Complaint in this matter are barred by the statute of limitations.

NINTH AFFIRMATIVE DEFENSE

The damages sustained by Plaintiffs, if any, were accomplished with the full consent and approval of Plaintiffs.

TENTH AFFIRMATIVE DEFENSE

No award of punitive damages can be awarded against NDOC under the facts and circumstances alleged in Plaintiffs' FAC.

ELEVENTH AFFIRMATIVE DEFENSE

Any job action or inaction in relation to Plaintiffs was in conformity with the statutes, rules, regulations and agreements governing Plaintiffs' employment relationship, if any, with NDOC.

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TWELFTH AFFIRMATIVE DEFENSE

The losses, injuries and damages which Plaintiffs allege, if any, were directly and proximately caused by the negligence, carelessness, recklessness, or intentional acts of the Plaintiffs, which are greater than any negligence, carelessness, recklessness or fault of this answering Defendant, and therefore, Plaintiffs' claims against this answering Defendant are barred.

THIRTEENTH AFFIRMATIVE DEFENSE

NDOC has, at all times, acted in good faith and without intent to pay its classified employees improperly.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to exhaust administrative, contractual or statutory remedies.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiffs may not be appointed, paid, transferred, promoted, demoted or discharged except through the action of Chapter 284 of the Nevada Revised Statutes.

SIXTEENTH AFFIRMATIVE DEFENSE

At all times relevant hereto, the actions or omissions of NDOC, if any there were, were privileged either absolutely or conditionally and thus plaintiffs' FAC fails to state a cause of action n this regard.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by *res judicata*: i.e., issue preclusion and/or claim preclusion.

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by laches.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrine of unclean hands.

TWENTIETH AFFIRMATIVE DEFENSE

Plaintiffs' claims must be dismissed because NDOC exercised reasonable care to prevent and to promptly correct any alleged pay irregularities in its workplace.

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TWENTY FIRST AFFIRMATIVE DEFENSE

Plaintiffs' claims must be dismissed because NDOC did not aid, abet, ratify, condone, encourage or acquiesce in any unlawful conduct.

TWENTY SECOND AFFIRMATIVE DEFENSE

NDOC has a clearly communicated policy set forth in statute and regulation which entitles it to safe harbor.

TWENTY THIRD AFFIRMATIVE DEFENSE

NDOC paid to each Plaintiff the hours worked as each submitted on their timesheet.

TWENTY FOURTH AFFIRMATIVE DEFENSE

Any time which Plaintiffs allege to be non-compensated meets the definition of *de minimus* and NDOC is not liable pursuant to this exception.

TWENTY FIFTH AFFIRMATIVE DEFENSE

Correctional officers donning and doffing of protective gear does not qualify for overtime because the equipment is not integral to their work.

TWENTY SIXTH AFFIRMATIVE DEFENSE

If Plaintiffs arrived early at their previously bid and assigned post, Plaintiffs were waiting to be engaged, not engaged to be waiting.

TWENTY SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs cannot demonstrate that they are similarly situated to the proposed class of collective plaintiffs as each prison and post has its own procedures.

TWENTY EIGHTH AFFIRMATIVE DEFENSE

The FLSA does not preempt state statutes concerning classified employees which require prior requests, approval, and documentation of overtime work.

TWENTY NINTH AFFIRMATIVE DEFENSE

Plaintiffs cannot establish a common question which predominates for certification of a class.

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THIRTIETH AFFIRMATIVE DEFENSE

There is no policy, practice or custom sufficient to establish liability pursuant to 29 U.S.C. §201, *et seq.*, and Plaintiffs' FAC should be dismissed.

THIRTY FIRST AFFIRMATIVE DEFENSE

The State of Nevada's wage and overtime policies set forth in statute for persons in the classified service of the State are not unlawful.

THIRTY SECOND AFFIRMATIVE DEFENSE

The State of Nevada maintains an appropriate system of record keeping providing for employees to submit their time worked and assent to its correctness.

THIRTY THIRD AFFIRMATIVE DEFENSE

NDOC pleads all applicable limitations periods, both as a bar to the claims and requests for relief asserted in the FAC and as limitations upon evidence to be admitted or considered in connection with any proceedings in this case.

THIRTY FOURTH AFFIRMATIVE DEFENSE

To the extent that the period of time alleged in the FAC predates the limitations period set forth in Section 6(a) of the Portal-to-Portal Act, 29 U.S.C. § 255(a), such claims of Plaintiffs are barred.

THIRTY FIFTH AFFIRMATIVE DEFENSE

The claims of Plaintiffs may be barred in whole or in part by Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259, to the extent that actions in connection with the compensation of Plaintiffs were taken in good faith in conformity with and reliance upon written administrative regulations, orders, rulings, approvals, interpretations, and written and unwritten administrative practices or enforcement policies of the Administrator of the Wage and Hour Division of the United States Department of Labor.

THIRTY SIXTH AFFIRMATIVE DEFENSE

The claims of Plaintiffs may be barred in whole or in part by Section 11 of the Portal-to-Portal Act, 29 U.S.C. § 260, because any acts or omissions giving rise to this action were taken in

good faith and with reasonable grounds for believing that the actions or omissions were not a violation of the FLSA.

THIRTY SEVENTH AFFIRMATIVE DEFENSE

The claims of Plaintiffs may be barred in whole or in part by Section 4 of the Portal-to-Portal Act, 29 U.S.C. § 254, as to all hours in which Plaintiffs were travelling to and from work, were engaged in activities that were preliminary or postliminary to their principal activities, and were engaged in activities incidental to the use of employer-provided vehicles.

THIRTY EIGHTH AFFIRMATIVE DEFENSE

The claims of Plaintiffs may be barred in whole or in part to the extent that the work they performed falls within exemptions, exclusions, exceptions, or credits provided for in Section 7 of the FLSA, 29 U.S.C. § 207.

THIRTY NINTH AFFIRMATIVE DEFENSE

The claims of Plaintiffs may barred in whole or in part to the extent that the work they performed falls within exemptions provided for in Section 13(a) and/or (b) of the FLSA, 29 U.S.C. § 213(a) and/or (b).

FORTIETH AFFIRMATIVE DEFENSE

Plaintiffs seek compensation for time, all or part of which does not constitute work or compensable time for purposes of the FLSA.

FORTY FIRST AFFIRMATIVE DEFENSE

Plaintiffs are barred in whole or in part from obtaining relief for failure of consideration on their part to one or more of the Defendants.

FORTY SECOND AFFIRMATIVE DEFENSE

Some or all of the time spent by Plaintiffs, which is not otherwise excluded from hours worked under the FLSA, may be *de minimus*, and therefore not compensable.

FORTY THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part by statutory exclusions, exceptions, or credits under the FLSA and/or Nevada law.

FORTY FOURTH AFFIRMATIVE DEFENSE

To the extent that discovery reveals that Plaintiffs falsely reported their hours and there is no evidence that NDOC required the false reporting of hours, no evidence that NDOC encouraged Plaintiffs to represent to falsely report their hours, and no evidence that NDOC knew or should have known that Plaintiffs were providing false information as to their hours, NDOC invokes the doctrine of estoppel to bar the claims asserted by the Plaintiffs. *See Brumbelow v. Quality Mills, Inc.*, 462 F.2d 1324, 1327 (5th Cir. 1972).

FORTY FIFTH AFFIRMATIVE DEFENSE

NDOC at all times acted in good faith to comply with the FLSA and with reasonable grounds to believe that its actions did not violate the FLSA, and NDOC asserts a lack of willfulness or intent to violate the FLSA as a defense to any claim by Plaintiffs for liquidated damages and a three-year limitations period.

FORTY SIXTH AFFIRMATIVE DEFENSE

NDOC believes that a reasonable opportunity for investigation and discovery may reveal that Plaintiffs failed to take reasonable actions to mitigate their damages, if any, and any recovery to which Plaintiffs might be entitled must then be reduced by reason of their failure to mitigate their damages, if any.

FORTY SEVENTH AFFIRMATIVE DEFENSE

This matter is not appropriate for a collective action under the FLSA.

FORTY EIGHTH AFFIRMATIVE DEFENSE

There are no employees who are similarly situated to Plaintiffs, as that term is defined and/or interpreted under the FLSA, 29 U.S.C. § 216(b). Plaintiffs are not similarly situated to each other.

FORTY NINTH AFFIRMATIVE DEFENSE

Plaintiffs are precluded from pursuing FLSA violations on behalf of unnamed individuals.

FIFTIETH AFFIRMATIVE DEFENSE

Pursuant to 29 U.S.C. § 216(b), no individual shall be a party plaintiff to this action unless and until such individual gives his or her consent in writing to become such a party and such consent is filed with the Court.

FIFTY FIRST AFFIRMATIVE DEFENSE

Plaintiffs lack standing to represent unnamed individuals.

FIFTY SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred to the extent they seek duplicative relief or amounts seeking more than a single recovery.

FIFTY THIRD AFFIRMATIVE DEFENSE

Applying the equitable doctrines of setoff and recoupment, the purported claims of Plaintiffs and the claims Plaintiffs seek to assert on behalf of others must be offset by any amounts that Plaintiffs and putative class members previously received in connection with wage and hour complaints asserted before the instant litigation, and/or any benefits and/or other monies they have received or will receive, including overpayments by NDOC, if any.

FIFTY FOURTH AFFIRMATIVE DEFENSE

Plaintiffs may not properly maintain this case as a class action because: (1) Plaintiffs cannot establish the necessary procedural elements for class treatment; (2) a class action is not an appropriate method for the fair and efficient adjudication of the claims described in the Complaint; (3) common issues of fact or law do not predominate and, to the contrary, individual issues predominate; (4) Plaintiffs' claims are not representative or typical of the claims of the putative class members; (5) Plaintiffs are not proper class representatives and are not similarly situated to the proposed class group; (6) Plaintiffs and their counsel of record are not adequate representatives for the alleged putative class; (7) Plaintiffs cannot satisfy any of the requirements for class treatment, and class treatment is neither appropriate nor constitutional; (8) There is not a well-defined community of interest in the questions of law or fact affecting Plaintiffs and the members of the alleged putative class group; (9) The alleged putative class is not ascertainable, nor are its members identifiable; and (10) To the extent that the alleged putative class group is ascertainable and its members are identifiable, the number of putative class members is too small to meet the numerosity requirement for a class action.

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FIFTY FIFTH AFFIRMATIVE DEFENSE

Any request by Plaintiffs for class certification and/or a collective action should be denied because liability and/or damages, if any, to each member of the proposed class are dissimilar, may not be determined by on a group-wide basis, and therefore allowing this action to proceed as a class action or collective action would violate each NDOC'S right to due process.

FIFTY SIXTH AFFIRMATIVE DEFENSE

NDOC opposes class certification and disputes the propriety of class treatment. If the Court certifies a class in this case over NDOC'S objections, then NDOC asserts the affirmative and other defenses set forth herein against each and every member of the certified class.

FIFTY SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' FAC fails to state any facts that would entitle Plaintiffs to recover any compensatory damages, punitive damages, attorneys' fees, costs or equitable relief from NDOC.

FIFTY EIGHTH AFFIRMATIVE DEFENSE

To the extent any members of the putative class group or collective action group have signed a release and/or waiver encompassing claims alleged in Plaintiffs' FAC, their claims are barred by that release and/or waiver.

FIFTY NINTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred to the extent they failed to exhaust their administrative remedies or other prerequisites to filing their claims in this action.

SIXTIETH AFFIRMATIVE DEFENSE

Plaintiffs have been paid and/or received all wages and/or compensation due to them by virtue of their employment.

SIXTY-FIRST AFFIRMATIVE DEFENSE

Plaintiffs have been fully compensated for any wages owed, and, by accepting the payments made to them, have effectuated an accord and satisfaction of their claims.

SIXTY SECOND AFFIRMATIVE DEFENSE

Plaintiffs' alleged injuries / damages were not proximately caused by any unlawful policy, custom, practice and/or procedure promulgated and/or tolerated by Defendants.

SIXTY THIRD AFFIRMATIVE DEFENSE

If Plaintiffs are entitled to recover additional compensation on behalf of themselves and/or others, NDOC has not willfully or intentionally failed to pay such additional compensation, and as such, liquidated damages should not be awarded. Moreover, only a two-year statute of limitations should apply under the Fair Labor Standards Act.

SIXTY FOURTH AFFIRMATIVE DEFENSE

Plaintiffs cannot, fairly and adequately represent the interests of the purported collective action.

SIXTY FIFTH AFFIRMATIVE DEFENSE

To the extent that Plaintiffs are entitled to damages or penalties, NDOC is entitled to an offset for any over payments of wages or other remuneration previously provided (e.g., unauthorized extensions of meal or rest breaks, overpayment of wages, etc.).

SIXTY SIXTH AFFIRMATIVE DEFENSE

NDOC alleges that the FAC is barred, in whole or in part, to the extent that Plaintiffs, or some of them, consented to, encouraged, or voluntarily participated in all actions taken.

SIXTY SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs are barred in whole or in part from obtaining relief under the doctrine of laches to the extent Plaintiffs failed to bring their claims to the attention of NDOC in a reasonable timeframe and/or delayed in the filing of his action, causing prejudice to NDOC.

SIXTY EIGHTH AFFIRMATIVE DEFENSE

NDOC alleges that the FAC is barred, or any recover should be reduced, pursuant to the avoidable consequences doctrine because NDOC took reasonable steps to prevent and correct improper wage payments, if any, and to ensure compliance with the FLSA. Plaintiffs, or some of them, unreasonably failed to use the preventative and corrective opportunities provided to them by NDOC, and reasonable use of NDOC'S procedures would have prevented at least some, if not all, of the harm that Plaintiffs allegedly suffered.

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SIXTY NINTH AFFIRMATIVE DEFENSE

If it is determined that Plaintiffs are entitled to any relief for overtime compensation pursuant to the FLSA, the recovering Plaintiffs are limited to payment for overtime hours at one and one-half times that recovering Plaintiffs' hourly rate.

SEVENTIETH AFFIRMATIVE DEFENSE

To the extent Plaintiffs seek compensatory damages or other damages not available under the FLSA, any such attempt to obtain those damages is barred.

SEVENTY FIRST AFFIRMATIVE DEFENSE

To the extent Plaintiffs seek the imposition of penalties, the imposition of such penalties would violate NDOC'S due process rights under the U.S. Constitution and the Nevada Constitution.

SEVENTY SECOND AFFIRMATIVE DEFENSE

Plaintiffs cannot recover punitive damages because NDOC made good faith efforts to comply with all applicable statutes and laws.

SEVENTY THIRD AFFIRMATIVE DEFENSE

Plaintiffs' FAC fails to state a claim against NDOC upon which declaratory or injunctive relief can be awarded.

SEVENTY FOURTH AFFIRMATIVE DEFENSE

Pursuant to Rule 11 of the Federal Rules of Civil Procedure, as amended, all possible affirmative defenses may not have been alleged herein, insofar as sufficient facts were not available after reasonable inquiry upon the filing of NDOC'S Answer and, therefore, NDOC reserves the right to amend their answer to allege additional affirmative defenses if subsequent investigation warrants.

SEVENTY FIFTH AFFIRMATIVE DEFENSE

It has been necessary for NDOC to retain the services of an attorney to defend this action and therefore NDOC is entitled to a reasonable sum for attorneys' fees, together with the costs expended in this action.

WHEREFORE, having answered Plaintiffs' First Amended Complaint, NDOC prays for judgment in its favor and against Plaintiffs as follows:

1. That the First Amended Complaint be dismissed with prejudice;

2. That the request by Plaintiffs to designate this action as a collective action pursuant to 29 U.S.C. § 216(b) be denied;

3. That any request by Plaintiffs to designate this action as a class action pursuant to Fed. R. Civ. P. 23 be denied;

4. That Plaintiffs and any collective members or members of a putative class take nothing by virtue of this action;

5. That judgment be entered in favor of NDOC;

6. That NDOC be awarded attorneys' fees and costs of suit incurred herein; and

7. For such other and further relief as the Court may deem proper.

DATED this 19th day of April, 2018.

WILSON ELSER MOSKOWITZ
EDELMAN & DICKER LLP

BY: */s/ Richard I. Dreitzer*
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Attorneys for Defendant The State of Nevada, ex rel. its Department of Corrections

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP and that on April 19, 2018, I electronically filed and served a true and correct copy of the foregoing DEFENDANT'S ANSWER TO FIRST AMENDED AND CLASS ACTION COMPLAINT (ECF NO. 95) to all parties on file with the CM/ECF.

By: */s/ Naomi E. Sudranski*
An Employee of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DONALD WALDEN JR, NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY on behalf of themselves and all others similarly situated, Plaintiffs, vs. THE STATE OF NEVADA, *EX REL.* ITS NEVADA DEPARTMENT OF CORRECTIONS, and DOES 1-50, Defendants.	CASE NO. 3:14-cv-00320-MMD-WGC **NOTICE OF APPEAL**

Notice is hereby given that Defendant, State of Nevada ex rel. Nevada Department of Corrections, by and through counsel, Wilson Elser Moskowitz Edelman & Dicker LLP, appeal to the United States Court of Appeals for the Ninth Circuit from an Order Granting in Part and Denying in

. . .

. . .

Part the Defendants' Motion to Dismiss based on sovereign immunity as a matter of law. (ECF No. 166).

DATED this 19th day of April, 2018.

WILSON ELSER MOSKOWITZ
EDELMAN & DICKER LLP

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 19th day of April, 2018.

I certify that the following participants in this case are registered electronic filing systems users and will be served electronically:

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DONALD WALDEN JR., *et al.,* Plaintiffs, v. STATE OF NEVADA, *ex rel*. NEVADA DEPARTMETN OF CORRECTIONS, and DOES 1-50, Defendants.	Case No. 3:14-cv-00320-MMD-WGC ORDER

I. SUMMARY

Pending before the Court are five dispositive motions: (1) Plaintiffs' Motion for Partial Summary Judgment ("MPSJ ") (ECF No. 130); (2) Plaintiffs' Motion for Class Certification ("Motion to Certify") (ECF No. 133); (3) Defendant's Motion to Decertify Collective Action ("Motion to Decertify") (ECF No. 134); (4) Plaintiffs' Motion for Reconsideration of the Court's March 26, 2018 Order with Respect to the NRS § 284.180 Overtime Claim Pursuant to FRCP 59(e) and 60(b) ("Motion to Reconsider") (ECF No. 169); and (5) Defendant's Emergency Motion to Strike Plaintiffs' Voluntary Dismissal ("Motion to Strike") (ECF Nos. 136, 137 (sealed)[1]). The parties filed various responses and replies relating to these motions. (ECF Nos. 143, 144-46 (sealed), 150, 155, 156, 157 (sealed), 163, 170 (sealed), 171, 173, 174, 179, 184.)

[1]The Motion to Strike (ECF No. 136) should not have been filed a second time under seal (ECF No. 137). Instead, Defendant should have filed the three exhibits it wished to have sealed under seal in an individual docket entry and then filed the motion to seal as another separate docket entry.

For the reasons discussed herein, the Motion to Reconsider is denied, the unsealed version of the Motion to Strike is granted, the sealed version of the Motion to Strike will be stricken, and the MPSJ, Motion to Certify and Motion to Decertify are denied without prejudice.

Defendant has also filed five motions to seal (ECF Nos. 135, 138, 142, 159, 172), which the Court denies without prejudice.

II. BACKGROUND

Plaintiffs are employees or former employees of the Nevada Department of Corrections ("NDOC") who contend that NDOC failed to compensate them for time worked as well as for overtime pay. The underlying procedural history and facts of this case can be found in the Court's prior order. (ECF No. 166 at 2-5.)

III. MOTION TO RECONSIDER

On March 26, 2018, this Court issued an order (ECF No. 166) resolving in part Defendant's Motion to Dismiss Plaintiffs' First Amended Collective and Class Action Complaint ("Prior MTD"). Relevant here is the Court's ruling on Plaintiffs' claim under NRS § 284.180, in which this Court held that the claim was not ripe for judicial review because state administrative procedures had not been exhausted pursuant to state law. (ECF No. 166 at 16.) Plaintiffs now seek reconsideration pursuant to Federal Rules of Civil Procedure 59(e) and 60(b). (*See* ECF No. 169 at 1-3.)

A. Legal Standard

A motion to reconsider must set forth "some valid reason why the court should reconsider its prior decision" and set "forth facts or law of a strongly convincing nature to persuade the court to reverse its prior decision." *Frasure v. United States*, 256 F.Supp.2d 1180, 1183 (D. Nev. 2003). Reconsideration is appropriate if this Court "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist. No. 1J v. Acands, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A motion for reconsideration "may not be used to raise arguments or present evidence for the first time when they could

reasonably have been raised earlier in the litigation." *Marylyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009).

B. Discussion

Plaintiffs argue that this Court should reconsider its prior decision because the requirement to exhaust administrative remedies under NRS § 284.180 is futile and the administrative process provided for by that statute is inadequate. In support of this argument, Plaintiffs attach a declaration of opt-in Plaintiff James Kelly in which he describes his attempt to exhaust the administrative process available under state law. (ECF No. 169-1.) Defendant counters that this evidence was available to Plaintiffs in 2013, yet Plaintiffs failed to raise this argument or introduce the evidence in the Plaintiffs' opposition to the Prior MTD. (*See* ECF No. 179 at 8-9.) Plaintiffs dispute that Kelly's grievances are not new evidence by pointing out that they have opposed Defendant's separate motion to strike those grievances and by stating that Kelly is representative of the class despite being an opt-in plaintiff (Kelly became a party plaintiff on August 8. 2014). (ECF No. 184 at 3 n.2.) Neither response directly addresses Plaintiffs' failure to present this evidence in their opposition to the Prior MTD or their failure to argue that the administrative process under NRS § 284.180 is futile or inadequate as a matter of law. These issues could have reasonably been raised in Plaintiffs' opposition to the Prior MTD. The Court therefore denies Plaintiffs' Motion to Reconsider. *See Marylyn Nutraceuticals*, 571 F.3d at 880.

IV. MOTION TO STRIKE

Defendant filed an emergency motion to strike Plaintiffs' notice of voluntary dismissal on February 20, 2018 ("the Notice").[2] The Notice, filed on January 29, 2018, asserts that pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) Plaintiffs were "voluntarily dismiss[ing] the federal Fair Labor Standards Act ("FLSA") claims on behalf of the opt-in Plaintiffs who only worked at the NDOC conservation camps and transitional

[2]The Court issued a minute order on February 21, 2018, indicating that it would not consider the Motion to Strike on an emergency basis. (ECF No. 139.)

housing facilities." (ECF No. 129 at 1.) The deadline to file motions to certify the class pursuant to Rule 23 or to decertify the FLSA collective action was two days before on January 31, 2018.

Defendant argues that: (1) the Notice was improper and should be stricken because the parties agreed with the Court's prior order that dismissal of these plaintiffs must occur only by motion; and (2) under Rule 41, a plaintiff's ability to voluntarily dismiss a party is not absolute where an answer has been filed. (ECF No. 136 at 2.) The Court finds that the plain language and purpose of Rule 41 required that Plaintiffs seek leave of court to file the Notice because an answer had already been filed in this action.

Under Rule 41, voluntary dismissal of an action without prejudice at any time before service by the adverse party of an answer or motion for summary judgment and "is designed to permit a disengagement of the parties at the behest of the plaintiff in the early stages of a suit, before defendant has expended time and effort in the preparation of his case." *Pedrina v. Chun*, 987 F.2d 608, 610 (9th Cir. 1993) (quoting *Armstrong v. Frostie Co.*, 453 F.2d 914, 916 (4th Cir. 1971)) (internal quotation marks and alterations omitted). The Ninth Circuit has yet to address a situation like this one, where a plaintiff files a notice of voluntary dismissal of a portion of an amended complaint, the defendant has filed an answer to the original complaint, but the defendant has not filed an answer to the amended complaint. However, the District of Hawaii addressed this issue, finding that the rule is unequivocal that once a defendant serves *an* answer, leave of court is required for the plaintiff to file a notice of voluntary dismissal. *Aana v. Pioneer Hi-Bred Intern., Inc.*, Nos. 12-00231 LEK-BMK & 12-00665 LEK-BMK, 2014 WL 819158, at *3 (D. Haw. Feb. 28, 2014) ("The purpose of Rule 41(a)(1)(A)(i), however, is to allow a plaintiff to voluntarily withdraw his case before the defendant expends significant time and resources on the *case*, not just on the version of the plaintiff's complaint currently before the district court.") (emphasis in original). The Court agrees.

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The Motion to Strike is therefore granted. Plaintiffs' notice of voluntary dismissal will be stricken. Plaintiffs are given leave to file a motion seeking voluntary dismissal if they so choose.

V. MPSJ, MOTION TO CERTIFY, AND MOTION TO DECERTIFY

Plaintiffs' MPSJ and Motion to Certify are premised on their voluntary dismissal of certain opt-in plaintiffs while Defendant's Motion to Decertify is based on the conditional group approved for collective action under FLSA. Because the Court has ordered that the notice of voluntary dismissal be stricken, these motions are denied without prejudice.

VI. MOTIONS TO SEAL

Defendant filed five motions to seal: (1) motion to file under seal specific exhibits attached to its Motion to Decertify ("First Motion to Seal") (ECF No. 135); (2) motion to file under seal specific exhibits attached to its Motion to Strike ("Second Motion to Seal") (ECF No. 138[3]); (3) motion to file under seal certain exhibits attached to Defendant's opposition to Plaintiffs' MPSJ ("Third Motion to Seal") (ECF No. 142); (4) motion to file under seal certain exhibits attached to Defendant's opposition to Plaintiffs' Motion to Certify ("Fourth Motion to Seal") (ECF No. 159); and (5) motion to file under seal certain exhibits attached to Defendnat's reply in support of its Motion to Decertify ("Fifth Motion to Seal") (ECF No. 172). The Court denies all five motions without prejudice based on Defendant's failure to comply with Local Rule IA 10-5.[4]

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[3]The actual sealed documents should not have been filed with the motion and remaining documents for which Defendant is not seeking to seal (ECF No. 137); rather, the three documents Defendant wished to file under seal should have been filed under seal in one docket entry with the relevant motion to seal filed in a separate docket entry.

[4]Defendant also fails to cite to the correct standards for sealing and explain how the documents it seeks to seal comply with such standards. *See Kamakana v. City & Cty. of Honolulu,* 447 F.3d 1172, 1178 (9th Cir. 2006) (stating that there is a strong presumption in favor of access to court records and that a party seeking to seal such records bears the burden of overcoming this presumption with compelling reasons); *see also Ctr. for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1098-1102 (9th Cir. 2016) (clarifying when the compelling reasons standard applies to motions to seal).

In Defendant's First Motion to Seal, it seeks to have certain exhibits that are attached to its Motion to Decertify filed under seal. (ECF No. 135 at 3-6.) However, Defendant did not actually submit these documents under seal, so the Court is unable to make a determination about them. The First Motion to Seal is therefore denied without prejudice and with leave to refile the motion so long as Defendant also files the exhibits under seal.

Defendant makes the same error in moving to file certain exhibits under seal in the Second, Third, Fourth and Fifth Motions to Seal—Defendant files the primary document under seal when it seeks to have only certain exhibits filed under seal. Similarly, Defendant did not file an affidavit indicating that it served the sealed documents on Plaintiff. LR 10-5(c). The Court therefore denies these three motions to seal without prejudice and permits Defendant leave to refile the motions as well as the exhibits it wishes to be filed under seal independently of the primary document.

In turn, the Court will strike the following docket entries in their entirety: ECF Nos. 137, 144, 145, 146, 161, 170.

VII. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the parties' motions.

It is therefore ordered that Plaintiffs' Motion for Reconsideration (ECF No. 169) is denied.

It is further ordered that Defendant's Emergency Motion to Strike (ECF No. 136) is granted. The Clerk is instructed to strike the notice of voluntary dismissal (ECF No. 129). Plaintiffs are given leave to file a motion seeking voluntary dismissal and must file said motion within ten (10) days of this order.

It is further ordered that Plaintiffs' Motion for Partial Summary Judgment, Plaintiffs' Motion to Certify, and Defendant's Motion to Decertify (ECF Nos. 130, 133, 134) are

denied without prejudice. If the Court grants Plaintiffs' anticipated motion for voluntary dismissal, the parties will have forty-five (45) days from the date that order is issued to file renewed motions to certify and decertify the class. The parties will then have forty-five (45) days from the Court's order resolving the motions to certify or decertify the class to file any dispositive motions. (*See* ECF No. 121 (minute order from Judge Cobb indicating that the dispositive motions deadline is "deferred until 45 days after decision on the Motion for Class Certification/Motion to Decertify").) If Plaintiffs do not file a motion for voluntary dismissal, the parties are permitted to file renewed motions to certify and decertify based on the conditional class. Those motions must be filed within forty-five (45) days of this order, and the normal briefing schedule will then follow. In this scenario, the parties will also have forty-five (45) days from the Court's order resolving the motions to certify or decertify to file any dispositive motions.

It is further ordered that Defendant's motions to seal (ECF Nos. 135, 138, 142, 159, 172) are denied without prejudice and with leave to refile. While the Court did not consider the sealed exhibits (ECF Nos. 137-2, 137-3, 137-4) when ruling on the Motion to Strike, Defendant must file those exhibits under seal in an independent docket entry (without also filing the motion itself under seal), file a separate motion to seal explaining why those exhibits should be filed under seal, and indicate by way of affidavit that it has served the sealed exhibits on Plaintiffs. If Defendant chooses to refile the other motions, it must file under seal a separate docket entry with the documents it wishes to be sealed WITHOUT the primary document included and filed under seal, and it must otherwise comply with LR IA 10-5.

The Clerk is instructed to strike ECF Nos. 137, 144, 145, 146, 161, 170.

DATED THIS 18th day of July 2018.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-15691

STATE OF NEVADA, *ex rel.* NEVADA DEPARTMENT OF CORRECTIONS

Defendant/Appellant

v.

DONALD WALDEN, JR, *et al.*,

Plaintiffs/Appellees

Appeal from Order (filed March 26, 2018), Document 166, of
United States District Court
District of Nevada
Case No. 3:14-cv-00320-MMD-WGC

APPELLANT, STATE OF NEVADA, *ex rel.* NEVADA DEPARTMENT OF CORRECTIONS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellant State of Nevada, *ex rel.* Nevada Department of Corrections is not required to provide the statement contemplated by Rule 26.1(a) of the Federal Rules of Appellate Procedure.

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I.

JURISDICTION

The District Court has original jurisdiction. *See* 28 U.S.C. § 1331, 29 U.S.C. §§ 201 to 219 and 29 U.S.C. § 207. In its March 26, 2018 Order ("March 26 Order"), the District Court held that the State waived its sovereign immunity as to Plaintiffs' Fair Labor Standards Act ("FLSA") claims. (APP, Vol. I, pgs. 3-4.) That Order is immediately appealable. *See Phiffer v. Columbia River Corr. Inst.*, 384 F.3d 791, 792 (9th Cir. 2004) ("The denial of a state's motion for judgment on the pleadings on the grounds of Eleventh Amendment Immunity is an interlocutory appeal and need not await final judgment.") (internal citations omitted).

The State filed a timely notice of appeal. The District Court filed its Order on March 26, 2018. (APP, Vol. I, pgs. 3-20.) The State complied with the applicable time limits by filing its Notice of Appeal on April 19, 2018. *See* Fed. R. App. P. 3-4; 9th Cir. R. 3-1 & 3-2.

II.

ISSUES PRESENTED ON APPEAL

A. WHETHER THE STATE OF NEVADA WAIVED SOVEREIGN IMMUNITY FROM LIABILITY FOR FEDERAL FLSA CLAIMS IN ITS OWN STATE COURTS.

B. WHETHER THE STATE OF NEVADA'S REMOVAL OF PLAINTIFFS' FLSA CLAIMS TO FEDERAL COURT WAIVED THE STATE'S SOVEREIGN IMMUNITY FROM LIABILITY.

III.

STATEMENT OF THE CASE

A. BACKGROUND OF LITIGATION

This matter is a wage and hour dispute between the Nevada Department of Corrections and its Correctional Officers. Regardless of their employment position, job duties, facility where they work, and site of their job duties within a given facility, Plaintiffs assert the State has not compensated them for time they allegedly spent working either before or after their scheduled shift at the State's 10 conservations camps, 7 prisons, and 2 transitional housing units. (APP, Vol. V, pgs. 1129-1164, Vol. VI, Pgs. 1165-1229; APP, Vol. VII, Pgs. 1521-1536.)

Plaintiffs filed an action against the State in the First Judicial District in Carson City, Nevada. (APP, Vol. VII, pgs. 1521-1536.) Plaintiffs, in their own right and on behalf of other Correctional Officers, pleaded claims for failure to pay wages and overtime in violation of the FLSA, failure to pay minimum wages under Nevada's Constitution, and breach of contract. *Id.*

The State removed the Complaint to federal court and then answered. (APP, Vol. VII, pgs. 1506-1541.) In the Answer, NDOC specifically averred in its Affirmative Defenses that "Defendant is immune from liability as a matter of law."

(APP, Vol. VII, pg. 1511.) Plaintiffs moved for conditional certification of the FLSA collective action pursuant to 29 U.S.C. § 216(b). (APP, Vol. VI, pgs. 1399-1445, Vol. VII, pgs. 1446-1505.) The District Court granted the Plaintiffs' motion. (APP, Vol. VI, pgs. 1390-1398.) The District Court ordered that notice of this lawsuit be sent to all current and former non-exempt hourly paid employees, including sergeants and lieutenants, who were employed by NDOC as Correctional Officers at any time from May 12, 2011 to the date of the Order. (APP, Vol. VI, pg. 1397.) Five hundred forty-two current and former employees have opted into the action. (APP, Vol. V, pg. 1152 n.2.)

After mediation proved unsuccessful, the State moved for judgment on the pleadings on all claims. (APP, Vol. VI, pgs. 1230-1304; *see also* APP, Vol. VI, pgs. 1309-1389 (previous motion was denied without prejudice to refile following mediation).) The District Court granted the State's motion, but permitted Plaintiffs to amend with specific facts supporting their FLSA claims. (APP, Vol. VII, pgs. 1561-1565.) Plaintiffs filed an Amended Complaint in which they alleged wage and overtime claims under the FLSA, failure to pay minimum wages under Nevada's Constitution, failure to pay overtime as required by NRS § 284.180, and breach of contract. (APP, Vol. V, pgs. 1129-1164; APP, Vol. VI, pgs. 1165-1229.)

The State moved to dismiss all claims. (APP, Vol. V, pgs. 1013-1097.) The District Court granted the State's motion on Plaintiffs' claims under NRS

§ 284.180 and breach of contract, but denied it on the FLSA claims. (APP, Vol. I, pgs. 3-20.) The parties stipulated to dismiss Plaintiffs' minimum wage claim under Nevada's Constitution. (APP, Vol. II, pgs. 90-91.) Only Plaintiffs' FLSA claims remain active and are the subject of this appeal.

B. FOCUS OF PRESENT APPEAL

The District Court, *sua sponte*, issued an Order questioning its subject matter jurisdiction over the Plaintiffs' FLSA claims in light of sovereign immunity ("March 1 Order"). (APP, Vol. II, pgs. 200-201.) The Court observed:

> …[I]n reviewing [the State's] Motion to Dismiss and the related briefs, the Court finds that the doctrine of sovereign immunity may apply to the FLSA claims against the State of Nevada as brought in federal court. While FLSA confers subject matter jurisdiction on this Court, the Supreme Court has found that the statute does not waive a state's sovereign immunity from suit in federal court. *See Employees of Dep't of Public Health & Welfare of Missouri v. Dep't of Public Health & Welfare of Missouri*, 411 U.S. 279, 283 (1973) (finding that FLSA generally applied to the state of Missouri but that the state's immunity to a private suit barred recovery in federal court); *see also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996) (finding that Congress lacks the power under Article I of the Constitution to abrogate the States' sovereign immunity from suits commenced or prosecuted in the federal courts).
>
> Similarly, the Ninth Circuit has held that "federal courts lack jurisdiction over FLSA cases brought against States in the absence of a waiver of immunity." *QuiIlin v. State of Oregon*, 127 F.3d 1136, 1139 (9th Cir. 1997). A waiver of sovereign immunity will be found "only where

> stated by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).
>
> Under NRS § 41.031(3), the State of Nevada has explicitly refused to waive its sovereign immunity in suits brought by state citizens in federal court. ***Thus, it appears that this Court is barred from adjudicating the FLSA claims and this case should be remanded…***

Id. (emphasis added). The District Court requested supplemental briefing. *Id*.

Plaintiffs argued that the State waived sovereign immunity to any suit by enacting NRS § 41.031(1) and by removing the case to federal court. (APP, Vol. II, pgs. 190-199.) The State argued that NRS § 41.031(1) is a waiver of sovereign immunity to tort claims but not a blanket waiver and that removal did not waive sovereign immunity since the State is entitled to a federal forum to have its immunity to a federal claim determined. (APP, Vol. II, pgs. 145-150.)

In its March 26 Order, the District Court addressed the State's sovereign immunity in perfunctory form. It stated:

> After reviewing the supplemental briefs (ECF Nos. 149, 158), the Court is convinced that Nevada has waived its sovereign immunity in this Court**.** The Supreme Court has held that a state's removal of suit to federal court constitutes a waiver of its Eleventh Amendment immunity. *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 616 (2002). Here, the State of Nevada removed this action from the state court. Therefore, it has waived its sovereign immunity.

(APP, Vol. I, pg. 4.)

The District Court incorrectly applied *Lapides* to find waiver, contrary to the Supreme Court's limiting language in *Lapides* and subsequent interpretations in cases involving federal claims in which there has been no valid abrogation of sovereign immunity. In the process, the District Court failed to address the foundational question of whether the State can be sued under the FLSA in any forum, state or federal. Both errors warrant reversal of the District Court's Order and dismissal with prejudice of the FLSA claims against the State.

IV.

STANDARD OF REVIEW

This Court "review[s] *de novo* questions of sovereign immunity." *Miller v. Wright*, 705 F.3d 919, 923 (9th Cir. 2013); *see also Alvarez v. Hill*, 667 F.3d. 1061, 1063 (9th Cir. 2012) (same); *Holley v. California Dep't of Corr.*, 599 F.3d 1108, 1111 (9th Cir. 2010) (same).

V.

SUMMARY OF ARGUMENTS ON APPEAL

A. THE STATE OF NEVADA HAS NOT WAIVED ITS SOVEREIGN IMMUNITY FROM LIABILITY IN SUIT FOR FEDERAL FLSA CLAIMS IN ITS OWN STATE COURTS.

It is black-letter constitutional law that a state enjoys sovereign immunity as to FLSA claims in any court, including its own state courts, unless it expressly waives that immunity. Two seminal Supreme Court decisions—*Alden v. Maine*,

527 U.S. 706 (1999), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)—establish that Congress lacks the power to subject states to being sued in their own courts without their express consent. This principle is grounded within the separation of powers envisioned under the structure of the United States Constitution.

The State of Nevada has not waived its sovereign immunity from private FLSA claims, nor has the State granted Plaintiffs a private right of action for compensation under the FLSA within Nevada law. While the State has adopted some language from the FLSA into state law, these adoptions are unrelated to the compensation disputes at issue in this case. In contrast to the federal FLSA, Nevada law contemplates a state *administrative process* for the adjudication of Plaintiffs' wage and hour claims, and this process has no connection to the federal FLSA or any of its provisions. Moreover, the express language of NRS § 41.031(1) extends to state tort liability only, with certain inapplicable exceptions.

Thus, consistent with *Alden*'s directly on-point holding, sovereign immunity bars federal FLSA claims against the State of Nevada in its own courts.

B. NEVADA'S REMOVAL TO FEDERAL COURT DID NOT WAIVE ITS SOVEREIGN IMMUNITY FOR PLAINTIFFS' FEDERAL FLSA CLAIMS.

The District Court did not dispute that Nevada has sovereign immunity from FLSA claims in its *own* courts. But it erroneously concluded, without any analysis

other than citing to the Supreme Court's 2002 *Lapides* decision, that when Nevada removed the FLSA claims to federal court, it waived its immunity from liability. (APP, Vol. I, pg. 4.)

The District Court misread *Lapides*. That decision simply stands for the proposition that a state waives its Eleventh Amendment immunity from suit in federal court by voluntarily invoking the jurisdiction of a federal court for claims as to which the state has waived its underlying sovereign immunity in state court. 535 U.S. at 620. A majority of the courts of appeal have recognized that the narrow holding of *Lapides* does not apply to these circumstances. "It was undisputed in [*Lapides*] that the state had already waived its general immunity from suit" in its own state courts "prior to the litigation." *Beaulieu v. Vermont*, 807 F.3d 478, 486 (2d Cir. 2015). Under those circumstances, "allowing a state which had waived its sovereign immunity to effectively recover immunity by removing the case to federal court and then claiming Eleventh Amendment immunity would give the state an 'unfair tactical advantage.'" *Id.* at 487 (quoting *Lapides*, 535 U.S. at 621).

But that is not what happened here. Unlike Georgia in *Lapides*, Nevada has never waived its sovereign immunity from suit for federal FLSA claims in its own courts. So as many courts of appeals have concluded, "*Lapides* therefore furnishes no support whatsoever for Plaintiffs' contention that [Nevada's] removal waived

its general immunity from FLSA claims." *Id.*; *see also Lapides*, 535 U.S. at 617-18 ("Nor need we address the scope of waiver by removal in a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court.").

The *Beaulieu* Court's conclusion is consistent with footnote 20 of the *Embury v. King* decision, where this Court—like the Supreme Court in *Lapides*—expressly stated: "This is not a case where Congress acted beyond its limited power over the States … *so we need not decide* whether a removing State defendant remains immunized from federal claims that Congress failed to apply to the States through unequivocal and valid abrogation of their Eleventh Amendment immunity." 361 F.3d 556, 562 n.20 (9th Cir. 2004) (emphasis added). As an example of the type of case where Congress *would* be "act[ing] beyond its limited power over the States," the *Embury* court cited *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996) (see *Embury*, 361 F.3d at 556 n.20)—the very same case that the Supreme Court relied on *Alden v. Maine* to "hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private [FLSA] suits for damages in state courts." 527 U.S. at 712. Thus, this Court in *Embury* expressly did "*not* decide" the issue presented in this case.

In deciding it now, this Court should follow the eight circuits that have expressly addressed the issue of waiver in this context and conclude that where, like here, "a state defendant has not waived its underlying state sovereign immunity, i.e., where it is arguably protected from private suit in its own courts as well as in federal fora, the state may avail itself of removal to the federal court without sacrificing this immunity." *Beaulieu*, 807 F.3d at 488.

VI.

ARGUMENT

A. THE STATE OF NEVADA AND ITS AGENCIES DID NOT WAIVE THE *ALDEN* IMMUNITY FROM FLSA LIABLITY THAT IT ENJOYED IN ITS OWN COURTS WHEN IT REMOVED THIS CASE TO FEDERAL COURT.

Sovereign immunity protects a state's treasury from private suit. *See Hess v. Port Auth. Trans–Hudson Corp.*, 513 U.S. 30, 39-40 (1994). There are at least two distinct types of sovereign immunity. **First**, the Eleventh Amendment's text prohibits a private party from suing a state in federal court. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). Congress, in enacting the FLSA, could not strip states of their Eleventh Amendment immunity to suit in federal court. *Quillin v. Oregon*, 127 F.3d 1136, 1138 (9th Cir. 1997). This is called Eleventh Amendment immunity.

Second, states enjoy broader sovereign immunity based on the structure and history of the United States Constitution. *Alden v. Maine*, 527 U.S. 706, 713

(1999). This latter type of sovereign immunity—sometimes called *Alden* or general immunity—bars civil actions for federal claims against non-consenting states in their own courts. This applies with equal force to federal FLSA claims; indeed, the *Alden* case involved FLSA claims.

Thus, Nevada has immunity from Plaintiffs' FLSA claims, and unless it has expressly waived that immunity, either by statute or by removing the case to federal court, it retains that immunity. Nevada has never waived its immunity from federal FLSA claims, and its mere removal of such claims from which it had immunity in state court did not strip Nevada of its immunity.

B. THE DISTRICT COURT'S RELIANCE ON *LAPIDES* AS CREATING A BLANKET WAIVER OF IMMUNITY FROM LIABILITY BY REMOVAL TO FEDERAL COURT WAS CLEARLY ERRONEOUS, AS MANY CIRCUITS HAVE RECOGNIZED.

1. THE DISTRICT COURT'S MARCH 1 ORDER CORRECTLY CONCLUDED THAT THE FLSA DID NOT ABROGATE NEVADA'S SOVEREIGN IMMUNITY FROM SUIT IN FEDERAL COURT AND THAT THE STATE REFUSED TO WAIVE IT.

In its March 1, Order, the District Court correctly reasoned that:

1. The FLSA conferred subject matter jurisdiction on the District Court, but the statute does not waive a state's sovereign immunity from suit in federal court. *Employees of Dep't of Pub. Health & Welfare of Mo. v. Department of Pub. Health & Welfare of Mo.*, 411 U.S. 279, 283 (1973).

2. Congress lacks the power under Article I of the United States Constitution to abrogate a state's sovereign immunity from suits brought or prosecuted in federal court. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996).

3. Ninth Circuit precedent makes clear that federal courts "lack jurisdiction over FLSA cases brought against States in the absence of a waiver of immunity…" *Quillin v. Oregon*, 127 F.3d 1136, 1139 (9th Cir. 1997).

4. A waiver of a state's sovereign immunity will be found "only where stated by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction…" *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). (APP, Vol. II, pgs. 200-201.)

Based on these observations, the District Court preliminarily concluded that Plaintiffs' FLSA claims did not carry with them a waiver of the State's sovereign immunity, nor was Congress empowered to abrogate this immunity without an express and unmistakable waiver by the State that was absent from this record. *Id.*

Specifically, the District Court focused on NRS § 41.031, which states, in pertinent part, that "[t]he State of Nevada does not waive its immunity from suit conferred by Amendment XI of the Constitution of the United States." NRS § 41.031(3). As the District Court explained:

> Under NRS § 41.031(3), the State of Nevada has explicitly refused to waive its sovereign immunity in

> suits brought by state citizens in federal court. Thus, it appears that this Court is barred from adjudicating the FLSA claims and this case should be remanded…

(APP, Vol. II, pg. 201.)

The State agreed with the District Court's conclusions in its March 1 Order.

2. THE DISTRICT COURT'S MARCH 26 ORDER DEPARTED FROM ITS PRIOR ANALYSIS AND MISREAD *LAPIDES* AS ESTABLISHING A BLANKET RULE OF SOVEREIGN IMMUNITY WAIVER UPON REMOVAL.

The *Quillin* and *Edelman* decisions cited in the District Court's March 1 Order leave no doubt that federal courts lack jurisdiction over FLSA claims brought against a state without a waiver of its sovereign immunity from liability, and that a demonstration of such a waiver must be expressly made and incapable of being construed otherwise.

As explained in *Edelman v. Jordan*, such a waiver will only be found where "stated by the most express language possible or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction …" 415 U.S. at 653. As the District Court recognized in its March 1 Order, "[u]nder NRS § 41.031(3), the state of Nevada has explicitly *refused* to waive its sovereign immunity in suits brought by state citizens in federal court." (APP, Vol. II, pg. 201.) (emphasis added).

In contrast with its March 1 Order, the District Court's March 26 Order only cursorily addressed the issue of Nevada's sovereign immunity, as follows:

> After reviewing the supplemental briefs (ECF Nos. 149, 158), ***the Court is convinced that Nevada has waived its sovereign immunity in this Court.*** The Supreme Court has held that a state's removal of suit to federal court constitutes a waiver of its Eleventh Amendment immunity. *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 616 (2002). ***Here, the State of Nevada removed this action from the state court. Therefore, it has waived its sovereign immunity.***

(APP, Vol. I, pg. 4.) (emphasis added).

The only support provided by the District Court for its changed view on Nevada's sovereign immunity in federal court was a bare citation to *Lapides*. But *Lapides*, by its own terms, only addressed the situation "where the State has [already] waived immunity from state court proceedings," 535 U.S. at 613, and then seeks to reacquire immunity simply by removing the case to federal court and asserting Eleventh Amendment immunity in that forum. As explained in *Lapides*, such a practice "would permit States to achieve unfair tactical advantages" and create an odd "inconsistency" between the state and federal courts. *Id.* at 620-21.

In contrast, where, like here, a State *already* enjoys *Alden* immunity from suit in its own courts, which it has not expressly waived,

> neither logic nor precedent supports the proposition that a state waives its general state sovereign immunity by removing an action from state court to federal court. A state's sovereign immunity from private suit is a common law doctrine historically recognized by both state and federal courts, though most clearly explicated in federal judicial precedents. A state defendant sued in state court, when entitled to remove the suit to federal court, may

> well wish to do so in the belief that its entitlement to have the suit dismissed by reason of the state's sovereign immunity, an entitlement largely elaborated by federal courts, will be better protected by the federal courts then by courts of the state. Furthermore, a state agency sued on a federal law claim, which contends that the state's sovereign immunity remains intact but wishes to have the federal law claim adjudicated in federal court in the event of a finding that the state's immunity has been waived or abrogated, should not be compelled to abandon its claim of immunity as the price of access to a federal court.

Beaulieu, 807 F.3d at 486 (citations omitted).

So for *Lapides* to control this matter, the District Court would have needed to determine that Nevada has already waived its immunity from FLSA claims in its state courts. But the District Court did no such thing. Instead, it simply read *Lapides* broadly as establishing a blanket rule of waiver upon removal. This is inconsistent with the conclusion of the federal circuits that have directly considered the question. Nor is it required by Ninth Circuit precedent. To the contrary, in *Embury*—this Circuit's closest precedent—the Court expressly refused to "decide" the issue presented in this appeal. 361 F.3d at 556 n.20. This Court should follow the super-majority rule in the circuits and reverse the District Court's denial of immunity based on Nevada's removal of this case to federal court.

3. THIS COURT SHOULD FOLLOW THE OTHER CIRCUITS IN FINDING WAIVER OF IMMUNITY BASED ON REMOVAL ONLY WHERE NO IMMUNITY EXISTED IN STATE COURT.

Just like the plaintiffs in the Second Circuit's *Beaulieu* case, Plaintiffs here will not doubt urge this Court to "misread the Ninth Circuit's decision in *Embury*." *Beaulieu*, 807 F.3d at 489. But the *Embury* panel could not have been clearer: it did "not decide whether a removing State defendant remains immunized from federal claims that Congress failed to apply to the States through unequivocal and valid abrogation of their Eleventh Amendment immunity." *Embury*, 361 F.3d at 556 n.20. That question, left undecided in *Embury*, is precisely the issue that is before this panel.

After *Embury*, this Circuit has never addressed the issue reserved in *Embury*. *See Independent Living Ctr. of S. Cal., Inc. v. Maxwell–Jolly*, 572 F.3d 644, 662 n.20 (9th Cir. 2009), *vacated on other grounds sub. nom Douglas v. Independent Living Ctr. of S. Cal., Inc.*, 565 U.S. 606 (2012); *Bank of Lake Tahoe v. Bank of Am.*, 318 F.3d 914, 917 (9th Cir. 2003).

But at least eight other circuits have,[1] and they have concluded that removal of a case with federal claims for which a State has immunity and has not consented

[1] In addition, it appears at least one other circuit, the Sixth Circuit, follows that rule. The Sixth Circuit has taken a narrow approach suggesting that removal does not waive sovereign immunity or other defenses to liability. *See generally Agrawal v. Montemagno*, 574 Fed.Appx. 570, 573 (6th Cir. 2014) ("*Lapides* is limited to state law claims for which the state has waived or abrogated its

to suit in state court ***does not amount to a waiver of sovereign immunity.*** *See generally Bergemann v. Rhode Island Dep't of Envtl. Mgmt.*, 665 F.3d 336, 343 (1st Cir. 2011) ("when a state has maintained a consistent, across-the-board position regarding its immunity, the invocation of federal jurisdiction to enforce that immunity does not effect a waiver"); *Beaulieu*, 807 F.3d at 485-89 (same); *Lombardo v. Pennsylvania Dep't of Pub. Welfare*, 540 F.3d 190, 200 (3d Cir. 2008) (removal does not waive sovereign immunity because "a State may establish its own immunity against liability that is distinct from the Eleventh Amendment immunity from suit enjoyed by all the States"); *Stewart v. North Carolina*, 393 F.3d 484, 490 (4th Cir. 2005) ("…North Carolina, having not already consented to suit in its own courts, did not waive sovereign immunity by voluntarily removing the action to federal court for resolution of the immunity question."); *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 255 (5th Cir. 2005) ("the Constitution guarantees a state's prerogative, by its own law, to treat its immunity from liability as separate from its immunity from suit for purposes of waiver or relinquishment," thereby permitting a state to waive Eleventh Amendment immunity from suit in

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immunity from damages claims in the state trial courts"); *Dantz v. American Apple Grp.*, 123 Fed.Appx. 702, 706-07 (6th Cir. 2005) (same). A recent district court opinion from that Circuit has construed those decisions as permitting "Defendants to assert Eleventh Amendment immunity for the federal claim which they permissibly removed to federal court." *Burke v. Kentucky State Police*, 2016 WL 361690, at *5 (E.D. Ky. Jan. 27, 2016).

federal court "while retaining its immunity from liability"); *Trant v. Oklahoma*, 754 F.3d 1158, 1173 (10th Cir. 2014) ("A state does not gain an unfair advantage asserting in federal court an affirmative defense it would have had in state court. Accordingly, we recognize that a state may waive its immunity from suit in a federal forum while retaining its immunity from liability."); *Stroud v. McIntosh*, 722 F.3d 1294, 1301 (11th Cir. 2013) ("We hold that although the Board's removal to federal court waived its immunity-based objection to a federal forum, the Board retained its immunity from liability for a violation of the ADEA"); *Watters v. Washington Metro. Area Transit Auth.*, 295 F.3d 36, 42 n.13 (D.C. Cir. 2002) (waiver of immunity from suit in federal court did not preclude District from asserting sovereign immunity where immunity from liability for attorney's liens had not been expressly waived).

The remaining handful of circuits, including this one, that are sometimes cited as supporting the type of "removal-always-waives-immunity" rule applied by the District Court below have not actually applied such a broad rule, but have instead—like the *Lapides* opinion—been overread by zealous advocates. *See Beaulieu*, 807 F.3d at 488-90 (analyzing cases, including the Ninth Circuit's *Embury* case).

That is especially true of this Circuit's *Embury* case. As the *Beaulieu* court explained, *Embury* "dealt with the question whether the state defendant, by

removing the litigation to federal district court, had waived its Eleventh Amendment immunity from the adjudication of the federal court. The Ninth Circuit answered the question in the affirmative, but the court in no way suggested that a state defendant's removal waives its general sovereign immunity, nor did the court even consider the question." *Id.* at 489 (citing *Embury v. King*, 361 F.3d 562, 566 (9th Cir. 2004)).

In at least one of the circuits where, like the Ninth Circuit *Embury* decision, an early decision broadly applying *Lapides* was equivocal on the precise issue presented in this case, the circuit later, when confronted with the precise question in this case, agreed with the other circuits. *Compare e.g.*, *Estes v. Wyoming Dep't of Transp.*, 302 F.3d 1200, 1206 (10th Cir. 2002) (stating broadly but ambiguously that "a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts"), *with Trant*, 754 F.3d at 1172-73 (citing with approval the majority rule and concluding that "a state may waive its immunity from suit in a federal forum [under the Eleventh Amendment] while retaining its immunity from liability [pursuant to the state's general sovereign immunity]").[2]

For that reason, post-*Embury*, district courts in the Ninth Circuit generally follow the prevailing rule from the other circuits that removal does not waive a state's sovereign immunity from liability. *See Wood v. Montana Dep't of Revenue*,

[2] Counsel for the State of Nevada are unaware of any circuit that has clearly and expressly rejected the *Beaulieu* reading of *Lapides*.

826 F. Supp.2d 1232, 1237 (D. Mont. 2011) (the state "did not waive its immunity under the broader doctrine of state sovereign immunity by removing this case, and it is therefore entitled to the protection of that immunity"); *Zavareh v. Nevada ex rel. Board of Regents of Nev. Sys. of Higher Educ.*, 2013 WL 5781729, at **6-7 (D. Nev. Oct. 17, 2013) (same); *Cornfield v. Pickens*, 2016 WL 6584928, at * (D. Ariz. July 21, 2016) (relying on "the modern trend" to "recognize states retain broad sovereign immunity despite choosing to remove a case to federal court" in concluding that an ADEA claim against a state agency was dismissed because of sovereign immunity). As a court explained in an analogous case addressing the question left unanswered in *Embury*, "because Congress has not validly abrogated the States' sovereign immunity on FLSA claims" the state defendant "did not waive its immunity on Plaintiff's FLSA claim by removing this action to federal court." *Gorney v. Arizona Bd. of Regents*, 43 F. Supp.3d 946, 952 (D. Ariz. 2014).

The nearly universal acceptance of the rule that sovereign immunity from liability on a federal claim is not waived by removal is grounded on the unfairness that a contrary rule would impose on the states. As the First Circuit explained, echoing *Beaulieu*, 807 F.3d at 486, if a state waived its sovereign immunity whenever it removed a case to federal court,

> A state with a colorable immunity defense to a federal claim brought against it in its own courts would face a Morton's Fork: remove the federal claim to federal court and waive immunity or litigate the federal claim in state court regardless of its

> federal nature. Either way, the state would be compelled to relinquish a right: either its right to assert immunity from suit or its "right to a federal forum."

Bergemann, 665 F.3d at 342 (quoting *Martin v. Franklin Capitol Corp.*, 546 U.S. 132, 140 (2005)). Nevada did not "gain an unfair advantage asserting in federal court an affirmative defense" (sovereign immunity to FLSA liability under *Alden*) that "it would have had in state court." *Trant*, 754 F.3d at 1173.

As a result, Nevada's mere decision to remove this matter to federal court cannot itself be construed as a waiver of the State's sovereign immunity from liability recognized in *Alden*. Only if this Court first concludes that Nevada had already waived its immunity for federal FLSA claims in *state* court would Nevada have waived its immunity from suit in federal court by removing.

C. THE STATE OF NEVADA NEVER WAIVED ITS STATE COURT IMMUNITY FROM SUIT FOR FLSA CLAIMS.

Separate and apart from the State of Nevada's entitlement to sovereign immunity under the Eleventh Amendment of the United States Constitution, Nevada also enjoys sovereign immunity from liability for FLSA claims in any court. This is established by two decisions from the Supreme Court of the United States, *Alden v. Maine*, 527 U.S. at 713, and *Seminole Tribe of Florida v. Florida*, 517 U.S. at 54. The Court's earlier *Seminole Tribe* decision made clear that the Eleventh Amendment to the United States Constitution prevents a private party from suing a state in federal court. *Alden* later explained that a broader form of

sovereign immunity (sometimes called *Alden* or general sovereign immunity) derives from the structure and history of the United States Constitution, and that this immunity bars civil actions (including FLSA claims) against non-consenting states in their own courts.

The Supreme Court's *Alden* decision incorporated the logic of *Seminole Tribe*, where state-employed probation officers sued the State of Maine in state court. 527 U.S. at 711. Specifically, the *Alden* Court held that the State of Maine was immune from state employee FLSA civil actions, concluding that Congress did not have the power to subject non-consenting states to suits in their own courts. *Id*. at 752. Congress lacks this power, not because of the Eleventh Amendment's text (which applies only to federal courts), but because of the "Constitution's structure, its history, and the authoritative interpretations" of the Supreme Court. *Id*. at 713.

Given this well-established understanding of state sovereign immunity, Nevada can only be liable for Plaintiffs' FLSA claims if it has expressly waived that immunity. As explained, mere removal to federal court does not constitute a waiver of Nevada's *Alden* or general sovereign immunity. Instead, having removed Plaintiffs' FLSA claims to federal court, Nevada can only be liable for those claims in federal court if it has first expressly waived its sovereign immunity for those claims *in state court*, and then removed those claims to federal court.

Thus, the central question in this appeal turns on an issue that the District Court never addressed: has Nevada waived its sovereign immunity from liability for federal FLSA claims in state court. As explained below, it has not.

A state's waiver of sovereign immunity must be "stated by the most express language possible or by such overwhelming implications from the text as (will) leave *no room for any other reasonable construction* …" *Edelman*, 415 U.S. at 653 (emphases added). NRS § 41.031(1) was enacted in 1965. 1965 Statutes of Nevada, Page 1413. This was decades before the FLSA was interpreted to apply to the states. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56 (1985). Thus, to accept Plaintiffs' argument that the text of NRS § 41.031(1) is a blanket waiver would be to assume that Nevada's legislature in 1965 intended to expose the State to potential liability under any federal statute that Congress might dream up in the future in perpetuity. There are several reasons why Plaintiffs' interpretation of NRS § 41.031(1) is unpersuasive.

Plaintiffs' blanket waiver interpretation is inconsistent with how Nevada's Supreme Court has interpreted NRS § 41.031(1). In 1977, Nevada's Supreme Court explained the statute's purpose. "When the State qualifiedly waived its immunity from liability and consented to civil actions, it did so to provide relief for persons *injured through negligence* in performing or failing to perform non-discretionary operations." *Hagblom v. State Director of Motor Vehicles*, 93 Nev.

599, 604, 571 P.2d 1172, 1176 (Nev. 1977) (emphasis added). Forty years later, Nevada's Supreme Court again reaffirmed that NRS § 41.031(1)'s purpose is as a qualified waiver of immunity for *torts*. *Franchise Tax Bd. of Cal. v. Hyatt*, 407 P.3d 717, 728 (Nev. 2017) (emphasis added).

Plaintiffs' interpretation also is inconsistent with the broad retention of sovereign immunity found in NRS § 41.032(1). The text of this statute provides that "no action may be brought under NRS § 41.031 … based upon an act or omission by an officer …, exercising due care, in the execution of a statute or regulation…" NRS § 41.032(1). The methods of compensation for state employees and resolving disputes pertaining to compensating employees is entirely governed by Nevada statute and regulation.

Reading NRS § 41.032(1) together with Nevada's comprehensive employee grievance process, it is plain that Nevada has never waived its immunity to employee suits under the FLSA. Statutory personnel law determines when a state employee is eligible for overtime. *See generally* NRS § 284.180(3). Administrative law governs the rate of overtime pay. NAC 284.250(1). Nevada has an administrative procedure for addressing state employee "grievances," a term which includes "any condition arising out of the relationship between an employer and an employee, including, but not limited to, compensation…" NAC 284.658(2). Under Nevada law, employees must grieve their compensation dispute with their

supervisor (NAC 284.678), then to the head of that employee's department (NAC 284.686), then to the highest administrative level (NAC 284.690), and finally to the State of Nevada's Employee-Management Committee (NAC 284.695). Nevada specifically adopted this multi-level grievance procedure, which is unlike the FLSA, precisely to avoid lawsuits over compensation of the very kind that the Plaintiffs have asserted in this matter. Plaintiffs' interpretation of NRS § 41.031(1) as a blanket waiver of immunity would render the State's multi-level grievance procedure at once irrelevant and superfluous. Nevada specifically adopted this multi-level grievance procedure, which is unlike the FLSA, precisely to avoid lawsuits over compensation of the very kind that the Plaintiffs have asserted in this matter.

In addition to making the administrative grievance procedure irrelevant, applying the federal FLSA to the State would potentially result in doubling the State's exposure under Nevada law. Under the FLSA, employers face liability for liquidated damages (double damages), 29 U.S.C. § 255(a), which is not allowed under state law. Moreover, under state law, liability for unpaid overtime may be compensated by providing compensatory time up to 120 hours. NAC 284.250(3).

Nevada has also not created a state-law private right of action to sue for unpaid compensation under the *federal* FLSA. In their briefing before the District Court, Plaintiffs included a generic reference to NRS Chapter 284. (APP, Vol. II,

pg. 191.) Looking more specifically at their First Amended Complaint, Plaintiffs referenced NRS § 284.180. (APP, Vol. V, pgs. 1140, 1160.) But that law does not create a private right of action. In opposing the State's Motion to Dismiss that claim, Plaintiffs also relied on NRS § 284.195. (APP, Vol. V, pg. 1029.) But that statute has no relevance to the FLSA. It merely creates a right of action for improperly employed workers who were not paid because Nevada's Administrator refused to certify payroll.[3] *See* NRS § 284.195(1). NRS § 284.195(1) purports to punish an appointing authority for improperly hiring someone in the first place by creating a right of action *against the appointing authority*. That is why the appointing authority is not reimbursed for sums paid by virtue of such actions. *See* NRS § 284.195(2).

When Nevada wanted to incorporate provisions of the FLSA into its own law, it did so, but notably *did not* incorporate the FLSA's provisions regarding overtime compensation, the FLSA's statute of limitations, or liquidated damages. The State adopted the federal FLSA only "[f]or purposes of NAC 284.523 to 284.598." NAC 284.581(1)(b). These provisions pertain exclusively to attendance and leave issues, but not compensation. *See generally* NAC 284.523-284.598. Further, even as to attendance and leave issues, they would still be subject to Nevada's administrative grievance procedure since they concern a "condition

[3] The District Court reached the same conclusion in its March 26 Order. (APP, Vol. I, pgs. 0017-0018.)

arising out of the relationship between an employer and employee …" NAC 284.658(2).

Even if Nevada had incorporated FLSA provisions related to overtime compensation (which it did not), such an action would have no impact upon the State's sovereign immunity from liability. A state's decision to copy federal standards into state law does not transform state law into federal law any more than mimicking the Federal Rules of Civil Procedure means that federal procedure, as opposed to state procedure, prevails in state courts. It is still state procedure that governs in state courts, not federal procedure. Where state law follows federal law, that simply means that a there is a state law parallel to a federal cause of action; it does not mean that the federal cause of action *is* the state cause of action (or vice versa). *See, e.g.*, *Mueller v. Thompson*, 133 F.3d 1063, 1064-65 (7th Cir. 1998) (sovereign immunity barred FLSA claim in federal court even where Wisconsin law allowed state overtime claims akin to FLSA overtime claims).

In any event, Nevada's wage and hour laws are hardly a simple doppelganger of the FLSA. That is directly counter to the type of waiver of immunity "by the most express language possible" required by the Supreme Court. *Edelman, supra*.

VII.

CONCLUSION

The District Court issued two orders pertaining to the issues presented by this appeal:

The first order, on March 1, 2018, correctly concluded that the State of Nevada has immunity from liability for the Plaintiffs' federal FLSA causes of action for all the reasons set forth in that order.

The second order, issued 26 days later, summarily concluded that the State's removal of the federal FLSA claims to federal court waived its immunity from liability. But the District Court misapplied *Lapides*, which did not address waiver where the state retained its *Alden* immunity from suit in its own state courts. And the District Court failed to apply the carefully considered precedent from at least eight sister circuits. This Court should correct that mistake, hold that the Ninth Circuit follows the super-majority rule, and rule that the State of Nevada's mere act of removing this matter to federal court did not waive its sovereign immunity from liability for federal FLSA claims that would be barred in Nevada state court.

This Court should reverse and remand this case to the District Court, with instructions that this matter be remanded to the state court from which it was

previously removed, and the FLSA claims dismissed with prejudice.

Dated: August 28, 2018

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, STATE OF NEVADA, *ex rel.* NEVADA DEPARTMENT OF CORRECTIONS hereby represents that there are no known related cases.

CERTIFICATE PURSUANT TO Fed. R. App. P. 32(a)(7)(C)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 6539 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

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Dated: August 28, 2018

/s/ Richard I. Dreitzer
RICHARD I. DREITZER, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of August, 2018, I forwarded a true and correct copy of the foregoing APPELLANT STATE OF NEVADA, *ex rel.* NEVADA DEPARTMENT OF CORRECTIONS OPENING Brief to the parties by filing a true copy thereof with the Clerk of the Court using the CM/ECF System to be served upon all parties using the CM/ECF System.

/s/ Naomi E. Sudranski
An Employee of WILSON, ELSER,
MOSKOWITZ, EDELMAN & DICKER LLP

No. 18-15691

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF NEVADA, *ex rel.* NEVADA DEPARTMENT OF CORRECTIONS,

Defendant/Appellant,

v.

DONALD WALDEN, JR, *et al.*,

Plaintiffs/Appellees.

On Appeal from Order (filed March 26, 2018), Document 166, of
the United States District Court
for the District of Nevada
Honorable Miranda M. Du
United States District Court Case No. 3:14-cv-00320-MMD-WGC

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I. INTRODUCTION

This is a wage-hour case brought on behalf of Correctional Officers ("COs") employed by Defendant/Appellant the State of Nevada, *ex rel.*, its Nevada Department of Corrections ("Appellant" or "State of Nevada" or "NDOC") for work activities performed pre- and post-shift without overtime pay. Nevada COs are paid on a per shift basis beginning at the time they are scheduled to assume their assigned post. COs are not paid for the time spent performing pre- and post-shift work activities, such as reporting for duty to the Shift Sergeant, receiving assignments and briefings for the day, passing a uniform inspection, collecting mail and gear needed for their assigned post (e.g., radio, keys, weapons, restraints), engaging in a "pass down" of information with the outgoing officer at the assigned post, and engaging in these same work activities (except for roll call and uniform inspection) after the end of their regularly scheduled shift.

This case was filed in Nevada state court over four (4) years ago. Appellant removed the action to federal court based on federal question jurisdiction. Since that time, the case has been actively litigated. The Parties have taken nearly 40 depositions, produced 24,000-plus pages of documents, inspected 8 correctional facilities, distributed notification to 3,075 correctional officers, exchanged expert reports, and filed numerous dispositive motions. With the exception of some information relating to damages, the case is all set for trial.

At no point in the last four and a half years has Appellant ever moved to dismiss this case on immunity grounds. The immunity defense was first raised by District Court Judge Miranda M. Du. Only now, after litigating the case for over four years, has Appellant sought to invoke its immunity from suit. Appellant's timing and strategy could not be stranger. Indeed, is it not the purpose of an immunity defense to save state resources from time (and money) consuming litigation?

Appellant never sought to dismiss this case on immunity grounds before being nudged by Judge Du's *sua sponte* request for briefing because that defense is simply untenable for two reasons. **First**, Appellant has procedurally waived its Eleventh Amendment immunity from being sued in federal court by choosing to remove this action from state court (*i.e.*, waiver of "jurisdictional immunity"). *See Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004). **Second**, Appellant has waived its sovereign immunity from liability for unpaid wages under the Fair Labor Standards Act (FLSA) by statute pursuant to NRS 41.031(1) (*i.e.*, waiver of "general immunity"). Ultimately, Judge Du's rejection of the immunity defense was correct and her quick treatment of the argument was warranted because it is not even a close question. For these reasons and those set forth more fully below, Appellant's appeal should be denied and Judge Du's decision with respect to Appellant's immunity defense affirmed.

II. QUESTIONS PRESENTED

A. Whether the State of Nevada waived its Eleventh Amendment immunity by removing this action from state court to federal court; and

B. Whether the State of Nevada has waived its general immunity from claims under the Fair Labor Standards Act (FLSA).

III. QUESTIONS ANSWERED

A. Pursuant to *Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004), the State of Nevada waived its Eleventh Amendment immunity when it voluntarily removed this action from Nevada state court to the federal forum.

B. The State of Nevada has waived its general immunity because: (1) NRS 41.031(1) expressly waives the State of Nevada's general immunity, with limited exceptions, which do not include claims for wages under the FLSA; and (2) Appellant failed to pursue the general immunity defense after four years of intense time-consuming and expensive litigation.

IV. STATEMENT OF FACTS

A. Procedural Background

On May 12, 2014, Plaintiffs/Appellees Donald Walden Jr, Nathan Echeverria, Aaron Dicus, Brent Everist, Travis Zufelt, Timothy Ridenour, and Daniel Tracy

("Appellees" or "Plaintiffs"), filed their complaint against NDOC in the First Judicial District for the State of Nevada, for alleged unpaid wages on behalf of themselves and similarly situated individuals under the FLSA and Nevada law. (Defendant's Excerpts of Record ("ER") at Vol. VII, APP 1522-1536)[1]. Plaintiffs alleged that NDOC required correctional officers and other non-exempt employees to perform work activities without compensation. *Id.* Plaintiffs alleged that NDOC failed to: (1) pay wages for all hours worked in violation of 29 U.S.C. § 201, et seq.; (2) pay overtime in violation of 29 U.S.C. § 207; (3) pay minimum wages in violation of the Nevada Constitution; and, (4) comply with the terms of its contract with Plaintiffs to pay an agreed upon hourly wage for all hours worked. *Id*.

NDOC removed the action to federal court and filed an Answer on June 24, 2014 (Vol. VII, APP 1516-1520; APP 1506-1515). Plaintiffs filed their motion for conditional certification under § 216(b) of the FLSA on August 6, 2014, (Vol. VI, APP 1399-1414), which was granted by the District Court on March 16, 2015 (Vol. VI, APP 1390-1398). Out of a total Opt-In Class of Three Thousand and Seventy-Five (3,075) potential class members, five-hundred and forty-two (542) similarly

[1] In Defendant/Appellant's Excerpts of Record Index "ER" refers to the ECF No. of the Federal Docket and "APP" refers to the actual numbering of the excerpt of record documents. For purposes of citation, Plaintiffs/Appellees cite to the volume number and use the "APP" number when referring to Defendant/Appellant's Excerpts of Record. Plaintiffs/Appellees documents are labeled with an "ER" prefix and will use this citation when citing to their own Excerpts of Record.

situated persons joined the FLSA portion of this action. (Vol. V., APP 1152 at ¶52 fn. 2.)

On April 3, 2016, NDOC filed its Motion for Judgment on the Pleadings, seeking dismissal of all four of Plaintiffs' claims with prejudice (Vol VI., APP 1309-1336). Subsequently, the Parties attended mediation and the Court issued a minute order denying NDOC's motion without prejudice, ordering that NDOC could reinstate its motion if mediation was unsuccessful (ER 13-14). The mediation was unsuccessful.

On April 1, 2016, the Parties filed a proposed briefing schedule and stay of discovery (ER 10-12; ER 7-9) until after the Court ruled on NDOC's Renewed Motion (Vol. VI., APP 1230-1260). The Parties further agreed, following the Court's decision on NDOC's Renewed Motion, that the Parties would submit an Amended Proposed Discovery Plan and Scheduling Order to the Court, which the Court approved with modification after hearing by Minute Order. (ER 3-6).

On April 13, 2016, NDOC filed its Renewed Motion for Judgment on the Pleadings (Vol. VI., APP 1230-1260). On March 20, 2017, the District Court granted NDOC's Renewed Motion and dismissed Plaintiffs' claims under 29 U.S.C. § 201 and § 207 without prejudice and permitted Plaintiffs to file an amended complaint (Vol VII., APP 1560-1565). The Court also declined to exercise supplemental jurisdiction over Plaintiffs' two state law claims, dismissing those

without prejudice. *Id*. On April 19, 2017, Plaintiffs filed their First Amended Complaint (Vol. V. APP 1129-1164, "FAC") asserting that Defendants failed to (1) pay wages for all hours worked in violation of 29 U.S.C. § 201, et seq.; (2) pay overtime in violation of 29 U.S.C. § 207; (3) pay minimum wages in violation of the Nevada Constitution; (4) pay overtime in violation of NRS 284.180; and (4) comply with the terms of its contract with Plaintiffs to pay an agreed upon hourly wage for all hours worked.

On May 10, 2017, NDOC filed their Motion to Dismiss the First Amended Complaint (Vol. V., APP 1072-1128) and their Motion to Strike. Plaintiffs filed responses to both motions and NDOC replied. (Vol. VII., APP 1551-1554; Vol. V, APP 1026-1048; Vol. VII, APP 1544-1550; Vol. V., APP 1013-1025). NDOC never raised the immunity argument in its Motion to Dismiss or Motion to Strike. Instead, NDOC sought legal vindication from the District Court that its pay policies and practices were lawful under the FLSA. NDOC's main argument in favor of its Motion to Dismiss was that the pre- and post-shift activities in question were not compensable under the FLSA. (Vol. V., APP 1082-1086). The District Court rejected NDOC's argument, stating that the pre- and post-shift activities were compensable under the FLSA:

> [T]he Court is able to reasonably infer from the factual allegations in the FAC as well as from common sense why these activities are "an intrinsic element" of a correctional officer's principal activities and "ones with which the

employee cannot dispense if he is to perform his principal activities." *See Busk*, 135 S. Ct. at 517. As to the purported requisite preliminary activities of check-in and receipt of assignments, "a law enforcement entity cannot ensure the safety of the population it oversees without (1) knowing who is present at a given time and (2) dispatching those that are present to attend to the greatest need." (ECF No. 105 at 12.) Moreover, "a correctional officer simply cannot perform his required job duties without first knowing where to go (whether to the exercise yard or to transport an inmate) nor can he perform his job effectively without knowing whether there is any potential dangerous situation developing amongst the inmates (such as a gang related issue or hunger strike)." (ECF No. 105 at 14.) The activities of check-in and receipt of assignments are therefore necessary to perform the officer's principal duties of safeguarding the prison during his shift.

As to the preliminary activity of retrieving tools and gear, correctional officers need specific items in order to perform assigned duties, for instance, handcuffs to transport inmates or tear gas to quell a potential riot. (*See* ECF No. 105 at 14.) Retrieving tools and gear, as described in the FAC (ECF No. 95 at ¶ 32), is distinguishable from the example Defendant identifies in its motion of "polishing shoes, boots and duty belts, cleaning radios and traffics vests, and oiling handcuffs." (ECF No. 99 at 15 (citing *Musticchi v. City of Little Rock, Ark.*, 734 F. Supp. 2d 621, 630-32 (E.D. Ark. 2010)).) As alleged, Plaintiffs are not cleaning gear; they are retrieving gear that is "necessary and required to complete their daily job tasks"—tasks which they are informed of only once they arrive at the prison and receive a work assignment from their supervisor. (*See* ECF No. 95 at ¶ 32.) As alleged, this activity is therefore indispensable to the officer's principal duties.

As to the preliminary activity of uniform inspection, the FAC contends that "if [a correctional officer's] uniform was not up to standards" then the officer "could

not proceed to their post[].” (ECF No. 95 at ¶ 31(b).) Defendant argues that because a uniform can be put on at home, this activity is not compensable under FLSA. (ECF No. 112 at 7 (citing *Balestrieri v. Menlo Park Fire Protection Dist.*, 800 F.3d 1094, 1100 (9th Cir. 2015)).) However, Plaintiffs do not contend that it is putting on a uniform at work that is compensable; rather, they state that uniform inspection by an officer’s shift supervisor is a component of “muster” and is therefore compensable because it is required. (*See* ECF No. 95 at ¶ 31(b).) While the time spent by a supervisor visually inspecting an officer’s uniform may itself be *de minimus*, it is a purported component of “muster” and therefore part of a continuous workday activity that is integral to the officer’s principal duty of ensuring the safety of the prison and monitoring its inmates.

As to the preliminary activity of walking from check-in, receipt of assignment, and tool collection to an officer’s assigned post for the day, this activity is compensable under the “continuous workday doctrine.” *See IBP, Inc.*, 546 U.S. at 37 (“[D]uring a continuous workday, any walking time that occurs after the beginning of the employee’s first principal activity and before the end of the employee’s last principal activity is excluded [from the Portal-to-Portal Act’s travel exemption], and as a result is covered by FLSA.”)

As to the postliminary activity of outgoing correctional officers briefing incoming officers, this is similarly necessary to the safety and security of the prison, and is an integral part of the officers’ principal duties. (ECF No. 106 at 16-17.) Finally, as to the postliminary activities of walking back to and returning any tools or gear taken by an officer, the allegations in the FAC permit the Court to reasonably infer that Plaintiffs were not allowed to take these tools and gear home with them and so were required to return them. As Plaintiffs are purportedly required to take these tools and gear before starting their shifts in order to perform their assigned

> duties, the postliminary activity of returning tools or gear is also indispensable to their principal duties during their shifts.

B. The District Court's Relevant Decisions

The March 1, 2018, Order. Prior to ruling on Defendants' Motion to Dismiss the First Amended Complaint and Motion to Strike, the Court, *sua sponte*, asked the Parties to brief the question of whether "the doctrine of sovereign immunity … appl[ies] to the FLSA claims against the State of Nevada ***as brought in federal court***." (Vol. II, APP 200-201). As evident by the Court's discussion in its March 1 Order, it was correctly concerned with the question of whether a sovereign state could be sued in the federal court forum. *Id.* (citing cases that were concerned with procedural immunity—i.e., the forum). It directed the Parties to file supplemental briefing on the issue of whether the State of Nevada waived its Eleventh Amendment immunity from suit by removing the case to federal court. *Id.* The Parties then filed supplemental briefing pursuant to the Court's Order. (ECF Nos. 149, 158).

The March 26, 2018, Order. In its Order granting, in part, NDOC's Motion to Dismiss, the District Court quickly resolved the question of whether NDOC had waived its Eleventh Amendment immunity by removing the action to federal court. As with its prior order requesting briefing on the issue, the Court was only concerned

with the State of Nevada's Eleventh Amendment immunity from suit in the federal forum:

> After reviewing the supplemental briefs (ECF Nos. 149, 158), the Court is convinced that Nevada has waived its sovereign immunity ***in this Court***. The Supreme Court has held that a state's removal of suit to federal court constitutes a waiver of its ***Eleventh Amendment immunity***. *Lapides v. Bd. Of Regents of Univ. Sys. Of Georgia*, 535 U.S. 613, 616 (2002). Here, the State of Nevada removed this action from state court. Therefore, it has waived its sovereign immunity.

Id. (emphasis added). The District Court's conclusion that the State of Nevada had "waived its sovereign immunity" was in reference to its waiver of Eleventh Amendment immunity. The District Court did not, as NDOC contends on appeal, conclude that NDOC waived its substantive or general sovereign immunity by removal. The District Court was not concerned with this question—whether the State of Nevada had waived its substantive or general immunity by removal—because the State of Nevada expressly and clearly waived its substantive or general immunity by enacting NRS 41.031(1).

Herein lies the crumbling foundation of NDOC's confused argument: NDOC believes that the District Court concluded that the State of Nevada waived its substantive or general immunity by removal. It did no such thing. The District Court concluded that the State of Nevada had waived its Eleventh Amendment immunity from being sued in federal court by removing. The District Court was not concerned

with the question of whether the State of Nevada had waived its substantive or general immunity from liability because Nevada statute 41.031(1)'s immunity waiver is clear and unambiguous. NDOC is confused because it conflated the removal waiver of Eleventh Amendment procedural with statutory waiver of general sovereign immunity.

C. Discovery Conducted

This case has been actively litigated for four and a half years. The Parties have taken nearly 40 depositions, produced 24,000-plus pages of documents, inspected eight correctional facilities, distributed notification to 3,075 correctional officers, exchanged expert reports, and filed numerous dispositive motions. With the exception of some information relating to damages, the case is all set for trial.[2]

Specifically, in addition to the 215 separate docket entries (many including multiple Exhibits that equal a sum total of approximately 438 docket entries) the following discovery has taken place:

Depositions: Plaintiffs took depositions of four (4) wardens between April 2015 and September 2015; Plaintiffs also took the deposition of NDOC's PMK on

[2] There is really no factual dispute over the duties performed pre- and post-shift, as these duties are mandated by State "Administrative Regulations" and "Operating Procedures", which have been produced in the exhaustive discovery that has taken place in this litigation. Nor is it disputed that NDOC does not pay for the time spent performing these duties. Thus, the only remaining legal question is, whether or not time spent performing these duties must be compensated, and if so, how much is due those who opted in.

payroll policies in September of 2015. NDOC took the depositions of the seven (7) named Plaintiffs—four of who were deposed twice—first in September 2015 and again in September 2017. NDOC also took two rounds of opt-in Plaintiff depositions, nineteen (19) in November/December 2015 and an additional three (3) in 2017, four (4) of the opt-ins also being deposed for the second time in 2017. And, the depositions of the three (3) experts in this litigation were taken in December 2017.

Written Discovery: Each of the seven (7) named Plaintiffs have responded to written Requests for Production (45 distinct requests not including subparts), Requests for Admissions (38 distinct requests) and Interrogatories (24 distinct requests not including sub-parts). Eighteen (18) opt-in Plaintiffs have each responded to Interrogatories (10 distinct requests).

Disclosure Documents: The Parties have exchanged some 24,000-plus pages of documents including but not limited to the following NDOC written policies, procedures, and operational directives: forty-six (46) separate Administrative Regulations (job requirements); "Posting Charts" (indicating how many correctional officers are need at each post) for each of the correctional facilities located in the State of Nevada; "Post Orders" (additional specific job requirements, staffing requirements, and standard responsibilities for each post, *i.e.*¸ gun tower, culinary, gymnasium, search and escort, etc.); "Operating Procedures" (additional job requirements including but not limited to "Reporting for Duty", "Posting of

Shifts/Overtime", "Use of Restraints" "Keys", "Armory and Weapons", "Perimeter and Gate Control", etc.). In addition, timesheets, payroll history, and personnel files for each of the seven (7) named Plaintiffs have been produced and reviewed; time and payroll data for the deposed opt-in Plaintiffs, as well as portions of their personnel files have been produced and used in deposition questioning.

Prison Site Visits: The Parties participated in eight (8) actual prison facility site visits that were videotaped over the course of October 17 through 19, 2017 and used in the various motions and expert reports.

Expert Discovery: NDOC has deposed Plaintiffs' two experts and Plaintiffs have deposed NDOC's expert, all taking place in December 2017. Each expert has provided a written report and a rebuttal report.

V. STANDARD OF REVIEW

Questions of Eleventh Amendment immunity and state sovereign immunity are reviewed *de novo*. *Hill v. Blind Indus. & Servs.,* 179 F.3d 754, 756 (9th Cir.1999), *amended by* 201 F.3d 1186 (9th Cir.2000); *Carey v. Nev. Gaming Control Bd.,* 279 F.3d 873, 877(9th Cir.2002). "[A]n entity invoking Eleventh Amendment immunity bears the burden of asserting and proving those matters necessary to establish its defense." *Id.* at 118.

Nevada's waiver of general sovereign immunity under NRS 41.031 "is to be broadly construed" in favor of a waiver of immunity. *Martinez v. Maruszczak*, 123

Nev. 433, 441, 168 P.3d 720, 725 (2007) ("In NRS Chapter 41, the Nevada Legislature has, with some exceptions, waived Nevada's sovereign immunity from liability.") (citing *State v. Silva,* 86 Nev. 911, 914, 478 P.2d 591, 593 (1970) ("The apparent legislative thrust was to waive immunity and, correlatively, to strictly construe limits upon that waiver."); *Hagblom v. State Director of Motor Vehicles*, 571 P.2d 1172, 93 Nev. 599 (1977) ("Where case presents close question whether asserted conduct falls within statute conditionally waiving governmental immunity from suit, courts must favor a waiver of immunity."); *State v. Webster*, 504 P.2d 1316, 88 Nev. 690 (1972) ("Limitations on State's waiver of sovereign immunity should be strictly construed and in a close case the court favors a waiver of immunity.").

VI. SUMMARY OF ARGUMENT

Appellant correctly stated in its Opening Brief that there are two distinct types of sovereign immunity: (1) immunity based upon the express text of the Eleventh Amendment of the United States Constitution and (2) general immunity based upon the structure and history of the United States Constitution. Op. Brief at pp. 10-11. Appellant calls these two distinct types of sovereign immunity "Eleventh Amendment immunity" and "*Alden* or general immunity." *Id.*

Despite recognizing that there are two distinct types of sovereign immunity at play here, Appellant disregards the critical distinction between the two. One is

jurisdictional in nature (*i.e.*, under Eleventh Amendment immunity a state sovereign cannot be sued in a federal forum) and the other is substantive (*i.e.*, under general immunity the state cannot be sued at all). Under Eleventh Amendment immunity, a federal court does not have jurisdiction to entertain a legal action by an individual brought against a state sovereign. *Embury v. King*, 361 F.3d 562, 565 (9th Cir. 2004), *as amended* (May 17, 2004), *amended*, No. 02-15030, 2004 WL 1088297 (9th Cir. May 17, 2004) ("The Eleventh Amendment provides that '[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States.' This language speaks, not to immunity from claims, but to federal jurisdiction over 'any suit.'"). This was the type of immunity that Judge Du was concerned about when she raised the issue *sua sponte* in considering Appellant's Motion to Dismiss. In contrast, general immunity inoculates a state for liability in any court—state or federal.

(1) Eleventh Amendment Immunity

The Eleventh Amendment of the Constitution specifically gave the states immunity from being hauled into federal courts against their will: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. In 1977, the Nevada Legislature amended NRS 41.031 to retain the state of

Nevada's sovereign immunity conferred by the Eleventh Amendment: "The State of Nevada does not waive its immunity from suit conferred by Amendment XI of the Constitution of the United States." NRS 41.031(3). Absent a waiver of jurisdictional immunity, Appellant can never be forced to defend an action by an individual in federal court.

In this case, Appellant decided to voluntarily avail itself of the federal forum by removing this action from state court to federal district court. Ninth Circuit precedent instructs that when a state sovereign voluntarily avails itself of the federal forum, it waives its Eleventh Amendment immunity. *See Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004). This is what occurred here and this was the precise issue that Judge Du was concerned about when she posed the question to the Parties. Plaintiffs/Appellees are not arguing that the removal of the action waived Appellant's general immunity—the general immunity waiver was accomplished by statute (and, alternatively, by Appellant's litigation conduct).

(2) General Immunity

The Nevada legislature has waived the State of Nevada's general immunity by statute—NRS 41.031(1)—and by its own litigation conduct. The plain language of NRS 41.031(1) expressly states that "The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions

against natural persons and corporations, [with certain inapplicable exceptions.]" There are no applicable exceptions for wage claims pursued by employees of the states. *See* NRS 41.032-.0337 (Conditions and Limitations on Actions). The legislative history of NRS 41.031 further confirms that the statute was designed to eliminate the State of Nevada's general immunity from liability with only certain limited exceptions. Furthermore, or in the alternative, Appellant has waived its right to assert the general immunity defense by litigating this case for more than 4-years without having ever raised the defense.

Judge Du's decision on the immunity issue should thus be affirmed.

VII. ARGUMENT

Appellant mistakenly believes that the District Court ruled that the State of Nevada had waived its general immunity by removing the action from state court to federal court. Although less than clear, Judge Du was primarily concerned with Eleventh Amendment immunity—*i.e.*, jurisdictional immunity—as opposed to general immunity. Contrary to Appellant's arguments to the contrary, she did not hold that a state entity waives its general immunity by removal. She did not directly address that issue (probably because Appellant had never even raised the sovereign immunity defense in the first place) and because Nevada's waiver of general sovereign immunity pursuant to NRS 41.031(1) is so clear. Ultimately, Judge Du's Order concluding that she had jurisdiction to hear the case because Appellant has

waived its Eleventh Amendment immunity was correct. And, the State of Nevada has waived its general immunity by statute and its own refusal to assert the immunity defense after 4 years of intense litigation.

A. The District Court Correctly Concluded That Appellant Had Waived Its Immunity From Federal Court Jurisdiction By Removing The Action To Federal Court

Removal waives Eleventh Amendment "jurisdictional immunity" in this Circuit. *See Embury*, 361 F.3d at 564 (holding that the state waived Eleventh Amendment immunity by removing action, and waiver applied to both state and federal claims and applied to claims asserted after removal); *see also Bd. of Regents of the Univ. of Wis. Sys. v. Phx. Int'l Software, Inc.*, 653 F.3d 448, 463–64 (7th Cir. 2011) (recognizing that removal waives Eleventh Amendment immunity). In *Embury*, the state (California) tried to claim Eleventh Amendment immunity from the federal claims—which formed the anchor for federal court jurisdiction (as is the case here)—while conceding that it had no immunity from pendent state law claims. 361 F.3d at 564. Under this circumstance, the Ninth Circuit recognized that it would be absurd for a state to allow a federal court to adjudicate state law claims "where federal jurisdiction cannot even be obtained but for federal claims asserted in the same case," yet object to federal court jurisdiction over the federal claims. *Id.* ("We conclude that the rule in *Lapides* applies to federal claims as well as to state law claims and to claims asserted after removal as well as to those asserted before

removal. By removing the case to federal court, the State waived its Eleventh Amendment immunity from suit in federal court.") Thus, the *Embury* Court held that removal constituted a waiver of immunity for all claims.

Here, the District Court correctly concluded that Appellant had waived its Eleventh Amendment immunity by removal of the action to federal court. (Vol. I, APP 3-4). (citing *Lapides v. Bd. Of Regents of Univ. Sys. Of Georgia*, 535 U.S. 613, 616 (2002). Accordingly, the District Court was correct when it held that it had jurisdiction over the FLSA claims alleged in the Plaintiffs/Appellees' First Amended Complaint pursuant to *Embury* and *Lapides*.

Appellant attempts to discredit the District Court and to distinguish *Embury* by arguing that, while removal may establish a waiver of procedural Eleventh Amendment immunity from suit in a federal forum, it does not show a waiver of substantive general sovereign immunity for the removed claims. On this point, Appellant cites to *Beaulieu* and related cases for the proposition that a state may waive *procedural* immunity under the Eleventh Amendment in order to have the question of *substantive* general sovereign immunity adjudicated in a federal forum.

Appellant's argument misses the mark. The District Court never addressed the issue of whether removal waives general sovereign immunity; it only addressed Eleventh Amendment immunity. The reason is two-fold. First, Appellant never raised the argument. The District Court raised the issue of Eleventh Amendment

immunity, *sua sponte*. Second, it can safely be assumed the District Court was not concerned about the issue of whether removal waives general sovereign immunity because the State of Nevada had waived its general immunity by statute under NRS 41.031(1).

While Appellant's removal certainly evidences a voluntary waiver of immunity and submission of this case for federal adjudication, Plaintiffs/Appellees do not rely on Appellant's "mere removal" of this case to establish the State's waiver of its substantive general sovereign immunity because Nevada has expressly and unequivocally waived its general sovereign immunity through statute. *See* NRS 41.031(1). Furthermore, Appellant's refusal to ever raise a general immunity defense while actively litigating the suit for 4-years indicates that it never thought much of the argument in the first place and, as a result, it has been waived by Appellant's own litigation tactics.

B. The State Of Nevada and All Political Subdivisions Of The State Have Waived Their General Immunity From Liability

1. The Nevada Legislature has waived the State of Nevada's immunity from liability, codified by NRS 41.031(1)

The plain language of NRS 41.031(1) provides that the State of Nevada and all political subdivisions of the state waive their general immunity from liability:

> The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and

> corporations, except as otherwise provided in NRS 41.032 to 41.038, inclusive, 485.318, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of NRS 41.010 or the limitations of NRS 41.032 to 41.036, inclusive. The State of Nevada further waives the immunity from liability and action of all political subdivisions of the State, and their liability must be determined in the same manner, except as otherwise provided in NRS 41.032 to 41.038, inclusive, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive.

The few exceptions and limitations from liability provided by subdivision 1 are not applicable in a suit for wages and other associated relief. There is likewise no issue with compliance with the procedural requirements for asserting a claim against the State or one of its political subdivisions.[3] The text of NRS 41.031(1)

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[3] NRS 41.031(2) sets forth the following requirements:

> An action may be brought under this section against the State of Nevada or any political subdivision of the State. In any action against the State of Nevada, the action must be brought in the name of the State of Nevada on relation of the particular department, commission, board or other agency of the State whose actions are the basis for the suit. An action against the State of Nevada must be filed in the county where the cause or some part thereof arose or in Carson City. In an action against the State of Nevada, the summons and a copy of the complaint must be served upon:
>
> (a) The Attorney General, or a person designated by the Attorney General, at the Office of the Attorney General in Carson City; and
> (b) The person serving in the office of administrative head of the named agency.

clearly states that Appellant has waived its rights to the action brought by Plaintiffs/Appellees and its "liability [shall be] determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations[.]"

There is no limit to the scope of this waiver with respect to wage cases brought under state and/or federal law. Appellant's suggestion that NRS 41.031's waiver only applies to tort claims is without foundation. The plain language of the statute provides for a broad waiver of general sovereign immunity in all "civil actions" in state court, with limited exceptions. The FLSA applies to state employees, *see Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005 (1985), and actions can be brought in state court, *see* 29 U.S.C. 216(b) ("An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal ***or State court*** of competent jurisdiction by any one or more employees for and on behalf of himself or themselves and other employees similarly situated." (emphasis added)).

Each of these requirements has been met here. The action was filed against the State of Nevada and the Nevada Department of Corrections; it was originally filed in Carson City, Nevada; the summons and a copy of the complaint were served on the Attorney General and James Cox, the Director of the NDOC. *See* Plaintiffs' Complaint (Vol. VII., APP 1521-1536; Vol. II., APP 195-199; ER 1-2)

Furthermore, although the plain language of the statute is clear and it would be unnecessary to look to the legislative history of NRS 41.031's passage, it is apparent that the Nevada legislature did not express any intent to limit this waiver to tort claims. To the contrary, in the Minutes of Meeting – Assembly Judicial Committee, 53rd Session, March 29, 1965, the proponent of the bill to enact NRS 41.031 (SB 185) represented that the goal of the bill was that: "[t]he doctrine of sovereign immunity be abolished." *See* https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1965/SB185,1965.pdf (last visited Oct. 28, 2018) at p. 9 (stating, in part, "The doctrine of sovereign immunity seems to be out. It has been knocked out in the courts of a number of states and several states have legislation knocking it out. He made four requests of the Committee on behalf of the group: 1. The doctrine of sovereign immunity be abolished; . . ."). Further, the summary of the bill "provides for liability of and actions against the state, its agencies and political subdivisions, ***including*** tort claims."[4] The legislature's language is intentional, and further indicates that the waiver is not ***limited*** to tort claims, but rather tort claims are ***included*** in the waiver

[4] While one important goal of the State's waiver is to provide relief for persons injured through negligence, this is not the only goal of the waiver, nor is the waiver limited to this end.

along with other civil actions in the State's broad and express "abolishment" of its general sovereign immunity.[5]

To the extent that there is any ambiguity regarding the scope of the waiver, the Nevada Supreme Court has instructed all courts that the state of Nevada's waiver of general immunity "is to be broadly construed" in favor of a waiver of immunity. *Martinez v. Maruszczak*, 123 Nev. 433, 441, 168 P.3d 720, 725 (2007) ("In NRS Chapter 41, the Nevada Legislature has, with some exceptions, waived Nevada's sovereign immunity from liability.") (citing *State v. Silva,* 86 Nev. 911, 914, 478 P.2d 591, 593 (1970) ("The apparent legislative thrust was to waive immunity and, correlatively, to strictly construe limits upon that waiver.").[6] In addition, the Nevada

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[5] Indeed, Nevada's statutes governing compensation for state employees acknowledge the concurrently applicable compensation requirements set by FLSA. For example, NRS 284.180(7) provides that:

> Employees who are eligible under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 et seq., to work a variable 80-hour work schedule within a biweekly pay period and who choose and are approved for such a work schedule will be considered eligible for overtime only after working 80 hours biweekly, except those eligible employees who are approved for overtime in excess of one scheduled shift of 8 or more hours per day."

[6] *Hagblom v. State Director of Motor Vehicles*, 571 P.2d 1172, 93 Nev. 599 (1977) ("Where case presents close question whether asserted conduct falls within statute conditionally waiving governmental immunity from suit, courts must favor a waiver of immunity."); *State v. Webster*, 504 P.2d 1316, 88 Nev. 690 (1972)

Supreme Court has held that the State's immunity waiver applies to actions other than those involving torts. *See, e.g.*, *Golconda Fire Prot. Dist. v. Cty. of Humboldt*, 112 Nev. 770, 771, 918 P.2d 710, 710 (1996), *decision clarified on reh'g*, 113 Nev. 104, 930 P.2d 782 (1997) (statutory claim for wrongful apportionment of money interest).[7]

Appellant ignores the Nevada Supreme Court's mandate that the State's waiver of general immunity "is to be broadly construed" in favor of a waiver of immunity, and argues that NRS 41.031(1)'s waiver of general sovereign immunity should instead be analyzed under the inapplicable federal standard for waiver of

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("Limitations on State's waiver of sovereign immunity should be strictly construed and in a close case the court favors a waiver of immunity.").

[7] However, even if the legislature did intend to limit the waiver to tort claims, such an interpretation would likely still include a waiver of general immunity to FLSA claims. While Nevada has not addressed this hypothetical situation (it would not need to, because its waiver is not limited in this matter). The Oregon Court of Appeals addressed this exact situation in *Byrd v. Oregon State Police*, 236 Or. App. 555, 559, 238 P.3d 404, 406 (2010). In that case, the State of Oregon enacted a statute waiving general immunity, and ***expressly*** limited that waiver to tort claims. *Id.* at 558 (*citing* ORS 30.265). Applying state law, the court observed that Oregon defines a "tort" as "the breach of a legal duty that is imposed by law, other than a duty arising from contract or quasi-contract, the breach of which results in injury to a specific person or persons for which the law provides a civil right of action for damages or for a protective remedy." Under this definition, the court concluded that "a claim under the FLSA is a tort claim" under Oregon law and thus "it follows that it is a claim on which the state has waived its sovereign immunity against being sued in state court." *Id.* Unlike the statutory waiver at issue in *Byrd*, Nevada's statutory waiver is not expressly or implicitly limited to torts. However, even if this Court were to adopt such an interpretation, *Byrd* suggests that such a waiver would include claims under the FLSA.

Eleventh Amendment rights. Op. Brief at p. 12 (arguing that "[a] state's waiver of sovereign immunity must be stated 'in the most express language possible or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'"). The State of Oregon raised this same argument to the court in *Byrd*, arguing that "*Alden* establishes that a state's waiver of sovereign immunity against being sued in its own courts on an FLSA claim must meet the Eleventh Amendment standard for waiver, which is a stringent one." 236 Or. App. 555, 558. The court soundly rejected this argument, explaining:

> The state misunderstands *Alden*. *Alden* addressed "whether Congress has the power, under Article I [of the federal Constitution], to subject nonconsenting States to private suits in their own courts." 527 U.S. at 730, 119 S.Ct. 2240. The court held that Congress does not have that power. That means that a state has sovereign immunity against being sued in its own courts by private claimants, such as plaintiffs, on FLSA claims notwithstanding the provision in the FLSA that purports to subject states to private suits in their own courts on such claims.
>
> However, *Alden* did not make the Eleventh Amendment standard for waiver of state sovereign immunity applicable to the question whether a state has waived its sovereign immunity against being sued in its own courts. Whether a state has waived its sovereign immunity against being sued in federal court, that is, whether it has waived its protection under the Eleventh Amendment against such actions, presents a federal-law question. Whether a state has waived its sovereign immunity against being sued in its own courts presents a state-law question. We are aware of no principle or authority, and the state has not identified any, that supports the idea that federal law controls the

> resolution of such a state-law question. Hence, we reject the state's argument that the Eleventh Amendment standard for waiver of sovereign immunity applies to whether the state has waived its immunity against being sued on FLSA claims in state court.

Id. Based on Oregon law, the court concluded that "the state has waived its sovereign immunity against being sued on such a claim in state court." *Id*. Here, the Supreme Court of Nevada has clearly and consistently mandated a policy of liberality in determining the applicability and scope of the State's broad waiver of general sovereign immunity set forth in NRS 41.031(1).

In short, the plain statutory language, legislative history, and policy of judicial liberality in interpreting the scope of the waiver make clear that Nevada intended to "abolish" and waive its general sovereign immunity in all civil suits subject to limited exceptions (which do not include claims under the FLSA).[8]

2. Appellant's failure to pay overtime wages does not fall within NRS 41.032-.0337's exceptions to Nevada's waiver of sovereign immunity

[8] Appellant also argues that the FLSA's application to public employers post-dates the enactment of Nevada's immunity waiver statute and, as a result, the waiver could not have been intended to cover FLSA claims brought against the State. Once again, Appellant has an overly restrictive reading of the NRS 41.031, which is in direct conflict with the Nevada Supreme Court's mandate to liberally construe the statute in favor of waiver. Appellant's argument would, in effect, nullify the State from any liability for any law (state or federal) that was passed after 1965. The plain language of the NRS 41.031 does not limit the State's waiver only to claims that could have been actionable prior to 1965. Accordingly, this argument should be rejected.

NRS 41.032-.0337 set forth the "[c]onditions and [l]imitations on [a]ctions" of Nevada's general immunity waiver found at NRS 41.031(1). None of these limitations relate to a legal action by public employees against their employer for the recovery of unpaid wages.[9] Nevertheless, Appellant argues that the exception contained in NRS 41.032(1) applies to a claim for overtime.

NRS 41.032(1) states that no action may be brought under NRS 41.031 against any state agency or political subdivision that is "[b]ased upon an act or omission of an officer, employee or immune contractor, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, if the statute or regulation has not been declared invalid by a court of competent jurisdiction[.]"

[9] NRS 41.032 ("Acts or omissions of officers, employees and immune contractors."); NRS 41.0322 ("Actions by persons in custody of Department of Corrections to recover compensation for loss or injury."); NRS 41.0325 ("Negligence or willful misconduct of minor driver in legal custody of State."); NRS 41.0327 ("Injuries arising from acts incident to certain solicitations of charitable contributions."); NRS 41.033 ("Failure to inspect or discover hazards, deficiencies or other matters; inspection does not create warranty or assurance concerning hazards, deficiencies or other matters."); NRS 41.0331 ("Construction of fence or other safeguard around dangerous condition at abandoned mine."); NRS 41.0332 ("Acts or omissions of volunteer school crossing guards."); NRS 41.0333 ("Acts or omissions of members or employees of Nevada National Guard."); NRS 41.0334 ("Persons engaged in certain criminal acts in or on public buildings or vehicles; exceptions."); NRS 41.0335 ("Actions against certain officers and employees of political subdivisions for acts or omissions of other persons."); NRS 41.0336 ("Acts or omissions of firefighters or law enforcement officers."); NRS 41.03365 ("Actions concerning equipment or personal property donated in good faith to volunteer fire department."); NRS 41.0337 ("State or political subdivision to be named party defendant.").

This exception is inapplicable in a wage and hour collective action that seeks unpaid overtime against the agency for systematic pay policies that violate the law. NRS 41.032(1) only applies to an "act or omission" of an "officer, employee, or immune contractor." Plaintiffs/Appellees' FLSA claim is not based on an "act or omission" of an individual person; it is based on the systematic failure of NDOC to compensate its COs for the pre- and post-shift activities they perform each and every day at each and every prison facility in the state.

NRS 41.032(1) is further inapplicable to the instant case because Plaintiffs/Appellees are not alleging that an individual person followed a statute or regulation and some sort of damage resulted; Plaintiffs/Appellees are insisting that NDOC did not follow the appropriate laws and regulations that mandate public employees be compensated overtime when they perform pre- and post-shift activities that are at issue here. Accordingly, Appellant's attempt to hide behind NRS 41.032(1) is weak and must be rejected.

3. Appellant refuses to acknowledge that the FLSA applies to state government employees

Appellant urges this Court to find an exception to Nevada's broad waiver of sovereign immunity by identifying the differences between the FLSA and Nevada state law. While there are admittedly differences between federal and state wage-hour law, with Nevada wage-hour law being more employee friendly than its federal counterpart, see, e.g., *Amazon.Com, Inc. v. Integrity Staffing Sols., Inc.*, 905 F.3d

387 (6th Cir. 2018) (holding that Nevada law has not adopted the federal Portal to Portal Act), Appellant seems to forget that a court can have concurrent jurisdiction over both federal and state claims. Indeed, the State of Nevada and all of its political subdivisions are bound to follow the FLSA regardless of how this Court rules. See 29 U.S.C. 216(b) (The FLSA provides concurrent jurisdiction over its enforcement: "An action to recover [such liability] may be maintained against any employer (***including a public agency***) in any Federal ***or State court*** of competent jurisdiction...." (emphasis supplied)); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 533 (1985) (holding that Congress had authority under the Commerce Clause to impose the FLSA's minimum wage and overtime requirements on state and local employees.) Accordingly, Appellant's complaints about having to follow the FLSA, its regulations, and potentially being subject to its penalties, should fall on deaf ears.

Just because Nevada also regulates compensation under state statutes and regulations does not mean that the FLSA does not apply or that it does not fall under NRS 41.031(1)'s broad waiver. These state laws protect employees in both the private and public sector, and in both, the rules contemplate that an employer must comply with both state and federal compensation requirements. For example, NRS 284.180(7) explicitly references the FLSA in determining whether law enforcement officers and correctional security personnel are eligible to work variable workweeks.

The existence of state regulations does not imply or suggest an exception to Nevada's broad waiver of immunity in civil suits against the government.

Likewise, the existence of state administrative requirements for pursuing state claims does not preclude federal claims based on same conduct, or imply that state procedure is the *only* forum for resolving those claims. The fact that remedies differ is also irrelevant to the question of whether the state waived immunity.

4. After four years of active litigation, NDOC has waived its immunity from being sued in federal court by now raising this issue for the first time

Putting the plain language of NRS 41.031(1), its legislative history, and Nevada Supreme Court cases interpreting that statute broadly in favor of waiver aside for a moment, Appellant has nonetheless waived its general immunity by failing to raise the defense of its own volition and actively litigating this case for more than four years. At best, this conduct does not evidence an endorsement for Appellant's argument. At worst, Appellant should be deemed to have waived the defense.

Appellant has made a voluntary decision to litigate this case over the course of the last four years without pursuing the sovereign immunity defense.[10] Indeed,

[10] Appellant's tactical decision to delay raising its immunity argument provided concrete litigation benefits over this period. For example, Appellant sought to have its pay policies and procedures deemed legal by the District Court. Also, Appellant successfully moved the federal court to dismiss Respondents' state law claims. By delaying its assertion of sovereign immunity, Appellant gained a

as further delineated in section IV.C above, this case has been actively litigated for four and a half years, during which time the Parties have: taken nearly 40 depositions, including the depositions of the seven (7) named Plaintiffs (four of which were deposed twice), twenty-two (22) opt-in Plaintiffs (four of which were also deposed twice), depositions of four (4) wardens and NDOC's PMK on payroll policies; responses to written discovery in the form of interrogatories, requests for production, and requests for admission by each of the named Plaintiffs and eighteen (18) opt-in Plaintiffs have been provided; production of 24,000-plus pages of documents including NDOC's written policies and procedures in the form of Administrative Regulations and Operating Procedures; participation in the inspection of eight (8) correctional facilities; distribution of notification to 3,075 correctional officers, exchange of expert reports and rebuttals as well as depositions of each other's experts, and filed numerous dispositive motions.

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tactical advantage in having the federal court adjudicate state claims that could not have been adjudicated in federal court had Appellant timely raised its defense as to the federal claims. As the court observed in *Embury*, "it makes no sense that the State does not object to having state law questions resolved by a federal tribunal—where federal jurisdiction cannot even be obtained but for federal claims asserted in the same case—yet objects to federal jurisdiction over the federal claims." *Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004), as amended (May 17, 2004), amended, No. 02-15030, 2004 WL 1088297 (9th Cir. May 17, 2004); *see also Lapides*, 535 U.S. at 621, 122 S.Ct. 1640 (worrying that states will use immunity to "achieve unfair tactical advantages"); *Benzing*, 410 F.3d at 248–50 (discussing fear that states will selectively invoke immunity to gain a tactical advantage).

Appellant's tactical delay "undermines the integrity of the judicial system[,] ... wastes judicial resources, burdens jurors and witnesses, and imposes substantial costs upon the litigants." *See, e.g., Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1021-22 (9th Cir. 2010). Federal courts in the Ninth Circuit and elsewhere have frowned on this sort of delay because it evidences a clear and voluntary waiver of a state's immunity. This delay, both standing alone and in conjunction with Nevada's statutory waiver set forth in NRS 41.031(1) "is incompatible with an intent to preserve" the immunity defense and further evidences that the State of Nevada has never believed that it was immunity from Plaintiffs/Appellants' federal claims.

VIII. CONCLUSION

For all the reasons set forth above, the District Court's March 26, 2018, Order should be affirmed.

DATED: October 29, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume, typeface, and type-style requirements of Fed. R. App. P. 32(a)(5), (a)(6), and (a)(7)(B) . This brief contains 8,433 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief has been prepared in a proportionally-spaced typeface using Word 2010 in size 14 Times New Roman type.

STATEMENT OF RELATED CASES

Plaintiff is unaware of any cases pending in this Court that would be deemed related pursuant to Ninth Circuit Rule 28-2.6.

DATED: October 29, 2018

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify and declare under penalty of perjury that the following statements are true and correct:

1. I am over the age of 18 years and am not a party to the within cause. My business address is 7287 Lakeside Drive, Reno, Nevada, 89511.

2. I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-15691

STATE OF NEVADA, *ex rel.* NEVADA DEPARTMENT OF CORRECTIONS

Defendant/Appellant

v.

DONALD WALDEN, JR, *et al.*,

Plaintiffs/Appellees

Appeal from Order (filed March 26, 2018), Document 166, of
United States District Court
District of Nevada
Case No. 3:14-cv-00320-MMD-WGC

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I.

SUMMARY OF ARGUMENT

Appellees appear to recognize that the District Court was incorrect to rule that Nevada waived its sovereign immunity by removing this action to federal court. Accordingly, rather than address the issue decided, Appellees attempt to redirect this Court to a different argument by stating that the District Court did not rule as to sovereign immunity, but rather simply ruled that Nevada waived its jurisdictional immunity by removing to federal court. Though inconvenient for Appellees, the facts are that: (1) the District Court specifically directed the parties to brief the issue of Nevada's (NDOC's) sovereign immunity from payment of monetary claims under the Fair Labor Standards Act (FLSA); (2) the issue was fully briefed; and (3) the District Court erroneously concluded that NDOC waived its sovereign immunity.

Cases from this circuit and elsewhere, however, make clear that NDOC's removal of this matter to federal court cannot constitute a waiver of Nevada's sovereign immunity. As the Nevada Supreme Court has explained, Nevada's sovereign immunity waiver statute, NRS § 41.031, was crafted to apply solely to tort claims alleging negligence in performing or failing to perform non-discretionary or operational actions. Recognizing this, Appellees then argue that if this Court agrees with the Nevada Supreme Court that the sovereign immunity waiver is so limited, it should nonetheless categorize their FLSA claims as a tort. In support of this argument, Appellees cite to an outlier case from the intermediate appellate courts in Oregon, which departs from overwhelming authority in Nevada and elsewhere holding that wage claims under the FLSA are not torts.

Lastly, Appellees attempt to sidestep sovereign immunity in this matter through an argument they never raised below. For the first time on appeal,

Appellees claim that NDOC has somehow waived this defense by its litigation conduct. Nothing could be further from the truth. Far from seizing on this issue at the proverbial "eleventh hour," NDOC has repeatedly raised this issue in its Answer and subsequent briefing. The issue just has not been determinative until now because Appellees had duplicative state law claims that required virtually the same discovery and litigation.

For all of these reasons, Appellee's arguments fall flat and do nothing to alter the conclusion that the District Court's March 26, 2018 Order is in error and must be reversed.

II.

THE DISTRICT COURT ERRONEOUSLY HELD NDOC WAIVED ITS SOVEREIGN IMMUNITY TO FLSA CLAIMS BY REMOVAL.

Contrary to what Appellees argue, the District Court *did* "rule[] that the State of Nevada had waived its general immunity by removing the action from state court to federal court." (Appellee Br. pg. 17.) The District Court's two orders make that clear. The District Court's March 1 Order stated that "the Court finds that the doctrine of *sovereign immunity* may apply to the FLSA claims against the State of Nevada as brought in federal court. (APP, Vol. II, pg. 200 (emphasis added).) The District Court further noted, "A waiver of *sovereign immunity* will be found 'only where stated by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction.'" (*Id.* at 201 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (emphasis added).) Citing N.R.S. § 41.031(3), the District Court held that "the state of Nevada has explicitly refused to waive its *sovereign immunity* in suits brought by state citizens in federal court." (*Id.* (emphasis added).) The

District Court then directed the parties to address whether, given NDOC's sovereign immunity, "the Court should not remand this action." (*Id.*)

Appellees further misstate the record by maintaining that NDOC "never even raised the sovereign immunity defense in the first place." (Appellee Br. pg. 17.) A plain reading belies this claim. In its Answer filed on June 24, 2014, NDOC specifically stated that "Defendant is immune from liability as a matter of law." (APP, Vol. VII, pg. 1511.) As directed by the Court, NDOC's supplemental brief then showed why "it enjoys *sovereign immunity* from Plaintiffs' suit," and that "[t]he Court correctly diagnosed that *sovereign immunity* bars Plaintiffs' Fair Labor Standards Act (FLSA) claims." (APP, Vol. II, pg. 145 (emphasis added).)

The Court's March 26 Order directed the parties "to file supplemental briefs to address whether the State of Nevada has waived its *sovereign immunity* as to the [FLSA] claims in this action." (APP, Vol. I, pgs. 3-4 (emphasis added).) After reviewing them, the Court found "that Nevada has waived its *sovereign immunity* in this Court." (*Id.* at 4 (emphasis added).) Without elaboration (other than a cite to *Lapides*), the Court held that "the State of Nevada removed this action from state court. Therefore, it has waived its *sovereign immunity*." (*Id.* (emphasis added).). Thus, the record belies the claim that "Judge Du was primarily concerned with Eleventh Amendment immunity – i.e., jurisdictional immunity – as opposed to general immunity."[1] (Appellee Br. pg. 17.)

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[1] Appellees' confusion of this issue is based upon a fundamental misapprehension of the divisible nature of Eleventh Amendment immunity, which includes immunity to suit in federal court (what Appellees refer to as "jurisdictional immunity") and sovereign immunity from payment of monetary claims against non-consenting states (or "*Alden*" immunity). *See Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 54 (1996); *Alden v. Maine*, 527 U.S. 706, 713 (1999). As the Orders demonstrate, the District Court based its decision on sovereign immunity, not jurisdictional immunity as Appellees incorrectly maintain.

Yet, even if that were true, it would still be irrelevant to this case. This Court is not limited in reviewing defenses raised before the District Court, regardless of whether they were ever considered. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 539-40 (9th Cir. 1991); *see also V.S. ex rel. A.O. v. Los Gatos-Saratoga Jt. Union High Sch. Dist.*, 484 F.3d 1230, 1232 n.1 (9th Cir. 2007) (observing for panel decisions, "we are not bound by a holding 'made casually and without analysis … uttered in passing without due consideration of the alternatives….'"). The District Court rejected NDOC's sovereign immunity defense, which is properly the subject of the instant appeal.

III.

NO FEDERAL APPELLATE COURT HAS FOUND WAIVER OF SOVEREIGN IMMUNITY TO FLSA CLAIMS THROUGH REMOVAL.

Consistent with their attempt to muddle this record, Appellees argue a point not even before this Court, whether the Court had jurisdiction over Appellees' federal and state law claims. (Appellee Br. pgs. 18-20.) NDOC's removal of this case to federal court had no impact on its sovereign immunity from Appellees' FLSA claims, signifying only that NDOC resolved not to "relinquish … its 'right to a federal forum'" to decide its sovereign immunity from these claims. *Bergemann v. Rhode Island Dep't of Envtl. Mgmt.*, 665 F.3d 336, 342 (1st Cir. 2011) (quoting *Martin v. Franklin Capitol Corp.*, 546 U.S. 132, 140 (2005)). NDOC has not asserted jurisdictional immunity in seeking that decision in federal court, nor would it have following removal.

Appellees' clumsy attempt to conflate jurisdictional and sovereign immunity is clear from the cases they cite for the incorrect argument that removal waives both of these immunities. Specifically, they refer to this Court's holding in *Embury v. King*, 361 F.3d 562 (9th Cir. 2004), and a case from the Seventh

Circuit, *Board of Regents of the University of Wisconsin Systems v. Phoenix International Software, Inc.*, 653 F.3d 448 (7th Cir. 2011). These decisions merely expand on ` that a state waives its Eleventh Amendment immunity from suit in federal court by invoking the jurisdiction of a federal court for claims as to which the state has waived its underlying sovereign immunity in state court. *See* 535 U.S. at 620. Neither case addresses the issue at bar, namely whether removal somehow stripped the NDOC of sovereign immunity as to FLSA claims, when Nevada never waived sovereign immunity as to FLSA claims in its own state courts. NDOC has already shown how the *Embury* panel declined to apply its ruling to this issue. It did "not decide whether a removing State defendant remains immunized from federal claims that Congress failed to apply to the States through unequivocal and valid abrogation of their Eleventh Amendment immunity." *Embury*, 361 F.3d at 556 n.20.

In this sense, Appellees' citation of *Phoenix* is no coincidence. Initially, some courts interpreted the Seventh Circuit's decision as holding that a "state's removal to federal court constitutes a waiver of immunity, regardless of what a state waived in its own courts." *Stroud v. McIntosh*, 722 F.3d 1294, 1300 (11th Cir. 2013) (interpreting *Phoenix* in that manner and rejecting that proposition). However, the Seventh Circuit later distanced itself from that reading. In *Hester v. Indiana State Department of Health*, the Seventh Circuit addressed the concern posed by the district court's holding after *Phoenix* that Indiana waived jurisdictional immunity through removal to federal court, "but not its immunity from damages liability under the ADEA." 726 F.3d 942, 950 (7th Cir. 2013). The Seventh Circuit explained:

> This implicates a question that *we have not yet had to answer*, and that has divided our sister circuits: [2] Does a state waive the immunity it would have in state court by removing a suit to federal court? ….
>
> The closest we have come to addressing this question is our holding that, by filing suit in federal court based on federal copyright law, Wisconsin waived immunity to the defendant's counterclaims under the same federal law, even though it would ordinarily be immune from suit in federal court. *Phoenix*, however, does not answer the question we are discussing….

Id. (emphasis added). Thus, the Seventh Circuit did not reach this issue and was "content to save [related questions] for another day." *Id.* at 951. Instead, it upheld the lower court's order granting summary judgment to Indiana for lack of evidence. *See id.* at 946, 951.

Following *Hester*, the cases that Appellees cite, *Embury* and *Phoenix*, offer "no support to Plaintiffs' claim that removal from state to federal court by a state that otherwise retains its sovereign immunity in its own courts constitutes a waiver of that immunity." *Beaulieu v. Vermont*, 807 F.3d 478, 489 (2d Cir. 2015). Indeed, every federal appellate court that has addressed this question has reached the opposite conclusion. (Br. at 16-21). Consequently, Nevada's mere decision to remove this matter to federal court cannot itself be construed as a waiver of the State's sovereign immunity from liability recognized in *Alden*.

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[2] The Seventh Circuit was referring to the Tenth Circuit's decision in *Estes v. Wyoming Department of Transportation*, 302 F.3d 1200, 1204-06 (10th Cir. 2002). However, as NDOC has explained (Br. at 18-19), the Tenth Circuit rejected that idea, adopting the majority rule that "a state may waive its immunity from suit in a federal forum … while retaining its immunity from liability…" *Trant v. Oklahoma*, 754 F.3d 1158, 1172-73 (10th Cir. 2014).

IV.

NEVADA'S LIMITED WAIVER OF ITS SOVEREIGN IMMUNITY IN N.R.S. § 41.031 IS INAPPLICABLE TO APPELLEES' FLSA CLAIMS.

The crux of Appellees' Answering Brief rests on their incorrect argument that by enacting N.R.S. § 41.031, "all political subdivisions of the State have waived their general immunity from liability" for all purposes. In support, they misstate Nevada Supreme Court holdings regarding the limited waiver for tort actions, instead characterizing it as a broad waiver as to all claims of any kind.

By arguing that the limitation of this waiver "to tort claims is without foundation" (Appellees' Br. at 22), Appellees ask this Court to ignore several rulings from the Nevada Supreme Court on this point, including ones explaining that Nevada limited this waiver to mimic the Federal Tort Claims Act. *Martinez v. Maruszczak*, 123 Nev. 433, 444, 168 P.3d 720, 727-28 (2007). For example, in *Turner v. Staggs*, the Nevada Supreme Court held that "[t]he state's object of N.R.S. 41.031 is to waive the immunity of governmental units and agencies from liability for injuries caused by their *negligent conduct*, thus putting them on equal footing with private *tort*-feasors." 89 Nev. 230, 235, 510 P.2d 879, 882 (1973) (emphasis added). Indeed, in *Clark County School District v. Richardson Construction, Inc.*, the Nevada Supreme Court explained that the scope of the sovereign immunity waiver is exactly the opposite of what Appellees claim it to be; it is a narrow, limited waiver to a blank grant of immunity. 123 Nev. 382, 389, 168 P.3d 87, 92 (2007) ("Under the doctrine of sovereign immunity, generally, Nevada and its political subdivisions enjoy blanket immunity from tort liability. The Legislature, however, has waived this immunity *on a limited basis*.") (emphasis added); *see also Glover-Armont v. Cargile*, 134 Nev. Adv. Op. 49, 54, 426 P.3d 45 (App. 2018) (same).

As discussed in NDOC's Opening Brief (Br. at 24-26), "N.R.S. 41.032 conditionally limits this waiver." *Hagblom v. Director of Motor Vehicles*, 93 Nev. 599, 603, 571 P.2d 1172, 1175 (1977). "When the State qualifiedly waived its immunity from liability and consented to civil actions, it did so to provide relief for persons injured through negligence in performing or failing to perform non-discretionary or operational actions. It did not intend to give rise to a cause of action sounding in tort whenever a state official or employee made a discretionary decision injurious to some persons." *Id.* at 604, 571 P.2d at 1176.

Indeed, Appellees' arguments implicitly recognize that they cannot avoid the limited nature of Nevada's waiver of sovereign immunity. As a result, rather than confront it directly, they try to sidestep it by pretending that it is not limited at all. They simply ignore the language regarding "limited" altogether—not even bothering to try and attribute some other meaning to it.

Appellees ask this Court to ignore controlling authority from Nevada's highest court, contrary to rules of statutory construction. *See generally Teleflex Med. Inc. v. National Union Fire Ins. Co.*, 851 F.3d 976, 982 (9th Cir. 2017) ("When interpreting state law, federal courts are bound by decisions of the state's highest court."). In its place, Appellees ask this Court to overrule the judgment of Nevada's elected legislature and its courts to apply this limited waiver of the State's sovereign immunity to all civil claims, including their claims under the FLSA. To achieve that goal, Appellees misquote one legislator who was recorded as saying, "The doctrine of sovereign immunity *seems* to be out,"[3] not that it was "abolished" as Appellees contend. (Appellees' Br. at 23 (citation omitted).)

[3] Minutes of Meeting – Assembly Judiciary Committee, *available at* https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1965/SB185,1965.pdf, at pg. 178 (Nev. Legis., 53d Sess., Mar. 29, 1965) (emphasis added).

The Court cannot engage in the misadventure that Appellees urge. As an initial matter, "it is solely within the province of the state courts to authoritatively construe state legislation." *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1146 (9th Cir. 2001). Nevada courts have done so, holding that no such general abrogation of the state's sovereign immunity was intended. Rather, the waiver is limited to certain tort claims. In light of the clear limits on that waiver imposed by N.R.S. § 41.032 and its lack of ambiguity,[4] it is improper to consider legislative history. *See Valentine v. Mobile Oil Corp.*, 789 F.2d 1388, 1391 (9th Cir. 1986). It also highlights why this Court and Nevada's highest court have declined to rely on legislative statements of single sponsors, *Tyler v. United States*, 929 F.2d 451, 456 n.8 (9th Cir. 1991) (quoting Sutherland, Statutory Construction § 45.06 (4th ed. 1986)), or "episodic comments by legislators" that are taken out of context or misquoted, as Appellees have done. *Greater Basin Water Network v. Taylor*, 126 Nev. 187, 197, n.8, 234 P.3d 912, 918 n.8 (2010).

Appellees apparently see the futility of their position, expending nearly four pages of their brief on the idea that FLSA claims sound in tort, and therefore must fall under the limited waiver in N.R.S. § 41.031. (Appellees' Br. at 24-27 & n.7.) Their argument flies in the face of the admonition of Nevada's highest court to "avoid an interpretation" of a statute "that leads to an absurd result." *Washoe*, 122 Nev. at 1302, 148 P.3d at 793. Nevertheless, Appellees urge the application of reasoning from Oregon's intermediate appellate court that has been widely criticized and not followed for any FLSA claims arising outside of Oregon.

Although Appellees cite *Byrd v. Oregon State Police*, 238 P.3d 404 (Or. App. 2010), the intermediate court's rationale has its genesis elsewhere. In a 2-1

[4] *See generally Washoe Med. Ctr. v. Second Jud. Dist. Ct.*, 122 Nev. 1298, 1302, 148 P.3d 790, 792-93 (2006) ("When a statute is clear on its face, we will not look beyond the statute's plain language").

decision in *Butterfield v. Oregon*, the court held that the plaintiffs' FLSA claims were "torts" under Oregon's broad definition of torts under the Oregon Tort Claims Act ("OTCA"). 987 P.2d 569, 574-75 (Or. App. 1999). Judge Armstrong issued a vigorous dissent, arguing the axiomatic idea that the FLSA "regulates the terms of employment contracts, and claims under the act are claims on a contract." *Id.* at 575 (Armstrong, J., dissenting). This dissent is consistent with the unanimous chorus of federal court decisions reaching the same conclusion. *See id.* at 575-77; *see also id.* at 576 ("The federal district courts uniformly followed those decisions in holding that contract statutes of limitations governed FLSA actions").

In contrast to the position adopted by *Byrd* and *Butterfield* construing the OTCA, Nevada courts have concluded that FLSA claims sound in contract, not in tort. *See Eikleberry v. Washoe County*, 2013 WL 5881711 at *3 (D. Nev. Oct. 30, 2013) (plaintiff's FLSA claim "sounds in contract, even if it is couched as [a] statutory claim"). As such, FLSA claims are not subject to Nevada's limited waiver of its sovereign immunity pursuant to N.R.S. § 41.031. Moreover, in the Court's March 1 Order, it applied the plain meaning of N.R.S. § 41.031(3), in which "the state of Nevada has explicitly refused to waive its sovereign immunity in suits brought by state citizens in federal court." (APP, Vol. II, pg. 201). Another Nevada court recently concurred. *See Harrington v. Nevada ex rel. Nev. Sys. of Higher Educ.*, 2018 WL 4286169 at **2-3 (D. Nev. Sept. 6, 2018).

Finally, Appellees refer to what they describe as Nevada statutes that "acknowledge the concurrently applicable compensation requirements set by the FLSA," such as in N.R.S. § 284.180(7), to suggest a broader waiver was intended. (Appellees' Br. at 24 n.5.) Their contention is meritless. Certain provisions of Nevada law, such as the variable work schedule described in § 284.180(7), simply create a state law parallel to a federal cause of action. They do not constitute a waiver of NDOC's *Alden* immunity to monetary claims under the FLSA. *See*, *e.g.*,

Mueller v. Thompson, 133 F.3d 1063, 1064-65 (7th Cir. 1998) (sovereign immunity barred FLSA claim in federal court even where Wisconsin law allowed state overtime claims akin to FLSA overtime claims). There is no rational reason why Nevada's legislature would create a vast and comprehensive administrative scheme for resolving compensation disputes but also allow state employees to disregard it, as Appellees maintain.

In summary, Appellees' argument is based upon a flawed view of Nevada law. Reading N.R.S. §§ 41.031 and 41.032 together with Nevada's comprehensive administrative procedures for compensation of state employees, Nevada's legislature made several points clearly. "Nevada has waived its immunity for *state-law claims* in state court" through N.R.S. §§ 41.031(1)-(2). *Zavareh v. Nevada ex rel. Bd. of Regents of Nev. Sys. of Higher Educ.*, 2013 WL 5781729 at *6 (D. Nev. Oct. 17, 2013) (emphasis added). As Nevada's highest court has held, this waiver of sovereign immunity for state-law claims is limited to claims sounding in tort. *Turner*, 89 Nev. at 235, 510 P.2d at 882; *see also supra* pgs. 7-9 (collecting other decisions). "Nevada's waiver of sovereign immunity does not extend to its 'immunity from suit conferred by' the Eleventh Amendment." *Zavareh*, 2013 WL 5781729 at *6 (quoting N.R.S. § 41.031(3)) (holding that Nevada had not waived its immunity to claims brought under 42 U.S.C. § 1983). Thus, Nevada retains sovereign immunity for all claims for which Congress lacks the authority to abrogate, including FLSA claims. *See Alden*, 527 U.S. at 713.

Appellees' efforts to argue the applicability of exceptions to the effects of Nevada's limited waiver of its sovereign immunity are unavailing. (Appellees' Br. at 27-29.) Because these FLSA claims arise under federal law and do not involve state law claims sounding in tort, it is pointless to address this issue. Similarly, Appellees' arguments about where FLSA claims are to be litigated in the face of Nevada's sovereign immunity for such claims *in all courts,* are also baseless (*Id.* at

29-31). The Eleventh Amendment to the Constitution and the Supreme Court's decisions in *Seminole Tribe of Florida* and *Alden* foreclose the result urged by Appellees to apply the FLSA to the non-waiving State of Nevada.

V.

APPELLEES CANNOT MEET THEIR STRINGENT BURDEN OF ESTABLISHING WAIVER BY NDOC OF ITS SOVEREIGN IMMUNITY.

Appellees end their Answering Brief with an argument they never raised below. For the first time, Appellees argue that NDOC allegedly has "waived its general immunity by failing to raise the defense of its own volition and actively litigating this case for more than four years." (Appellees' Br. at 31.) Appellees failed to preserve this litigation conduct argument in their briefing before the District Court, which focused solely on their erroneous contentions that NDOC waived its sovereign immunity by statute and by removal. (APP, Vol. II, pgs. 190-199.) Moreover, Appellees failed to preserve this issue by filing a cross-appeal. Consequently, Appellees have waived their belated argument, making it inappropriate for the Court to entertain it on appeal. *See In Re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010).

Even if the Court were to consider Appellee's waived argument, it is unsupported by the record as well as applicable legal authority.

Sovereign immunity protects Nevada from private actions, such as those brought by the Appellees. *See* U.S. Const. amend. XI. Congress lacked the authority to abrogate the immunity of non-consenting states to these FLSA claims. *See Alden*, 527 U.S. at 713. Appellees likewise cannot show that the Attorney General could abrogate Nevada's immunity because that authority rests exclusively with the State Legislature. Thus, for these reasons and those advanced in NDOC's Brief, Nevada has not abrogated its immunity.

In reviewing Appellees' untimely litigation conduct "waiver" argument, this Court must "indulge in every reasonable presumption against waiver of fundamental constitutional rights. State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected." *College Sav. Bank v. Florida Prepaid Postsecondary Expense Bd.*, 527 U.S. 666, 682 (1999). Waiver of Eleventh Amendment sovereign immunity through litigation conduct can only occur if that conduct "is incompatible with an intent to preserve that immunity." *Hill v. Blind Indus. & Servs.*, 179 F.3d 754, 758 (9th Cir. 1999), *amended by* 201 F.3d 1186 (9th Cir. 2000). Appellees cannot meet their burden in this case.

The record refutes Appellees' disingenuous claim that NDOC raised sovereign immunity "for the first time" on appeal. NDOC asserted it in its June 24, 2014 Answer that "Defendant is immune from liability as a matter of law." (APP, Vol. VII, pg. 1511.) By doing so "early in the proceedings," NDOC provided "fair warning" to the Appellees. *Hill*, 179 F.3d at 761. Having been put on notice immediately after removal, Appellees failed to heed that warning.

NDOC also asserted this defense on other occasions. It was raised in supplemental briefing directed by the District Court in its March 1 Order. (APP, Vol. II, pgs. 145-50) It was raised in Appellees' First Amended Complaint. (APP, Vol. II, pgs. 36-37.) NDOC raised it again in its appeal, which did little more than repeat its prior invocations of sovereign immunity.

Legally, NDOC's invocations easily preserve immunity. In *Ashker v. California Department of Corrections*, similar invocations precluded plaintiffs from evading "the well-established general rule that states cannot easily waive their sovereign immunity." 112 F.3d 392, 394 (9th Cir. 1997). There, the state "'objected to [the plaintiff's] first amended complaint on sovereign immunity grounds,' in their answer and pretrial statement, and they asserted the defense" in their appellate briefs. *Id.* This Court held "[i]f the Eleventh Amendment immunity

defense ever was available [to the Defendants], *they did not waive it*." *Id.* (emphasis added). Contrary to what the Appellees contend, "a state does not waive Eleventh Amendment immunity merely by defending in federal court. Instead, waiver turns on the state's failure to raise immunity during the litigation." *Demshki v. Montieth*, 255 F.3d 986, 989 (9th Cir. 2001)

The case cited by Appellees, *Johnson v. Rancho Santiago Community College District*, 623 F.3d 1011 (9th Cir. 2010), is inapposite. There, the state failed to raise its sovereign immunity defense in dispositive motions filed after the plaintiffs amended their complaint. *See id.* at 1022. Here, in contrast, NDOC invoked its sovereign immunity in both of its Answers (APP, Vol. II, pgs. 36-37; APP, Vol. VII, pg. 1511) as well as in supplemental briefing filed on March 12, 2018 (APP, Vol. II, pgs. 145-50) *before* the District Court issued its March 26 Order ruling on sovereign immunity and several dispositive motions (APP, Vol. I, pgs. 3-20) and its July 18, 2018 Order adjudicating the other pending motions (APP, Vol. I, pgs. 21-27). NDOC made no "tactical decision to delay asserting the sovereign immunity defense" because it asserted the defense in 2014 and fully briefed it before the District Court ruled on the dispositive motions. *Johnson*, 623 F.3d at 1022. As such, this case is dissimilar to *Johnson* or the authority it cited, *In re Bliemeister*, 296 F.3d 858, 862 (9th Cir. 2002) (holding that the state had waived the defense waiting until after it "heard the court announce its preliminary leanings, which were initially unfavorable to the State" to raise it for the first time).

Moreover, Appellees' recitation of the discovery completed in this case omits a critical fact that refutes their waiver argument.[5] Appellees brought state

[5] This case also is far from being trial-ready, contrary to what Appellees imply. Appellees continue to wrestle with the scope of the class they seek to certify by seeking to dismiss many of the plaintiffs shortly before and after the instant appeal. (APP, Vol. II, pgs. 23-25; APP, Vol. VII, pg. 1593.) If the FLSA claims were not barred by NDOC's *Alden* immunity, changes in the class likely would warrant

law claims alleging failure to pay minimum wages under Nevada's Constitution, failure to pay overtime as required by N.R.S. § 284.180, and breach of contract. (APP, Vol. V, pgs. 1129-1164; APP, Vol. VI, pgs. 1165-1229.) Those claims rested on the same operative nucleus of facts and same evidence as their two claims under the FLSA. A state does not waive Eleventh Amendment immunity where it has asserted it as a defense, but nevertheless engaged in discovery on overlapping claims. *See Marino v. Victor Valley Cmty. Coll. Dist.*, 2016 WL 9455628 at *2 (C.D. Cal. July 28. 2016); *Garcia v. Idaho Dep't of Health & Welfare*, 2014 WL 5810516 at *9 (D. Idaho Nov. 7, 2014).

As a result, Appellees have failed to meet their heavy burden of establishing that NDOC waived its sovereign immunity under the Eleventh Amendment by its litigation conduct. *Mitchell v. Franchise Tax Bd.*, 209 F.3d 1111, 1117 (9th Cir. 2000). For those same reasons, NDOC would not have waived (if it could) *Alden* immunity through litigation conduct. Accordingly, NDOC is entitled to dismissal of Appellees' FLSA claims because Nevada has not abrogated its immunity to those claims. *See Alden*, 527 U.S. at 713.

VI.

CONCLUSION.

For all of the foregoing reasons, the State of Nevada (i.e., NDOC) respectfully requests that this Court reverse the District Court's erroneous finding in its March 26 Order rejecting NDOC's assertion of sovereign immunity. The State of Nevada (i.e., NDOC) further requests an Order instructing the District Court to remand this case to the state court from which it was previously removed and dismiss the FLSA claims with prejudice.

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reopening discovery before dispositive motions, class certification, and expert witnesses could be fully briefed and decided.

Dated: December 19, 2018

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I HEREBY CERTIFY that on the 19th day of December, 2018, I forwarded a true and correct copy of the foregoing APPELLANT STATE OF NEVADA, *ex rel.* NEVADA DEPARTMENT OF CORRECTIONS' REPLY BRIEF the parties by filing a true copy thereof with the Clerk of the Court using the CM/ECF System to be served upon all parties using the CM/ECF System.

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