THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

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

Electronically Filed
Feb 22 2021 02:06 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

JOINT APPENDIX VOLUME 4 OF 5

Mark R. Thierman, Nev. Bar No. 8285
mark@thiermanbuck.com
Joshua D. Buck, Nev. Bar No. 12187
josh@thiermanbuck.com
Leah L. Jones, Nev. Bar No. 13161
leah@thiermanbuck.com
Joshua R. Hendrickson, Nev. Bar No. 12225
joshh@thiermanbuck.com
THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, Nevada 89511
Tel. (775) 284-1500
Fax. (775) 703-5027
Attorneys for Appellants

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

ALPHABETICAL INDEX

DATE	DESCRIPTION	VOLUME	PAGES
06/24/2014	Answer to Complaint, ECF No. 3	1	30 - 39
04/19/2018	Answer to First Amended Complaint, ECF No. 175	3	532 - 551
02/01/2019	Appellants' Citation of Supplemental Authorities, Ninth Circuit 18-15691, Docket No. 32	4	664 - 673
08/28/2018	Appellants' Opening Brief, Ninth Circuit 18-15691, Docket No. 10	3	561 - 599
11/20/2019	Appellants' Petition for Panel Rehearing and Petition for Rehearing En Banc, Ninth Circuit 18-15691, Docket No. 44	4	674 - 692
12/19/2018	Appellants' Reply Brief, Ninth Circuit 18-15691, Docket No. 25	3	640 - 663
10/29/2018	Appellees' Answering Brief, Ninth Circuit 18-15691, Docket No. 17	3	600 - 639
03/12/2018	Defendants' Supplemental Briefing re Order, ECF No. 158	3	498 - 503
02/19/2021	Docket for *Walden, et al v. State of Nevada, et al* in USCA, Ninth Circuit, Case No. 18-15691	5	994 - 1002
02/11/2021	Docket for *Walden, et al v. State of Nevada, et al* in USDC, District of Nevada (Reno), Case No. 3:14-cv-00320-MMD-WGC	5	859 - 993
04/19/2017	First Amended Complaint, ECF No. 95	2	326 - 426
04/02/2018	Joint Response to Certification of NV Minimum Wage Amended Issue and Stipulation to Dismiss Related Cause of Action, ECF No. 167	3	522 - 523
08/06/2014	Motion for Conditional Certification, ECF No. 7	1	40 - 146
05/10/2017	Motion to Dismiss First Amended Complaint, ECF No. 99	3	427 - 483

04/03/2015	Motion for Judgment on the Pleadings, ECF No. 49	1	156 - 236
04/09/2018	Motion for Reconsideration of Order Denying Motion to Strike, Granting in Part and Denying in Part Motion to Dismiss, and Directing Supplemental Briefing, ECF No. 169	3	526 - 531
04/08/2020	Motion for Summary Judgment on Sovereign Immunity, ECF No. 276	4	708 - 723
04/08/2020	Motion for Summary Judgment on the Merits of Plaintiffs' FLSA Claims, ECF No. 283	4	724 - 749
04/19/2018	Notice of Appeal of Order Denying Motion to Strike, Granting in Part and Denying in Part Motion to Dismiss, and Directing Supplemental Briefing, ECF No. 176	3	552 - 553
06/17/2014	Notice of Removal, ECF No. 1	1	4 - 29
05/11/2020	Opposition to Motion for Summary Judgment on Sovereign Immunity, ECF No. 299	4	750 - 781
12/23/2020	Order Accepting Certified Question and Directing Briefing	4	857 - 858
12/23/2019	Order and Amended Opinion, Ninth Circuit 18-15691, Docket No. 45	4	693 - 707
07/10/2020	Order Certifying Question to Nevada Supreme Court, ECF No. 321	4	849 - 856
07/18/2018	Order Denying Motion for Reconsideration, ECF No. 192	3	554 - 560
03/26/2018	Order Denying Motion to Strike, Granting in Part and Denying in Part Motion to Dismiss, and Directing Supplemental Briefing, ECF No. 166	3	504 - 521
03/01/2018	Order Directing Supplemental Briefing re: Why Court Should Not Remand Action, ECF No. 147	3	484 - 485
04/02/2018	Order Granting Joint Response to Certification of NV Minimum Wage Amended Issue and Stipulation to	3	524 - 525

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

	Dismiss Related Cause of Action, ECF No. 168		
03/16/2015	Order Granting Motion for Conditional Certification, ECF No. 45	1	147 - 155
03/20/2017	Order Granting Renewed Motion for Judgment on the Pleadings, ECF No. 94	2	321 - 325
03/02/2018	Plaintiffs' Supplemental Briefing re Order, ECF No. 149	3	486 - 497
05/22/2014	Proof of Service of Summons and Complaint on Attorney General	1	1 - 2
05/22/2014	Proof of Service of Summons and Complaint on Nevada Department of Corrections	1	3
04/13/2016	Renewed Motion for Judgment on the Pleadings, ECF No. 86	2	237 - 320
06/03/2020	Reply in Support of Motion for Summary Judgement on Sovereign Immunity, ECF No. 315	4	782 - 826
06/17/2020	Reply in Support of Motion for Summary Judgment on the Merits of Plaintiffs' FLSA Claims, ECF No. 319	4	827 - 848

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

CHRONOLOGICAL INDEX

DATE	DESCRIPTION	VOLUME	PAGES
05/22/2014	Proof of Service of Summons and Complaint on Attorney General	1	1 - 2
05/22/2014	Proof of Service of Summons and Complaint on Nevada Department of Corrections	1	3
06/17/2014	Notice of Removal, ECF No. 1	1	4 - 29
06/24/2014	Answer to Complaint, ECF No. 3	1	30 - 39
08/06/2014	Motion for Conditional Certification, ECF No. 7	1	40 - 146
03/16/2015	Order Granting Motion for Conditional Certification, ECF No. 45	1	147 - 155
04/03/2015	Motion for Judgment on the Pleadings, ECF No. 49	1	156 - 236
04/13/2016	Renewed Motion for Judgment on the Pleadings, ECF No. 86	2	237 - 320
03/20/2017	Order Granting Renewed Motion for Judgment on the Pleadings, ECF No. 94	2	321 - 325
04/19/2017	First Amended Complaint, ECF No. 95	2	326 - 426
05/10/2017	Motion to Dismiss First Amended Complaint, ECF No. 99	3	427 - 483
03/01/2018	Order Directing Supplemental Briefing re: Why Court Should Not Remand Action, ECF No. 147	3	484 - 485
03/02/2018	Plaintiffs' Supplemental Briefing re Order, ECF No. 149	3	486 - 497
03/12/2018	Defendants' Supplemental Briefing re Order, ECF No. 158	3	498 - 503
03/26/2018	Order Denying Motion to Strike, Granting in Part and Denying in Part Motion to Dismiss, and Directing Supplemental Briefing, ECF No. 166	3	504 - 521
04/02/2018	Joint Response to Certification of NV Minimum Wage Amended Issue	3	522 - 523

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

	and Stipulation to Dismiss Related Cause of Action, ECF No. 167		
04/02/2018	Order Granting Joint Response to Certification of NV Minimum Wage Amended Issue and Stipulation to Dismiss Related Cause of Action, ECF No. 168	3	524 - 525
04/09/2018	Motion for Reconsideration of Order Denying Motion to Strike, Granting in Part and Denying in Part Motion to Dismiss, and Directing Supplemental Briefing, ECF No. 169	3	526 - 531
04/19/2018	Answer to First Amended Complaint, ECF No. 175	3	532 - 551
04/19/2018	Notice of Appeal of Order Denying Motion to Strike, Granting in Part and Denying in Part Motion to Dismiss, and Directing Supplemental Briefing, ECF No. 176	3	552 - 553
07/18/2018	Order Denying Motion for Reconsideration, ECF No. 192	3	554 - 560
08/28/2018	Appellants' Opening Brief, Ninth Circuit 18-15691, Docket No. 10	3	561 - 599
10/29/2018	Appellees' Answering Brief, Ninth Circuit 18-15691, Docket No. 17	3	600 - 639
12/19/2018	Appellants' Reply Brief, Ninth Circuit 18-15691, Docket No. 25	3	640 - 663
02/01/2019	Appellants' Citation of Supplemental Authorities, Ninth Circuit 18-15691, Docket No. 32	4	664 - 673
11/20/2019	Appellants' Petition for Panel Rehearing and Petition for Rehearing En Banc, Ninth Circuit 18-15691, Docket No. 44	4	674 - 692
12/23/2019	Order and Amended Opinion, Ninth Circuit 18-15691, Docket No. 45	4	693 - 707
04/08/2020	Motion for Summary Judgment on Sovereign Immunity, ECF No. 276	4	708 - 723

04/08/2020	Motion for Summary Judgment on the Merits of Plaintiffs' FLSA Claims, ECF No. 283	4	724 - 749
05/11/2020	Opposition to Motion for Summary Judgment on Sovereign Immunity, ECF No. 299	4	750 - 781
06/03/2020	Reply in Support of Motion for Summary Judgement on Sovereign Immunity, ECF No. 315	4	782 - 826
06/17/2020	Reply in Support of Motion for Summary Judgment on the Merits of Plaintiffs' FLSA Claims, ECF No. 319	4	827 - 848
07/10/2020	Order Certifying Question to Nevada Supreme Court, ECF No. 321	4	849 - 856
12/23/2020	Order Accepting Certified Question and Directing Briefing	4	857 - 858
02/11/2021	Docket for *Walden, et al v. State of Nevada, et al* in USDC, District of Nevada (Reno), Case No. 3:14-cv-00320-MMD-WGC	5	859 - 993
02/19/2021	Docket for *Walden, et al v. State of Nevada, et al* in USCA, Ninth Circuit, Case No. 18-15691	5	994 - 1002

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

WILSON ELSER
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

January 31, 2019

Richard I. Dreitzer
702.727.1249 (direct)
Richard.Dreitzer@wilsonelser.com

Molly Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: Case No. No. 18-15691, *State of Nevada ex rel, Nevada Department of Corrections v. Walden*
Argument Scheduled: Wednesday, March 13, 2019, at 9 a.m., Courtroom 3, San Francisco, CA
Panel Members:

Citation of Supplemental Authority Pursuant to FRAP 28(j) and Circuit Rule 28-6

Dear Ms. Dwyer:

Pursuant to Rule 28(j), Appellant State of Nevada advises the Court of two court decisions from Nevada's First Judicial District (enclosed) concerning Nevada's waiver of sovereign immunity. These cases were decided after Appellant filed its briefs. In both cases, state employees (represented by Respondents' counsel) filed a complaint (similar to the one in this matter) against the Nevada Department of Corrections alleging claims for failure to pay overtime. In both cases, the courts dismissed the FLSA claims because Nevada has not waived its sovereign immunity regarding FLSA claims.

(1) *Columbus et al. v. State of Nevada*, No. 18-OC-00188-1B, Dept. 2 (1/16/2019)

In its Reply Brief,[1] Appellant argued that the State of Nevada has not waived its sovereign immunity regarding FLSA claims. In *Columbus*, the court agreed, holding:

> [T]he State of Nevada enjoys sovereign immunity as to FLSA claims in any court, including its own state courts, unless it expressly waives that immunity.[2] 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. Nevada's Supreme Court has consistently construed Nevada Revised Statute 41.031(1) as a waiver to tort liability only.[3] No Nevada case has ever described a claim for overtime compensation under the FLSA as a

[1] Dkt. 25 at 7-8, 10-12.
[2] *Alden v. Maine,* 527 U.S. 706 (1999), and *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996).
[3] *Hagblom v. State Director of Motor Vehicles*, 93 Nev. 599, 604, 571 P.2d 1172, 1176 (1977); *Franchise Tax Ed. of Cal. v. Hyatt,* 407 P.3d 717 728 (Nev. 2017).

> tort. Therefore, the Court dismisses Plaintiffs' FLSA claim because sovereign immunity bars it.[4]

Appellant also argued[5] that Nevada courts do not construe compensation claims under the FLSA as torts. The *Columbus* court agreed, holding that "[n]o Nevada case has ever described a claim for overtime compensation under the FLSA as a tort."[6]

(2) *Prost v. State of Nevada*, No. 18-OC-00131-1B, Dept. 2 (1/18/2019)

As stated above, Appellant argued its Reply Brief[7] that the State of Nevada has not waived its sovereign immunity regarding FLSA claims. The *Prost* court agreed. Citing to its previous decisions in *Butler vs. Bayer*[8] and *Franchise Tax Board v. Hyatt*,[9] the court held that "Based upon the *Butler and Franchise Tax cases* the Court concludes Nevada has not waived sovereign immunity as to FLSA actions."[10]

Respectfully Submitted,

Wilson Elser Moskowitz Edelman & Dicker LLP

Richard I. Dreitzer
Counsel for Appellant
State of Nevada *ex rel.* Nevada Department of Corrections

Encl.

cc: Mark R. Thierman, Esq. (mark@thiermanbuck.com
Joshua D. Buck, Esq. (josh@thiermanbuck.com)
Leah L. Jones, Esq. (leah@thiermanbuck.com)

---

[4] *Columbus* Opinion at 2:8-19.
[5] Dkt. 25 at 9-10.
[6] *Columbus* Opinion at 2:16-19.
[7] Dkt. 25 at 7-8, 10-12.
[8] *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 465, 168 P.3d 1055, 1066 (2007) ("NRS 41.031 contains Nevada's general waiver of sovereign immunity from suits arising from acts of negligence committed by state employees. The purpose of that waiver is 'to compensate victims of government negligence in circumstances like those in which victims of private negligence would be compensated.'").
[9] *Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 728 (Nev. 2017), *cert. granted sub nom. Franchise Tax Bd. of California v. Hyatt*, 138 S. Ct. 2710, 201 L. Ed. 2d 1095 (2018) ("Nevada has waived traditional sovereign immunity from tort liability, with some exceptions. NRS 41.031.").
[10] *Prost* Opinion at 3:2-3.

AARON D. FORD
Attorney General
Steve Shevorski (Bar No. 8256)
Head of Complex Litigation
Theresa M. Haar (Bar No. 12158)
Senior Deputy Attorney General
State of Nevada
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
(702) 486-3792 (phone)
(702) 486-3773 (fax)
Attorneys for State of Nevada ex. rel. Nevada Department of Corrections

Affirmation pursuant to NRS 239B.039
The undersigned affirms that this document does not contain the personal information of any person

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

GENE COLUMBUS, DAVID ECKARD, APRIL HILL, and ANDREW MARREO, on behalf of themselves and all others similarly situated,

Plaintiff,

vs.

STATE OF NEVADA, EX. REL. NEVADA SUPREME COURT,

Defendant.

Case No. 18 OC 00188 1B

Dept. No. 2

PROPOSED
ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter comes before the Court on Defendants' Motion to Dismiss. Defendants filed their Motion to Dismiss on September 24, 2018. Plaintiffs filed their Opposition on October 29, 2018. Defendants filed their Reply on November 19, 2018. The Court, having reviewed the pleadings and papers on file, finds as follows:

Plaintiffs' Complaint asserts claims for failure to pay overtime under the FLSA and under Nevada Revised Statute 284.180. Dismissal is required where it appears beyond a

doubt that Plaintiff could prove no set of facts entitling Plaintiff to relief. *Munda v. Summerlin Life & Health Ins. Co.*, 127 Nev. 918, 923, 267 P.3d 771, 774 (2011).

1. First claim for relief under the Fair Labor Standards Act

Questions of sovereign immunity under Chapter 41 present mixed questions of law and fact. *Ransdell v. Clark Cty.*, 124 Nev. 847, 854, 192 P.3d 756, 761 (2008). A question of statutory construction is a question of law. *Id.* Whether Nevada's legislature waived Nevada's sovereign immunity to private lawsuits under the FLSA is a question of law.

The COURT FINDS the State of Nevada enjoys sovereign immunity as to FLSA claims in any court, including its own state courts, unless it expressly waives that immunity. *Alden v. Maine*, 527 U.S. 706 (1999), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). 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. Nevada's Supreme Court has consistently construed Nevada Revised Statute 41.031(1) as a waiver to tort liability only. *Hagblom v. State Director of Motor Vehicles*, 93 Nev. 599, 604, 571 P.2d 1172, 1176 (1977); *Franchise Tax Bd. of Cal. v. Hyatt*, 407 P.3d 717 728 (Nev. 2017). No Nevada case has ever described a claim for overtime compensation under the FLSA as a tort. Therefore, the Court dismisses Plaintiffs' FLSA claim because sovereign immunity bars it.

2. Second claim for relief under NRS 284.180

The question of whether Nevada's legislature intended to create a private right of action under statute is a question of law for this Court. *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007).

The COURT FURTHER FINDS that there is no private right of action under NRS 284.180. Nevada has created a complex administrative scheme to resolve compensation disputes between public employees and the State. The process works as follows. State 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 (EMC) (NAC 284.695). This process requires that claimants first file a grievance within 20 days of the occurrence regarding issues of compensation or working hours, that they then appeal the decision regarding their grievance to the EMC, and that, if still unsatisfied, they obtain judicial review of EMC's decision by filing a petition within 30 days. NRS §§284.384, 233B.130(2)(d), NAC 284.678, 682, 686, 690, and 695. Nevada would have not created this complex administrative scheme if a state employee could simply bypass it by filing a civil action.

The COURT FURTHER FINDS that Plaintiffs have failed to allege that they have exhausted their administrative remedies by properly pursuing the grievance procedure. Plaintiffs do not allege they ever asked for overtime, or that NDOC denied their request. Plaintiffs do not allege they timely filed a grievance. Plaintiffs do not allege they have sought judicial review of a final agency decision by the Employee-Management Committee. And the failure to exhaust administrative remedies is fatal to a state employee's claim. *City of Henderson v. Kilgore*, 122 Nev. 331, 336-37, 131 P.3d 11, 15-16 (2006).

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is GRANTED.

DATED this 16 day of January, 2019.

DISTRICT COURT JUDGE

Prepared by:

AARON D. FORD
Attorney General

Steve Shevorski (Bar No. 8256)
Head of Complex Litigation
Theresa M. Haar (Bar No. 12158)
Senior Deputy Attorney General
Attorneys for Defendants

Approved as to form by:

Mark R. Thierman (Bar No. 8285)
Joshua D. Buck (Bar No. 12187)
Leah L. Jones (Bar No. 13161)
THIERMAN BUCK LLP
Attorneys for Plaintiffs

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

KELLEN PROST,

Plaintiff,

vs.

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

Defendants.

CASE NO: 18 OC 00131 1B

Dept. No.: 2

ORDER ON DEFENDANTS' MOTION TO DISMISS

Before the Court is Defendants' Motion to Dismiss. Having considered the parties' briefs and arguments, and good cause appearing, the Court hereby finds and orders as follows:

FACTS

Plaintiff Prost is a nurse at the Northern Nevada Correctional Center. She alleges that she is paid on an hourly basis and that she was required to perform certain pre- and post- shift work over 40 hours per week (or over 80 hours every two weeks) for which she was not paid overtime. Prost claims that all other nurses at the facility similarly worked uncompensated overtime and she seeks to certify a class of "All persons who were employed by Defendant as correctional nurses at the Northern Nevada Correctional Center (NNCC) any time during the applicable statute of limitations period."

///

ANALYSIS

Prost advances two causes of action. First, Prost claims that the State has violated the federal Fair Labor Standards Act of 1938's ("FLSA") requirement to pay overtime under 29 U.S.C. § 207. Next, Prost contends that the State has violated NRS 284.180's requirement to pay overtime under state law.

Nevada Rule of Civil Procedure 12(b)(5) permits the court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Under this standard, courts take all allegations in the complaint as true and draw all inferences in the plaintiff's favor. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). The complaint "should be dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief." *Id.* A complaint should be dismissed when it does not state a cognizable claim for relief. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

1. Nevada has not waived sovereign immunity as to FLSA claims and therefore the FLSA claim must be dismissed..

Plaintiff argued Nevada has not warned its sovereign immunity in FLSA cases. Plaintiff argued Nevada has warned sovereign immunity in NRS 41.03/which states in part: "Nevada...waives its immunity from liability and action...except as other wise provided in NRS 41.032 to 41.0328, inclusive...". None of the exception statutes appear to except FLSA cases.

In reply defendant argued Nevada has not waived sovereign immunity on FLSA claims. Defendant argued NRS 41.031 waiver applies to negligence and other tort claims. In support defendant cited *Butler vs. Bayer*, 123 Nev 450, which states in dicta "NRS 41.031 contains Nevada's general waiver of sovereign immunity from suits arising from acts of negligence committed by state employers. The purpose of that waiver is 'to compensate victims of government negligence in circumstances like those in which victims of private negligence would be compensated.'" Defendant also cited *Franchise Tax Brd. v Hyatt*, 407 P.3d 771 which states in dicta: "...Nevada has waived traditional

sovereign immunity from tort liability, with some exceptions. NRS 41.031."

Based upon the *Butler and Franchise Tax cases* the Court concludes Nevada has not waived sovereign immunity as to FLSA actions.

2. Garcia is controlling law.

Because Garcia is the controlling law, plaintiff's arguments regarding *Garcia,* the Commerce Clause, the Tenth Amendment, federalism, a non-delegation arguments are unpersuasive.

3. Prost has not exhausted the available administrative remedies and therefore her Chapter 284 claim must be dismissed.

NRS 284.384 authorizes the State Personnel Commission to adopt regulations which provide for a state-employee grievance process. The grievance process includes disputes over compensation or working hours. NRS 284.384(6). A grievance process has been established in NAC 284.658 *et seq.* After exhausting these administrative remedies, an employee may file a petition for judicial review. NRS 233B.130.

Prost does not allege that she, or any other member of the proposed class, has exhausted the available administrative remedies. "[W]hether couched in terms of subject matter jurisdiction or ripeness, a person generally must exhaust all available administrative remedies before initiating a lawsuit, and failure to do so renders the controversy nonjusticiable." *Allstate Ins. Co. v. Thorpe,* 123 Nev. 565, 571, 170 P.3d 989, 993 (2007). Therefore, Prost's state law claims as set forth in her Second Cause of Action are dismissed.

The Court cannot allow Prost's alternative request for leave to amend to re-add the state law claim after exhaustion because a petition for judicial review is the exclusive means to challenge the result of the administrative process. NRS 233B. 130(6); *Deja Vu Showgirls v. State, Depot of Tax.*, 130 Nev. 711, 715, 334 P.3d 387, 390 (2014).

///

///

///

ORDER

IT IS ORDERED:

Because Nevada has not waived in NRS 41.031 sovereign immunity as to FLSA actions the FLSA claim is dismissed.

Because plaintiff has not exhausted her administrative remedies her claim under NRS Chapter 284 is dismissed.

January 18, 2019.

James E. Wilson Jr.
District Judge

CERTIFICATE OF SERVICE

I certify that I am an employee of the First Judicial District Court of Nevada; that on January 18 2019, I served a copy of this document by placing a true copy in an envelope addressed to:

Mark Thierman, Esq.
7287 Lakeside Drive
Reno, NV 89511

Steve Shevorski, Esq.
Theresa Haar, Esq.
555 E. Washington Ave., Ste 3900
Las Vegas, NV 89101

the envelope sealed and then deposited in the Court's central mailing basket in the Court Clerk's Office for delivery to the United States Post Office at 1111 South Roop Street, Carson City, Nevada for mailing.

Susan Greenburg
Judicial Assistant

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 United States District Court
for the District of Nevada
Case No. 3:14-cv-00320-MMD-WGC

APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

SHERI THOME
Nevada Bar No. 8657
JAMES T. TUCKER
Nevada Bar No. 12507
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
300 S. Fourth Street, 11th Floor
Las Vegas, NV 89101
(702) 727-1400; FAX (702) 727-1401

AARON FORD, Attorney General
HEIDI PARRY STERN
Nevada Bar No. 8873
STEVE SHEVORSKI
Nevada Bar No. 8256
555 E. Washington Avenue, Suite 3900
Las Vegas, NV 89101
(702) 486-3783; FAX (702) 486-3773
Attorneys for Appellant

TABLE OF CONTENTS

PAGE

STATEMENT OF THE ISSUES THAT MERIT REHEARING OR EN BANC CONSIDERATION 1

INTRODUCTION 1

PROCEDURAL BACKGROUND 3

ARGUMENT 4

I. Standard of Review 4

II. The Panel's Extension of *Lapides* Conflicts with the Underlying Rationale of *Lapides*, Unjustifiably Undercutting the Fundamental Constitutional Principle of State Sovereignty 4

A. The rule established by the panel in this case departs from the limited rationale of *Lapides* and unjustifiably undermines state sovereign immunity. 5

B. The other Federal Circuit Courts disagree on how to apply *Lapides* 8

III. The Panel Decision Is Unclear Regarding the Scope of Its Findings on Immunity, Thus Creating Confusion About Its Effect 9

CONCLUSION 13

CERTIFICATE OF COMPLIANCE 14

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

PAGE(S)

CASES

Agrawal v. Montemagno,
574 Fed. Appx. 570 (6th Cir. 2014) 12

Alden v. Maine,
527 U.S. 706 (1999) 10, 11

Bd. Of Regents of Univ. of Wis. Sys. v. Phx. Int'l Software, Inc.,
653 F.3d 448 (7th Cir. 2011).....8

Beaulieu v. Vermont,
807 F.3d 478 (2d Cir. 2015) 12

Bergemann v. R.I. Dep't of Envtl. Mgmt.,
665 F.3d 336 (1st Cir. 2011) 6, 8, 12

Church v. Missouri,
913 F.3d 736 (8th Cir. 2019).....12

Clark County School Dist. v. Richardson Const., Inc,
168 P.3d 87 (Nev. 2007).....11

Cushing v. Cohen,
420 A.2d 919 (Me. 1980) 11

Embury v. King,
361 F.3d 562 (9th Cir. 2004).....5

Estes v. Wyo. Dep't of Transp.,
302 F.3d 1200 (10th Cir. 2002).....8

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985) 7

Hester v. Indiana State Dep't of Health,
726 F.3d 942 (7th Cir. 2013).....12

Lombardo v. Pennsylvania Dep't of Pub. Welfare,
540 F.3d 190 (3d Cir. 2008).....12

Martinez v. Maruszczak,
168 P.3d 720 (Nev. 2007).....11

Meyers ex rel. Benzing v. Texas,
410 F.3d 236 (5th Cir. 2005) 8, 12

Seminole Tribe of Fla. v. Florida,
517 U.S. 44 (1996) 10

Stewart v. North Carolina,
393 F.3d 484 (4th Cir. 2005)..... 8, 12

Stroud v. McIntosh,
722 F.3d 1294 (11th Cir. 2013).....12

Trant v. Oklahoma,
754 F.3d 1158 (10th Cir. 2014).....12

Walden v. Nevada,
941 F.3d 350 (9th Cir. 2019)..... 1, 7, 8, 10

Watters v. Wash. Metro. Area Transit Auth.,
295 F.3d 35 (D.C. Cir. 2002) 8, 12

STATUTES

1965 Statutes of Nevada 7

Nev. Rev. Stat. 41.031 ..... 2, 7, 11

STATEMENT OF THE ISSUES THAT MERIT REHEARING OR *EN BANC* CONSIDERATION

1. Whether, by voluntarily removing a case to federal court, a state waives its 11th Amendment immunity for federal claims grounded upon an act of Congress that does not properly abrogate state sovereign immunity.

2. Whether, by voluntarily removing a case to federal court, a state waives its sovereign immunity *in toto* where the state's legislature has not expressly waived the state's immunity from liability.

INTRODUCTION

The panel decision's departure from the underlying rationale of the United States Supreme Court in *Lapides v. Board of Regents*, 535 U.S. 613 (2002), requires rehearing. Reconsideration of the panel decision would allow this Court to bring its case law in line with both *Lapides* and the case law of its sister circuits. This review is critical because the panel decision unjustifiably undermines the foundational principle of state sovereign immunity relied upon by *Lapides*: the avoidance of unfair results.

The panel decision fundamentally errs in finding that its preference for "a clear jurisdictional rule" outweighs unfairness to the states from loss of their sovereign immunity. *Walden v. Nevada*, 941 F.3d 350, 358 (9th Cir. 2019). *Lapides* simply does not support such a conclusion. The underlying concerns and rationale of the Supreme Court in *Lapides,* in fact, directly contradict this conclusion.

In *Lapides*, the Supreme Court recognized the unfairness that would result from allowing a state to use the 11th Amendment to avoid its own waiver of sovereign

immunity in state court. Here, however, Nevada gains no unfair advantage from removal. Nevada would be immune to a private FLSA suit in state court under Nev. Rev. Stat. (NRS) 41.031. The panel nevertheless concluded that Nevada's removal resulted in a waiver of its state sovereign immunity—without any consideration of whether Nevada would be immune from suit in state court.

The panel's only stated justification for its invasion of Nevada's state sovereignty is judicial expedience. This is insufficient. Easily applied rules may be desirable, but a court's preference for judicial expedience cannot be permitted to outweigh state sovereignty—a principal inherent in the constitutional design of our federal republic.

Even if the panel was correct to extend *Lapides* in this manner, the opinion lacks clarity as to its scope and effect on state sovereign immunity. The panel's blanket affirmance of the district court's order creates confusion about whether the Court is merely affirming on the waiver of 11th Amendment immunity or if it is affirming the district court's decision on waiver of state sovereign immunity as a whole.[1]

[1] While the district court treated state sovereign immunity as an indivisible concept, the panel begins its analysis by citing case law that distinguishes 11th Amendment immunity (or immunity from suit) and state immunity from liability, ultimately addressing only a state's 11th Amendment immunity.

To the extent this Court's opinion does not address whether Nevada Department of Corrections' (NDOC) removal to federal court waives its immunity from liability, NDOC asks this Court to expressly state that its opinion leaves that issue open to be reviewed on direct appeal from final judgment should plaintiffs prevail in district court. On the other hand, if the panel decision intended to affirm the district court immunity ruling as a whole, it creates a conflict with every other circuit that has confronted that issue.

PROCEDURAL BACKGROUND

Plaintiffs, correctional officers employed by NDOC, filed suit in Nevada's state courts, alleging violations of the Fair Labor Standards Act (FLSA) along with other claims made under state law. 7 APP 1522-36. NDOC removed the case to federal court. 7 APP 1516-18.

NDOC answered the complaint, asserting numerous affirmative defenses, including immunity from liability based on sovereign immunity. 7 APP 1506-14. After reviewing dispositive briefs in this case pertaining to plaintiffs' first amended complaint, the federal court *sua sponte* requested briefing on whether it lacked subject matter jurisdiction to proceed on plaintiffs' remaining FLSA private causes of action. 1 APP 0003-04.

After the parties briefed the issue, the court determined that NDOC waived sovereign immunity under *Lapides*, without distinguishing between 11th

Amendment immunity from suit and immunity from liability. 1 APP 0003-04. NDOC appealed and a three-judge panel of this Court affirmed. Despite recognizing that this Court's precedent acknowledges that the FLSA did not abrogate 11th Amendment immunity from suit—meaning the state can maintain immunity from claims under the FLSA in state court—the panel nevertheless determined that NDOC's removal of the case to federal court resulted in a waiver of this immunity. *Walden*, 941 F.3d at 356-58.

ARGUMENT

I. Standard of Review

Panel rehearing is appropriate where the panel has overlooked or misapprehended a point of law or fact. Fed. R App. P. (FRAP) 40(a)(2). This Court grants *en banc* rehearing to ensure "uniformity of the court's decisions" where a panel's decision conflicts with a decision of the Supreme Court of the United States or another decision of this Court. FRAP 35(b). This petition meets the standard for both panel and *en banc* rehearing.

II. The Panel's Extension of *Lapides* Conflicts with the Underlying Rationale of *Lapides*, Unjustifiably Undercutting the Fundamental Constitutional Principle of State Sovereignty.

Immunity from private suit under the 11th Amendment is "'[a]n integral component of the States' sovereignty…." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019). While states are free to waive that immunity, *Lapides* found that

allowing states to remove a case to federal court and rely on 11th Amendment immunity—in order to avoid their own waiver of immunity from suit under state law—would lead to unfair and inconsistent results. *Lapides*, 535 U.S. at 619-23. As a result, *Lapides* held that a state's voluntary removal of a lawsuit to federal court waives 11th Amendment immunity to any state law claims for which the state has expressly waived immunity in state court. *Id*.

This Court later extended *Lapides*'s rule by holding that a state's voluntary removal also waives immunity from suit with respect to federal claims. *Embury v. King*, 361 F.3d 562 (9th Cir. 2004). But *Embury* expressly declined to address whether this rule should apply where Congress has not properly abrogated state sovereign immunity. *Id*. at 566 n. 20. This case presents the question left open in *Embury*. However, the panel's resolution of that question here conflicts with *Lapides* itself, and unjustifiably undercuts state sovereign immunity. Either the panel or the *en banc* Court should grant rehearing.

A. The rule established by the panel in this case departs from the limited rationale of *Lapides* and unjustifiably undermines state sovereign immunity.

The panel's extension of *Lapides* departs drastically from *Lapides*'s rationale for implying a waiver of the 11th Amendment immunity defense. In *Lapides*, the Supreme Court held that where a state has waived its sovereign immunity to a state-law claim, the state may not remove a case to federal court and use 11th Amendment

immunity to seek dismissal of that claim. 535 U.S. at 618-19, 624. The Supreme Court's rationale for its narrow holding is simple and straight forward: it would be unfair, and lead to inconsistent results, to allow a state to use the 11th Amendment to avoid its own waiver of sovereign immunity in state court. *Id*. at 620-23; *see also Bergemann v. R.I. Dep't of Envtl. Mgmt*., 665 F.3d 336, 341 (1st Cir. 2011) (characterizing *Lapides* as prohibiting states from using removal and the Eleventh Amendment to make an "end-run" on a waiver of sovereign immunity in its own courts).

The panel decision justifies its new rule expanding *Lapides* by asserting that a blanket waiver of 11th Amendment immunity in all cases where the state removes to federal court is easy to apply. Straightforward, easy-to-apply rules may be appealing, but such a preference does not justify undercutting the constitutional design of our federal republic. *Cf. Hyatt*, 139 S. Ct. at 1492. As the First Circuit has noted, "[t]he desire to avoid unfairness has animated every invocation by the Supreme Court of the waiver by conduct doctrine." *Bergemann*, 665 F.3d at 342. This desire played no part in the panel's decision, however.

Additionally, the rule established by the panel inverts the unfairness and inconsistency this Court sought to avoid in *Lapides*. By establishing a total waiver by removal doctrine, the panel ignored the fact that NDOC achieved no tactical advantage by seeking a federal forum. It managed to do this by ignoring completely

the text of (NRS) 41.031, instead casting application of that statute as a mere "alternative argument" by plaintiffs. *Walden*, 941 F.3d at 358 n. 3.

Analysis of NRS 41.031, however, is necessary (and critical) under the rationale of *Lapides*. It is thus not a mere "alternative" argument. Unlike Georgia in *Lapides*, NDOC was not seeking an "end-run" around the Nevada state legislature's waiver of state sovereign immunity in state court. Unlike Georgia, Nevada has not waived its state sovereign immunity to private suits under the FLSA in state courts. There is no Nevada Supreme Court opinion holding that Nevada's legislature, by enacting NRS 41.031, waived its state sovereign immunity. In fact, Nevada enacted NRS 41.031(1) in 1965, decades before the Supreme Court held that the FLSA applies to the States. 1965 Statutes of Nevada at 1413; *see also Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56 (1985). NRA 41.031(1) is not a blanket waiver of state sovereign immunity to causes of action that arise under any federal statute that Congress may enact in the future.

A state, like Nevada, that removes a case to federal court, should be able to maintain its 11th Amendment immunity from any federal claims made under any acts of Congress that do not properly abrogate state sovereign immunity. Applying this principle would bring this case into harmony with the holding in *Lapides*: that a state should not be able to avoid a waiver of its sovereign immunity under state law by removing to federal court. In a situation where the state would be immune from a

claim in state court because Congress did not have the authority to abrogate the state's immunity from suit, the state gains no unfair advantage by removal to federal court. Instead, as the panel acknowledges, its rule will result in unfairness to states that remove to federal court—a result the Supreme Court sought to avoid in *Lapides*.

B. The other Federal Circuit Courts disagree on how to apply *Lapides*.

As the panel decision acknowledges, other circuits that have confronted the application of *Lapides* are divided on how to apply its rule. *Walden*, 941 F.3d at 356 n. 2.

Some circuits have read *Lapides* to create a rule that a state's removal to federal court results in a blanket waiver of 11th Amendment immunity on all claims. *Bd. of Regents of Univ. of Wis. Sys. v. Phx. Int'l Software, Inc.*, 653 F.3d 448, 460-71 (7th Cir. 2011); *Lomardo v. Pa. Dep't of Pub. Welfare*, 540 F.3d 190, 198-200 (3d Cir. 2008); *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 242 (5th Cir. 2005); *Estes v. Wyo. Dep't of Transp.*, 302 F.3d 1200, 1205 n.1, 1206 (10th Cir. 2002).

Other circuits have read *Lapides* more narrowly, finding waiver only when the state has expressly waived its immunity from suit in state court. *Bergemann*, 665 F.3d 336; *Stewart v. North Carolina*, 393 F.3d 484, 490 (4th Cir. 2005); *Watters v. Wash. Metro. Area Transit Auth.*, 295 F.3d 35, 42 n. 13 (D.C. Cir. 2002). The split of authority demonstrates the difficulty and importance of this issue.

As discussed above, the rationale of First, Fourth, and D.C. circuits is in line with *Lapides* and should prevail. A desire to prohibit states from gaining an unfair advantage by abusing the 11th Amendment drove the Supreme Court's decision in *Lapides*. Removal in cases like this one, however, does not grant a state any unfair advantage. If this Court allows the panel decision to stand, unfairness and inconsistency will result because the decision imposes a waiver of state sovereign immunity on the states even when the states would retain 11th Amendment immunity—and thus not be subject to suit—in their own courts.

III. The Panel Decision Is Unclear Regarding the Scope of Its Findings on Immunity, Thus Creating Confusion About Its Effect.

Even if the panel had correctly extended *Lapides* here, its blanket affirmance of the district court's order creates some confusion about the scope and effect of its opinion.[2] NDOC requests clarification of this matter because if the panel intended a blanket affirmance of the district court's findings on state sovereign immunity, it would create a conflict with every other circuit court decision to have addressed that issue.[3]

---

[2] The panel suggests in a footnote that it is not deciding the waiver on immunity from liability issue, but in the body of the opinion the scope of the ruling remains unclear.

[3] When denying NDOC's motion for judgment on the pleadings, the district court's order concluded that NDOC's removal of the case waived state sovereign immunity in all respects. 1 APP 0003-04.

The panel acknowledges that it would lack jurisdiction to hear this interlocutory appeal if NDOC based its sovereign immunity defense solely on immunity from liability. *Walden*, 941 F.3d at 354. The panel nonetheless finds that it has jurisdiction to hear the appeal because NDOC clarified for the panel that its claim of state sovereign immunity encompasses both 11th Amendment immunity (from suit) and immunity from liability. *Id*. The panel then discusses the merits of the appeal only in terms of immunity from suit, as is appropriate in an interlocutory appeal. The panel never explicitly states, however, that its opinion does not also resolve the issue of NDOC's immunity from liability. *Id*. at 354-58.

The distinction potentially left open by the panel regarding immunity is critical. State sovereign immunity consists of readily divisible concepts. First there is the immunity from the exercise of federal jurisdiction over private suits for damages—namely 11th Amendment immunity from suit. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). Second, states retain immunity from all private civil actions regardless of the jurisdiction—or immunity from liability. *See Alden v. Maine,* 527 U.S. 706, 713 (1999). If the panel found that NDOC waived both aspects of state sovereign immunity by removing to federal court, it departed inappropriately from *Alden*.

Alden recognized that states "on their own initiative" can waive sovereign immunity, but the court was also careful to recognize how a state chose to waive

sovereign immunity. *Id*. at 755. *Alden* noted that states may choose to enact statutes to demonstrate consent to private lawsuit of differing types. *Id*. It thus examined the law of Maine to determine not only what types of substantive suits were permissible against the state, but also how Maine had decided it would waive sovereign immunity. *Id*. at 757-58. As a result, *Alden* recognized and respected that in Maine a waiver of substantive sovereign immunity was not possible absent a specific legislative command. *Id*. (citing *Cushing v. Cohen,* 420 A.2d 919, 923 (Me. 1980)).

The panel decision failed to apply this same analysis and deference to the law of Nevada. In Nevada, like Maine, a legislative enactment is an absolute prerequisite for a waiver of sovereign immunity. *Clark County School Dist. v. Richardson Const., Inc*, 168 P.3d 87, 92 (Nev. 2007). Full state sovereign immunity applies "automatically" to suits against the State of Nevada. *Id*. Indeed, this doctrine is so strong in Nevada that the state need not even raise it as an affirmative defense for immunity to apply. *Id*. (finding that the sovereign immunity damages cap applied even where it was not raised as an affirmative defense, or at all, in the trial court). Nevada has only narrowly waived immunity to certain classes of claims, not implemented a blanket waiver of immunity. *See Martinez v. Maruszczak*, 168 P.3d 720, 724 (Nev. 2007). (describing the legislature's wavier of sovereign immunity in NRS 41.031 as a "qualified waiver of sovereign immunity from tort liability….").

Nine Circuits—the First, Second, Third, Fourth, Fifth, Eighth, Tenth, Eleventh, and D.C. Courts of Appeals—have published opinions that support NDOC's position. In each case, these Courts held that a state's removal of an action to federal court does not act as a blanket waiver of all aspects of state sovereign immunity, including its immunity from liability. *See Bergemann*, 665 F.3d at 343; *Beaulieu v. Vermont*, 807 F.3d 478, 485-89 (2d Cir. 2015); *Lombardo*, 540 F.3d at 200; *Stewart*, 393 F.3d at 490; *Meyers*, 410 F.3d at 255; *Church v. Missouri*, 913 F.3d 736, 742-43 (8th Cir. 2019); *Trant v. Oklahoma*, 754 F.3d 1158, 1173 (10th Cir. 2014); *Stroud v. McIntosh*, 722 F.3d 1294, 1301 (11th Cir. 2013); *Watters*, 295 F.3d at 42 n.13. In addition, the Sixth Circuit also appears to reject a conclusion that removal waives sovereign immunity or other defenses to liability. *See Agrawal v. Montemagno*, 574 Fed. Appx. 570, 573 (6th Cir. 2014). The Seventh Circuit is the only circuit yet to address the issue. *See Hester v. Indiana State Dep't of Health*, 726 F.3d 942, 950-51 (7th Cir. 2013).

To the extent the panel intended to affirm the district court on the issue of immunity from liability, in addition to 11th Amendment immunity from suit, the panel's "clear jurisdictional rule" creates an explicit conflict with the rulings of all other authoritative circuit court decisions. Those decisions recognize that removal alone is insufficient to waive the immunity from liability a state would enjoy in any

court. This Court should hold likewise, clarifying that Nevada retains its immunity from liability in this case on remand.

CONCLUSION

NDOC requests that this Court grant either panel rehearing or rehearing *en banc* regarding the issues raised above in order to resolve the conflict between the panel's decision and *Lapides* and in order to clarify the status of Nevada's immunity from liability on remand.

RESPECTFULLY SUBMITTED this 20th day of November, 2019.

AARON D. FORD
Attorney General

By: /s/ Heidi Parry Stern
Heidi Parry Stern (Bar No. 8873)
Solicitor General
Office of the Nevada Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
HStern@ag.nv.gov

Sheri Thome (Bar No. 8657)
James T. Tucker (Bar No. 12507)
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
300 S. Fourth Street, 11th Floor
Las Vegas, NV 89101
(702) 727-1400; FAX (702) 727-1401
Attorneys for *Appellant State of Nevada, ex rel. Nevada Department of Corrections*

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 35-4 AND 40-1

9th Cir. Case Number(s) 18-15691

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing *en banc*/answer to petition is *(select one)*:

[X] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words:** 2,969**.**
(Petitions and answers must not exceed 4,200 words)

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Dated: November 20, 2019.

AARON D. FORD
Attorney General

By: /s/ Heidi Parry Stern

Heidi Parry Stern (Bar No. 8873)
Solicitor General
Office of the Nevada Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
HStern@ag.nv.gov

Sheri Thome (Bar No. 8657)
James T. Tucker (Bar No. 12507)
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
300 S. Fourth Street, 11th Floor
Las Vegas, NV 89101
(702) 727-1400; FAX (702) 727-1401
Attorneys for *Appellant State of Nevada, ex rel. Nevada Department of Corrections*

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 20th day of November, 2019, I served a copy of the foregoing *Appellant State of Nevada, ex rel. Nevada Department of Corrections' Petition for Rehearing En Banc*, by Ninth Circuit ECF electronic filing to all parties using the CM/ECF System.

/s/ Renee Carreau
An Employee of the Office of the Attorney General

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD WALDEN, JR.; NATHAN ECHEVERRIA; AARON DICUS; BRENT EVERIST; TRAVIS ZUFELT; TIMOTHY RIDENOUR; DANIEL TRACY, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellees*, v. STATE OF NEVADA; NEVADA DEPARTMENT OF CORRECTIONS, *Defendants-Appellants.*	No. 18-15691 D.C. No. CV 14-0320 MMD ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, Chief District Judge, Presiding

Argued and Submitted March 13, 2019
San Francisco, California

Filed October 16, 2019
Amended December 23, 2019

Before: Eugene E. Siler,* A. Wallace Tashima, and M. Margaret McKeown, Circuit Judges.

Order;
Opinion by Judge Tashima

SUMMARY**

Sovereign Immunity

The panel filed (1) an order withdrawing its opinion and substituting in its place an amended opinion, denying a petition for panel rehearing, and denying on behalf of the court a petition for rehearing en banc; and (2) an amended opinion affirming the district court's holding that the State of Nevada waived its Eleventh Amendment sovereign immunity as to plaintiffs' Fair Labor Standards Act claims when the State removed the case from state court to federal court.

Extending the holding of *Embury v. King*, 361 F.3d 562 (9th Cir. 2004), the panel held that a State that removes a case to federal court waives its immunity from suit on all federal-law claims in the case, including those federal-law claims that Congress failed to apply to the states through unequivocal and valid abrogation of their Eleventh Amendment immunity.

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Richard I. Dreitzer (argued), James T. Tucker, and Sheri Thome, Wilson Elser Moskowitz Edelman & Dicker LLP, Las Vegas, Nevada; Aaron Ford, Attorney General; Heidi Parry Stern, Solicitor General; Steve Shevorski, Ketan D. Bhirud, Theresa M. Haar; Office of the Attorney General, Las Vegas, Nevada; for Defendants-Appellants.

Joshua D. Buck (argued), Mark R. Thierman and Leah L. Jones, Thierman Buck LLP, Reno, Nevada, for Plaintiffs-Appellees.

ORDER

The Opinion filed October 16, 2019, and reported at 941 F.3d 350, is withdrawn and the Amended Opinion filed concurrently with this Order is substituted in its place.

With the filing of the Amended Opinion, the panel has voted to deny the petition for panel rehearing. Judge McKeown votes to deny the petition for rehearing en banc and Judges Siler and Tashima so recommend. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). The petition for panel rehearing and the petition for rehearing en banc are denied. No further petitions for panel rehearing or rehearing en banc will be entertained.

OPINION

TASHIMA, Circuit Judge:

Plaintiffs-Appellees ("Plaintiffs") are a group of correctional officers who allege violations of the Fair Labor Standards Act ("FLSA") by Defendants-Appellants State of Nevada and the Nevada Department of Corrections (together, "Nevada"). Nevada removed the case from state court to federal court, then moved for judgment on the pleadings based on state sovereign immunity from suit. We have previously held that a State's removal of a suit from state to federal court waives state sovereign immunity from suit on certain federal-law claims. *Embury v. King*, 361 F.3d 562 (9th Cir. 2004). But *Embury*'s holding did not cover federal-law claims that Congress did not apply to the states through unequivocal and valid abrogation of their Eleventh Amendment immunity. *Id.* at 566 n.20. We now hold that a State that removes a case to federal court waives its immunity from suit on all federal-law claims in the case, including those federal-law claims that Congress failed to apply to the states through unequivocal and valid abrogation of their Eleventh Amendment immunity.

BACKGROUND

Plaintiffs allege that Nevada has not compensated them for time that they spent working before or after scheduled shifts at state prisons and correctional facilities. Plaintiffs allege wage and overtime claims under the FLSA, failure to pay minimum wages under Nevada's Constitution, failure to pay overtime as required by Nev. Rev. Stat. § 284.180, and breach of contract.

Plaintiffs filed this action in state court. Nevada removed the case to federal court and then answered the complaint. In its answer, Nevada pleaded the affirmative defense that "Defendant is immune from liability as a matter of law," but did not explicitly mention state sovereign immunity or the Eleventh Amendment. Upon Plaintiffs' motion, the district court granted conditional certification of the FLSA collective action and ordered notice be sent to all current and former non-exempt hourly paid employees who were employed by the Nevada Department of Corrections as correctional officers at any time from May 12, 2011 to the date of the order (March 16, 2015). In total, 542 current and former employees have opted into this action.

On March 1, 2018, the district court *sua sponte* requested supplemental briefing on the issue of whether "the doctrine of state sovereign immunity [applied] to the FLSA claims against the State of Nevada as brought in federal court." This issue had not been raised at all until this point of the litigation, almost four years after the complaint was filed and after significant discovery had been completed, notwithstanding the affirmative defense Nevada raised in its answer, that "Defendant is immune from liability as a matter of law." In that order, the district court noted that although the FLSA confers subject-matter jurisdiction in federal court, the district court might be "barred from adjudicating the FLSA claims and this case should be remanded" because "[u]nder Nev. Rev. Stat. § 41.031(3), the state of Nevada has explicitly refused to waive its sovereign immunity in suits brought by state citizens in federal court."

After supplemental briefing, the district court held that the State had waived its sovereign immunity as to Plaintiffs' FLSA claims, and denied Nevada's motion to dismiss those

claims. The district court's discussion of Nevada's waiver of sovereign immunity was limited to a short paragraph:

> After reviewing the supplemental briefs . . . , 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.

The district court also denied Nevada's motion to dismiss the FLSA claims, but dismissed Plaintiffs' Nev. Rev. Stat. § 284.180 and breach of contract claims. The parties then stipulated to the dismissal of Plaintiffs' minimum wage claim under Nevada's Constitution, leaving only the FLSA claims which are at issue on this appeal.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under the collateral order doctrine of 28 U.S.C. § 1291. The denial of a State's motion for judgment on the pleadings on the grounds of Eleventh Amendment immunity, although an interlocutory order, need not await a final judgment to be appealable. *Phiffer v. Columbia River Corr. Inst.*, 384 F.3d 791, 792 (9th Cir. 2004).

Under the collateral order doctrine, we have appellate jurisdiction under § 1291 to consider a State's claims of

immunity from suit, but there is no such appellate jurisdiction to consider claims of immunity from liability. *Taylor v. Cty. of Pima*, 913 F.3d 930, 934 (9th Cir. 2019). Under *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), an ordinary claim of Eleventh Amendment immunity encompasses a claim of immunity from suit. But when a State defendant asserting immunity declares that "it was asserting *only* immunity from liability," then the collateral-order doctrine of § 1291 does not apply and there is no appellate jurisdiction. *Taylor*, 913 F.3d at 934. Nevada's briefing is not clear whether it is asserting *only* immunity from liability or also immunity from suit, as Nevada appears to use these terms interchangeably. But Nevada clarified at oral argument that it is in fact asserting both immunity from liability and immunity from suit. Because Nevada asserts both immunity from liability and immunity from suit, we have jurisdiction to hear the appeal.[1] *See id*.

The existence of sovereign immunity under the Eleventh Amendment is a question of law reviewed de novo. *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016). Whether immunity has been waived is also a question of law reviewed de novo. *Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001).

[1] As explained above, because we have interlocutory appellate jurisdiction only of "claims of immunity from suit," and not of "claims of immunity from liability," the following discussion – and holding – applies only to the former claim of immunity from suit. We express no opinion on the claim of immunity from liability.

DISCUSSION

The Eleventh Amendment grants a State immunity from suit in federal court by citizens of other states, U.S. Const. amend. XI, and by its own citizens as well, *Hans v. Louisiana*, 134 U.S. 1 (1890). The question before us is whether Nevada waived its sovereign immunity by removing Plaintiffs' FLSA claims to federal court.

States can waive their Eleventh Amendment sovereign immunity from suit in state and federal court. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 618–21 (2002). A State's decision voluntarily to invoke the jurisdiction of a federal court by removing an action from state court to federal court can waive Eleventh Amendment immunity, but this general "voluntary invocation" principle does not apply in all circumstances. *Id*. Many states statutorily waive their immunity from suit on state-law claims in state court. *See, e.g.*, Nev. Rev. Stat. § 41.031. The Supreme Court has held that, when a State that has enacted one of these statutes voluntarily removes a suit on state-law claims from state court to federal court, that State waives its Eleventh Amendment immunity from suit. *Lapides*, 535 U.S. at 618–21.

In *Lapides*, a plaintiff brought a § 1983 and state tort law action against the State of Georgia in state court. *Id.* at 616. The Georgia legislature had passed a statute expressly waiving Georgia's sovereign immunity to state law claims filed in state court. *See id.*; Ga. Code Ann. § 50-21-23. Georgia removed the plaintiff's suit to federal court and moved to dismiss on the ground of Eleventh Amendment immunity, even though it conceded that its own state statute

had waived its sovereign immunity from state-law claims in state court. *Lapides*, 535 U.S. at 616.

At the outset of its opinion, the Supreme Court determined that the sole federal claim in *Lapides*, which sought monetary damages under 42 U.S.C. § 1983, was invalid because Georgia was "not a 'person' against whom a § 1983 claim for money damages might be asserted." *Id.* at 617. Consequently, the Supreme Court began its opinion by "limit[ing]" its decision to the peculiar procedural circumstances of that case—that is, "to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." *Id.*; *see also id.* at 617–18 (emphasizing that the Court did not "need [to] 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 Court discussed the consequences of Georgia's decision to remove the case:

> It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the "Judicial Power of the United States" extends to the case at hand.

Id. at 619. Observing that it had previously held that a "State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity," *id.* (citing *Clark v. Barnard*, 108 U.S. 436, 447 (1883)), the Court

reasoned that a State similarly expresses its intent to "voluntarily invoke[ ] the federal court's jurisdiction" by "voluntarily agree[ing] to remove the case to federal court." *Id.* at 620. Unable to discern "something special about removal or about this case," the Court concluded that the "general legal principle requiring waiver" when a State voluntarily invokes judicial authority "ought to apply" in order to prevent states from "achiev[ing] unfair tactical advantages." *Id*. at 620, 621. Therefore, under *Lapides*, a State that statutorily waives its immunity from suit on state-law claims in state court also waives its Eleventh Amendment immunity from suit on the same state-law claims when it voluntarily removes a state-law-claim case to federal court. *Id.* at 624.

The Ninth Circuit built on *Lapides* in *Embury*, holding that a State's removal of a suit from state court to federal court waives Eleventh Amendment immunity from suit for certain federal-law claims. In *Embury*, a physician sued the Regents of the University of California in state court for wrongful discharge, in violation of his due process rights under the federal and state Constitutions and in violation of state labor law. 361 F.3d at 563. After the State defendants removed the case to federal court, the district court dismissed the case with leave to amend. *Id*. Embury then amended his complaint, and defendants again moved to dismiss, this time asserting Eleventh Amendment immunity. *Id*. We "conclude[d] 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." *Id.* at 564. Noting that the defendants had conceded that they were stuck with federal jurisdiction over Embury's state law claims, we reasoned:

> Nothing in the reasoning of *Lapides* supports limiting the waiver to the claims asserted in the original complaint, or to state law claims only. Indeed, 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.

Id. The *Embury* court stated that it would "instead hold to a straightforward, easy-to-administer rule in accord with *Lapides*: Removal waives Eleventh Amendment immunity." *Id.* at 566.

This case would be definitively controlled by *Embury* were it not for a footnote that contains an important limitation to its holding; *Embury* expressly 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." *Id.* at 566 n.20. Congress' enactment of the FLSA did not abrogate a State's sovereign immunity from suit in federal court. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996); *Quillen v. Oregon*, 127 F.3d 1136, 1139 (9th Cir. 1997).[2] Although many FLSA

[2] In *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993) (en banc), we held that "Congress has made unmistakably clear its intention to apply the FLSA to the States," and, thus, had "abrogate[d] the states' Eleventh Amendment immunity." *Id.* at 1391. Subsequently, however, the Supreme Court held in *Seminole Tribe* that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal

protections apply to state employees, *see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Ninth Circuit has held that federal courts lack jurisdiction over FLSA cases brought against States in the absence of a waiver of immunity. *Quillin*, 127 F.3d at 1139. Therefore, this case falls within the scope of *Embury*'s Footnote 20, meaning that neither *Lapides* nor *Embury* entirely controls the outcome of this issue. Because this case involves a statute that Congress has not applied to the States through unequivocal and valid abrogation, we are faced with an issue of first impression in the Ninth Circuit.[3]

Relying on the reasoning of *Lapides* and *Embury*, we now hold that a State defendant that removes a case to federal court waives its immunity from suit on all federal-law claims in the case, including those claims that Congress failed to

---

jurisdiction." 517 U.S. at 72–73. Thus, because *Hale* is "clearly irreconcilable" with *Seminole Tribe*, *Hale*'s holding has been abrogated by *Seminole Tribe*. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

[3] Other circuits' approaches to interpreting *Lapides* are not uniform. "As a result of the tension between *Lapides*'s express limitations on its own holding and [its] general language, courts are divided on whether *Lapides* indicates that a State defendant's removal to federal court waives its Eleventh Amendment immunity if the State has not waived its immunity to suit in state court." *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1019 (9th Cir. 2016) (discussing *Lapides*, but holding that its waiver-through-removal reasoning does not apply in the context of tribal immunity). Some circuits have simply opted for a narrow reading of *Lapides*. *See, e.g.*, *Bergemann v. R.I. Dep't of Envtl. Mgmt.*, 665 F.3d 336, 341 (1st Cir. 2011). Others have read Lapides to state a more general rule. *See, e.g.*, *Bd. of Regents of Univ. of Wis. Sys. v. Phx. Int'l Software, Inc.*, 653 F.3d 448, 460–71 (7th Cir. 2011); *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 242 (5th Cir. 2005); *Estes v. Wyo. Dep't of Transp.*, 302 F.3d 1200, 1205 n.1, 1206 (10th Cir. 2002).

apply to the States through unequivocal and valid abrogation of their Eleventh Amendment immunity. Essentially, we extend *Embury*'s "removal means waiver" rule to those circumstances left open in Footnote 20. In *Embury*, we indicated a very strong preference for a clear jurisdictional rule. 361 F.3d at 566 ("Allowing a State to waive immunity to remove a case to federal court, then 'unwaive' it to assert that the federal court could not act, would create a new definition of chutzpah. We decline to give the State such unlimited leeway, and instead hold to a straightforward, easy-to-administer rule in accord with *Lapides*: Removal waives Eleventh Amendment immunity."). Even though *Embury*'s footnote expressly left open the question of whether a removing State defendant remains immunized from certain federal claims like those under the FLSA, *Embury*'s strong preference for a straightforward, easy-to-administer rule supports our holding that removal waives Eleventh Amendment immunity for all federal claims.

In the context of waiver of state-law claims in federal court, we have held that, "Eleventh Amendment immunity is an affirmative defense that must be raised early in the proceedings to provide fair warning to the plaintiff." *Aholelei v. Dep't of Pub. Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007) (internal quotation marks omitted). "Express waiver is not required; a state 'waive[s] its Eleventh Amendment immunity by conduct that is incompatible with an intent to preserve that immunity.'" *Id.* (quoting *Ariz. ex rel. Indus. Comm'n v. Bliemeister (In re Bliemeister*), 296 F.3d 858, 861 (9th Cir. 2002)). Here, Nevada only points to one place in the first four years of active litigation where it arguably raised the issue of state sovereign immunity: the line in the Answer that said, "Defendant is immune from liability as a matter of law." This line does not even mention "state sovereignty" or "the

Eleventh Amendment." The issue of state sovereign immunity was not raised early enough in the proceedings to provide fair notice to Plaintiffs. Therefore, to allow Nevada to assert Eleventh Amendment immunity now would give Nevada a significant tactical advantage in this litigation and would "generate seriously unfair results." *Lapides*, 535 U.S. at 619.

Furthermore, the reasoning of *Lapides* also supports extending the holding of *Embury* to cover cases like this one. As discussed above, the *Lapides* Court reasoned:

> It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the "Judicial Power of the United States" extends to the case at hand.

Lapides, 535 U.S. at 619. The Court concluded that the "general legal principle requiring waiver" when a State voluntarily invokes judicial authority "ought to apply" in order to prevent states from "achiev[ing] unfair tactical advantages." *Id.* at 620, 621. "A benign motive, however, cannot make the critical difference . . . . Motives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* at 621. Therefore, we conclude that *Lapides*' reasoning supports our holding that removal means waiver for all federal-law claims in the case.

Forcing a State to waive sovereign immunity whenever it removes a case to a federal court might lead to unfair results

for the State in some circumstances. *See Bergemann*, 665 F.3d at 342. But these concerns are not strong enough to overcome the need for a clear jurisdictional rule. *See Lapides*, 535 U.S. at 621. A State defendant that removes a case to federal court waives its immunity from suit on all federal-law claims brought by the plaintiff. Here, Nevada waived its Eleventh Amendment immunity from Plaintiffs' FLSA claims by removing the case to federal court.

CONCLUSION

For the foregoing reasons, we affirm the district court's holding that Nevada waived its Eleventh Amendment immunity as to Plaintiffs' FLSA claims when it removed this case to federal court. In doing so, we extend the holding of *Embury* to cover all federal-law claims, even when those federal claims are ones Congress did not apply to the States through unequivocal and valid abrogation of their Eleventh Amendment immunity.[4]

AFFIRMED.

[4] Because we affirm on the waiver-by-removal ground, we do not address Plaintiffs' alternate argument that Nevada has waived sovereign immunity from FLSA claims by enacting Nev. Rev. Stat. § 41.031.

SHERI M. THOME, ESQ.
Nevada Bar No. 008657
JAMES T. TUCKER, ESQ.
Nevada Bar No. 012507
CARA T. LAURSEN, ESQ.
Nevada Bar No. 014563
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
300 South Fourth Street, Eleventh Floor
Las Vegas, Nevada 89101
Tel: 702.727.1400/Fax: 702.727.1401
Sheri.Thome@wilsonelser.com
James.Tucker@wilsonelser.com
CaraT.Laursen@wilsonelser.com
Attorneys for Defendant The State of Nevada, ex rel. its Department of Corrections

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' MOTION FOR SUMMARY JUDGMENT ON SOVEREIGN IMMUNITY**

Defendant The State of Nevada, *ex rel.* Nevada Department of Corrections ("NDOC"), by and through undersigned counsel, moves for summary judgment on Plaintiffs' claims under the Fair Labor Standards Act ("FLSA").

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

This Court should grant NDOC summary judgment based on Supreme Court precedent, the language of NRS 41.031, and Nevada's administrative scheme to resolve state employee compensation disputes.

First, nothing in Congress' Article I powers permits Congress to impose a FLSA private right of action against a non-consenting state. Four cases confirm this bedrock federalism principle: last month's *Allen v. Cooper*, 2020 U.S. LEXIS 1909 (Mar. 23, 2020) (No. 18-877), *Alden v. Maine*, 527

U.S. 706 (1999), *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

Second, Nevada has not waived its sovereign immunity to private suits under the FLSA. The relevant state statute, NRS 41.031, contains no "unequivocal express[ion]" of Nevada's intent to waive sovereign immunity to private suits for damages under the FLSA. *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 99 (1984). Forty years of precedent confirms NRS 41.031(1)'s purpose as a qualified waiver of immunity for torts. *Compare Hagblom v. State Director of Motor Vehicles*, 93 Nev. 599, 604, 571 P.2d 1172, 1176 (Nev. 1977) *with Franchise Tax Bd. v. Hyatt*, 133 Nev. 826, 835, 407 P.3d 717, 728 (2017), *rev'd on other grounds*, 139 S. Ct. 1485 (2019).

Third, this Court should not jettison Nevada's comprehensive administrative scheme to resolve state employee compensation disputes. Under Nevada law, employees must grieve their compensation disputes. Plaintiffs ignored Nevada's grievance procedure and seek an end-run around it through a private right of action under the FLSA. But that strategy is conclusively foreclosed by *Allen*.

For these reasons, this Court should grant NDOC summary judgment.

II. Procedural History

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. [ECF No. 95 - FAC.] NDOC asserted that it enjoyed sovereign immunity in its affirmative defenses and denied waiving sovereign immunity in the body of the answer. [ECF No. 175 - Answer to FAC, Third Aff. Def. and denial at ¶ 3].

The Ninth Circuit had no opportunity to consider *Allen*'s impact on this case. The Court adopted a categorical rule that a "State defendant that removes a case to federal court waives its immunity from suit on all federal-law claims brought by the plaintiff." *See Walden v. Nevada*, 945 F.3d 1088, 1095 (9th Cir. 2019) (amended op.). In so holding, the Ninth Circuit determined it had no interlocutory appellate jurisdiction over Nevada's assertion of its sovereign immunity from

liability. *Id.* at 1092 n.1. Several months later, the United States Supreme Court decided *Allen*.

III. Legal Discussion

A. State sovereign immunity is the rule, absent valid abrogation.

The Constitution recognizes the States as sovereign entities. *Alden*, 527 U.S. at 728; *Seminole Tribe,* 517 U.S. at 71 n.15. As the Supreme Court explained in *Allen*, the bar against an individual suing a non-consenting State extends well beyond the language of the Eleventh Amendment. *Allen*, 2020 U.S. LEXIS 1909 at *9. The "Court has long understood that Amendment to 'stand not so much for what it says' as for the broader 'presupposition of our constitutional structure which it confirms.'" *Id.* (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)).

"'[E]ach State is a sovereign entity in our federal system.'" *Allen*, 2020 U.S. LEXIS 1909 at *9 (quoting *Seminole Tribe*, 517 U.S. at 54). An essential attribute of that sovereignty is the constitutional right "'not to be amenable to the suit of an individual *without its consent*'" *Alden*, 527 U.S. at 716-17 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)) (italics in original); *see also Allen*, 2020 U.S. LEXIS 1909 at **9-10 (same). Sovereign immunity thus protects a State's treasury from private suit. *See Hess v. Port Auth. Trans–Hudson Corp.,* 513 U.S. 30, 39-40 (1994). The federal constitutional design reserves to sovereign States such as Nevada "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden*, 527 U.S. at 714; *see also Allen*, 2020 U.S. LEXIS 1909 at *9 (quoting *Blatchford*, 501 U.S. at 779, and stating that the "fundamental aspect of sovereignty constrains federal 'judicial authority'").

There are only two narrow exceptions to sovereign immunity. First, Congress can authorize private suits against a non-consenting State through appropriate legislation enacted within the scope of power granted to it under the Constitution. *City of Boerne v. Flores*, 521 U.S. 507, 519-20, 536 (1997). Second, a State may waive its sovereign immunity and consent to be sued. *Alden*, 527 U.S. at 755; *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999).

Neither of those two exceptions is present in this case. Accordingly, Plaintiffs' FLSA claims must be dismissed with prejudice.

B. Congress lacks the authority to authorize private suits under the FLSA against non-consenting States like Nevada.

Plaintiffs cannot establish that Congress has validly authorized private FLSA claims such as theirs to be brought against a non-consenting State like Nevada. Neither of the two essential conditions to establishing a valid authorization are met here. First, Congress did not enact the statute in question using "'unequivocal statutory language' abrogating the States' immunity from suit." *Allen*, 2020 U.S. LEXIS 1909 at *10 (quoting *Seminole Tribe*, 517 U.S. at 56). Second, no "'constitutional provisions [] allow Congress to have thus encroached on the [Nevada's] sovereignty. Not even the most crystalline abrogation can take effect unless it is a 'valid exercise of constitutional authority.'" *Allen*, 2020 U.S. LEXIS 1909 at *10 (quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 78 (2000)).

There is no "valid exercise of constitutional authority" that allows Congress to waive Nevada's sovereign immunity from the FLSA's provisions authorizing damages for proven violations. The commerce powers in Article I provide no such authority. Nor does the scope of congressional power under the Enforcement Clause of the Fourteenth Amendment, which was nowhere cited by Congress in the FLSA's passage, provide such authority. The FLSA thus fails to abrogate Nevada's sovereign immunity because Congress lacks any proper basis to do so under its limited authority to impose federal mandates on unwilling States.

1. The FLSA was enacted under the Commerce Clause in Article I, but Congress' right to impose a private right of action against non-consenting states has never been clear.

Since 1938, the FLSA has been one of the principal battlegrounds over congressional efforts to impose mandates on unwilling States. As originally enacted, the Act applied only to private-sector workers. *See* Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 3(d), 52 Stat. 1060 (excluding "any State or political subdivision of a State"). The Act was grounded in the power of Congress "to regulate commerce among the several States" to ameliorate burdens on "commerce and the free flow of goods in commerce." *Id.* at § 2. Three years later, the Supreme Court unanimously

concluded that the Commerce Clause allowed Congress to regulate the wages of private-sector workers, regardless of whether their activities or the goods they produced crossed State lines. *See United States v. Darby*, 312 U.S. 100, 118-20 (1941).

In the 1960s, Congress began its efforts to expand the FLSA to cover state employees. In 1961, the Act was amended to cover all employees of any "enterprise engaged in commerce or in the production of goods for commerce" within a list of certain categories. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 3(s), 75 Stat. 65, 66. In 1966, Congress for the first time attempted to cover certain state employees by expanding "enterprise" to apply to workers employed in hospitals, nursing homes and schools "regardless of whether" those employers were "public or private…." Fair Labor Standards Act Amendments of 1966, Pub. L. No. 89-601, § 203(s)(4), 80 Stat. 830, 832. Congress also amended the definition of "employer" to apply the Act "with respect to employees of a State, or a political subdivision thereof" that were employed in hospitals, nursing homes, and schools. *Id.* at § 203(d), 80 Stat. 831. Two years later, the Supreme Court upheld the application of the FLSA to the listed state employees as a valid exercise of Commerce Clause powers. *See Maryland v. Wirtz*, 392 U.S. 183, 198-99 (1968).

In 1973, the Court revisited the application of the FLSA to certain state employees. In *Employees v. Missouri Department of Public Health and Welfare*, the Court found that when Congress expanded the FLSA to apply to those state employees, it did not abrogate state sovereign immunity through "clear language." 411 U.S. 279, 285 (1973). The Court explained, "we have found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts." *Id.* Instead, Congress had left intact language in § 216(b) of the Act that made clear that States could not be sued. *Id.* As a result, the Court held that a State's immunity from suit in federal court under the Eleventh Amendment barred a private action by covered state workers under the Act. *Id.*

The next year, Congress responded by making three changes to the FLSA to attempt to apply the Act to non-consenting States. First, it amended the FLSA's definition of "employee" to include most of the public employees of a State. *See* Fair Labor Standards Amendments of 1974, 93 Pub. L.

No. 259, § 6(a)(2), 88 Stat. 55, 58-59 (codified at 29 U.S.C. § 203(e)(2)(c)). Second, the definition of "enterprise engaged in commerce or in the production of goods for commerce" was expanded to include "an activity of a public agency." *Id.* at § 6(a)(3), 88 Stat. 59-60 (codified at 29 U.S.C. § 203(e)(3)(s)). Third, Congress amended § 216(b) of the Act by changing "in any court of competent jurisdiction" to "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." *Id.* at 6(d)(1), 88 Stat. 61. This effort to apply the FLSA to States again was made under the commerce powers of Article I of the Constitution. *See* 29 U.S.C. § 202. The amending language was "among the first statutory enactments purporting in express terms to subject nonconsenting States to private suits." *Alden*, 527 U.S. at 744.

The 1974 FLSA amendments marked a substantial escalation of attempts by Congress to try to subject States like Nevada to private suits, departing from "'almost two centuries of apparent congressional avoidance of the practice.'" *Id.* (quoting *Printz v. United States*, 521 U.S. 898, 918 (1997)). For the first time, the FLSA imposed "upon almost all public employment the minimum wage and maximum hour requirements previously restricted to employees engaged in interstate commerce." *National League of Cities v. Usery*, 426 U.S. 833, 839 (1976). This dramatic expansion of the Act under Article I commerce powers created requirements for state workers "essentially identical to those imposed upon private employers…" *Id.* Those changes were a high-water mark in the FLSA's departures from well-accepted norms of respecting State sovereignty.

National League of Cities overruled *Wirtz*, which had been decided just eight years earlier. 426 U.S. at 855. The Court agreed with the States' contention that "when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution." *Id.* at 841. The Court found that "[t]his exercise of congressional authority does not comport with the federal system of government embodied in the Constitution." *Id.* at 852. The FLSA, as applied to the States, was outside congressional Commerce Clause powers to the extent that it "directly displace[d] the States' freedom to structure integral operations in areas of traditional governmental functions…" *Id.*

Just nine years later, the Court found that determining which governmental functions were "integral" or "traditional" to trigger a States' immunity to the FLSA's minimum wage and overtime requirements was an unworkable standard. *Garcia v. San Antonio Metropolitan Transit Authority*. *See* 469 U.S. 528, 530-31, 546-47 (1985). The Court declined to redefine the limitations that State sovereign immunity imposed upon congressional action under the Commerce Clause. *See id.* at 547-48. Instead, *Garcia* concluded that the States could sufficiently protect their immunity through their ability to exercise "their influence" through the federal legislative process. *Id.* at 552-54. "The result of *Garcia* was to bring all employees of the states and their political subdivisions within the full coverage of the FLSA." *Gilbreath v. Cutter Biolagical, Inc.*, 931 F.2d 1320, 1324 (9th Cir. 1991).

2. *Allen* conclusively establishes that the commerce powers in Article I do not allow Congress to impose a private right of action under the FLSA on non-consenting States.

This term, the Supreme Court resolved, once and for all, the question: Is Congress empowered by the Commerce Clause of Article I to abrogate State immunity to the FLSA? It is not, according to a unanimous Court.[1] *Allen* completes the trilogy of cases that began with *Seminole Tribe* in 1996 and was followed by *Alden* in 1999. It is now well-established that in attempting to use the Commerce Clause to apply the FLSA to non-consenting States, Congress exceeded its constitutional authority and intruded on the sovereignty of the States to remain free of such federal encroachments.

In *Allen*, the Supreme Court reaffirmed that Article I provides Congress with no authority to abrogate a State's sovereign immunity. Instead, the Court found that only the Bankruptcy Clause of Article I compels the States to be hauled into federal court. *See* 2020 U.S. LEXIS 1909 at **13-14 (citing *Central Va. Cmty. v. Katz*, 546 U.S. 356, 359 (2006)). However, that is not because the Bankruptcy Clause abrogates the States' sovereign immunity. Rather, the Supreme Court "decided

[1] Justices Breyer and Ginsburg concurred, finding that *Seminole Tribe* and its sovereign immunity progeny dictated that conclusion. *See* 2020 U.S. LEXIS 1909 at *32 (Breyer, J., concurring). Notably, Justice Breyer acknowledged that any federal efforts to abrogate sovereign immunity rested not in the Commerce Clause, but in § 5 of the Fourteenth Amendment. *See id.* at **31-32.

that no congressional abrogation was needed because the States had already 'agreed in the plan of the [Constitutional] Convention [of 1787] not to assert any sovereign immunity defense' in bankruptcy proceedings." *Allen,* 2020 U.S. LEXIS 1909 at *16 (quoting *Katz*, 546 U.S. at 377).

If the broad authority granted to Congress in the Intellectual Property Clause to secure uniformity of copyrights and patents is insufficient to sustain federal mandates imposed on non-consenting States,[2] then none of the other Article I powers can possibly do so outside of the bankruptcy arena. *Allen* firmly shuts the door on congressional attempts to abrogate the sovereign immunity of the States through the Commerce Clause. Thus, as the Court earlier found in *Alden*, Congress could not constitutionally abrogate the States' sovereign immunity to the FLSA.

3. *Alden* holds that Congress lacks the authority under Article I to create jurisdiction in any court for FLSA claims against a non-consenting State

In *Alden*, a group of state-employed probation officers sued the State of Maine in federal court, alleging violations of the FLSA and seeking overtime compensation and liquidated damages. 527 U.S. at 711-12. While their suit was pending, the Supreme Court decided *Seminole Tribe*, "which made it clear that Congress lacks power under Article I" of the Constitution "to abrogate the States' sovereign immunity from suits commenced or prosecuted in the federal courts." *Id.* at 712. The federal district court responded by dismissing the FLSA claims of the *Alden* plaintiffs. *Id.* The plaintiffs then filed the same action in state court. *Id.* The state court dismissed their lawsuit on the basis of sovereign immunity, and the Maine Supreme Judicial Court affirmed. *Id.*

On appeal, the Supreme Court concluded that *Seminole Tribe*'s limitations on congressional commerce powers to impose federal jurisdiction on the States was equally applicable to state court jurisdiction. 527 U.S. at 711. In particular, 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 under Article I to subject non-consenting states to suits in their own courts. *Id*. at 754. 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"

[2] *See Allen*, 2020 U.S. LEXIS 1909 (striking down the Copyright Remedy Clarification Act of 1990); *Florida Prepaid*, 527 U.S. at 627 (striking down the Patent and Plant Variety Protection Clarification Act of 1992).

of the Supreme Court. *Id*. at 713. "When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States." *Id.* at 732. The States retain their "immunity in sweeping terms, without reference to whether the suit was prosecuted in state or federal court." *Id.* at 745.

Alden explains why the monetary demands made by Plaintiffs in FLSA actions such as this necessitate that States retain broad immunity from liability from federal claims. A contrary conclusion would force a State to "defend or default" and "face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf." *Id.* at 749. In the process, "Private suits against nonconsenting States – especially suits for monetary damages – may threaten the financial integrity of the States." *Id.* at 750.

Alden clarifies that in enacting the FLSA, Congress did not constitutionally abrogate the States' immunity from suit in federal court or immunity from liability under the statute. *Id.* at 712. As a result, the combined effect of *Seminole Tribe* and *Alden* is to make it black-letter constitutional law that a State enjoys sovereign immunity from FLSA claims in any court, including both federal court and its own state courts, unless it expressly waives that immunity. Consequently, Plaintiffs cannot pursue their FLSA claims against the State of Nevada under the first exception to sovereign immunity.

4. The Circuit Courts agree that Section 5 of the Fourteenth Amendment does not empower Congress to abrogate a State's sovereign immunity from FLSA liability.

Because this case does not implicate the Bankruptcy Clause, and the Supreme Court has held that the rest of Article I does not permit Congress to abrogate State sovereign immunity, the only remaining basis for an FLSA suit against Nevada is Section 5 of the Fourteenth Amendment. If the FLSA was an exercise of Congress' power derived from Section 5, then it could—in theory—be a valid means of stripping Nevada of immunity. *See Allen*, 2020 U.S. LEXIS 1909 at **17-19. However—as every federal court of appeals to consider the question has held – the FLSA was not an

exercise of Congress' Section 5 power. Congress may abrogate state sovereign immunity under Section 5 only if the abrogation "sufficiently connects to conduct courts have held Section 1 [of the Fourteenth Amendment] to proscribe." *Id.* Six circuits have considered whether the FLSA sufficiently connects to the Fourteenth Amendment's proscriptions, and six circuits have concluded that it does not.[3] If Plaintiffs raise this argument, this Court should reject it, in accordance with that unanimous authority.

B. Nevada has not waived its sovereign immunity from private FLSA actions.

Nevada retains its immunity unless Plaintiffs can demonstrate that it has somehow waived that immunity. As this Court recognized in its March 1, 2018 Order, 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…" [ECF No. 147 at 2 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974))]. Plaintiffs cannot meet their heavy burden.

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 holding, sovereign immunity bars federal FLSA claims against the State of Nevada in its own courts.

Based on these observations, this 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

[3] *See Mich. Corr. Org. v. Mich. Dep't. of Corr.*, 774 F.3d 895, 901-02 (6th Cir. 2014); *Bergemann v. R.I. Dep't of Envtl. Mgmt.*, 665 F.3d 336, 339 (1st Cir. 2011); *Keeler v. Fla. Dep't of Health, Div. of Disability Determinations*, 397 F. App'x 579, 582 (11th Cir. 2010) (unpublished); *Abril v. Virginia*, 145 F.3d 182, 186 (4th Cir. 1998); *Raper v. Iowa*, 115 F.3d 623, 624 (8th Cir. 1997); *Aaron v. Kansas*, 115 F.3d 813, 817 (10th Cir. 1997).

from this record. [ECF No. 147 at 1-2.] Specifically, this 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 this 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…

[ECF No. 147 at 2 (emphasis added)]. The State agrees with this Court's conclusions, which are equally applicable to this motion.

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. 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), and nine years before Congress for the first time attempted to amend the Act's definition of "employer" to include certain State employees. *See* 93 Pub. L. No. 259, § 29(a), 88 Stat. at 76. Thus, to accept Plaintiffs' argument (made in their previous briefing) that the text of NRS 41.031(1) is a blanket waiver [ECF No. 149 at 2-4] 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 enact in the future. Plaintiffs' interpretation of NRS 41.031(1) is unpersuasive and incorrect.

Plaintiffs' blanket waiver interpretation is inconsistent with how Nevada's Supreme Court has interpreted NRS 41.031(1). "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." *Clark Cty. Sch. Dist. v. Richardson Const., Inc.*, 123 Nev. 382, 389, 168 P.3d 87, 92 (Nev. 2007). No broad waiver was specified nor intended. Nevada adopted this limited waiver to provide a state counterpart to the Federal Tort Claims Act. *Martinez v. Maruszczak*, 123 Nev. 433, 444, 168 P.3d 720, 727-28 (Nev. 2007). "The state's object of NRS

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." *Turner v. Staggs*, 89 Nev. 230, 235, 510 P.2d 879, 882 (Nev. 1973); *see also Glover-Armont v. Cargile*, 134 Nev. Adv. Op. 49, 54, 426 P.3d 45 (Nev. App. 2018) (same*); Jimenez v. State*, 90 Nev. 204, 207, 644 P.2d 1023, 1025 (Nev. 1982) (same).

In 1977, Nevada's Supreme Court explained the statute's purpose as a qualified waiver of immunity for torts. "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. 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." *Hagblom*, 93 Nev. at 604, 571 P.2d at 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***. *Hyatt*, 133 Nev. at 835, 407 P.3d at 728 (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.

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 also has not created a state-law private right of action to sue for unpaid compensation under the federal FLSA. In their earlier briefing before this Court, Plaintiffs included a generic reference to NRS Chapter 284. [ECF No. 149 at 2.] In their First Amended Complaint, Plaintiffs specifically referenced NRS § 284.180. [ECF No. 95, FAC at ¶¶ 42, 87.] 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. [ECF No. 105 at 4.] 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.[4] *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

[4] This Court reached the same conclusion in its March 26, 2018 Order. [ECF No. 166 at 15-16.]

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 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 private suit 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. Where state law follows federal law, the result is that 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 sum, there is no wavier of sovereign immunity "by the most express language possible" in Nevada law. *Edelman*, 415 U.S. at 673. [ECF No. 147 at 2.] Consequently, NDOC is entitled to summary judgment and all of Plaintiffs' remaining claims under the FLSA must be dismissed with prejudice.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

IV. Conclusion

NDOC respectfully requests that its Motion for Summary Judgment on Sovereign Immunity be GRANTED. Because all of Plaintiffs' remaining claims are barred by sovereign immunity, this lawsuit should be dismissed with prejudice.

DATED this 8th day of April, 2020.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

BY: */s/ James T. Tucker*

James T. Tucker
Nevada Bar. No. (12507)
300 South 4th Street - 11th Floor
Las Vegas, NV 89101-6014
Attorneys for Defendants 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 the 8th day of April, 2020, I electronically filed and served a true and correct copy of the foregoing **DEFENDANT STATE OF NEVADA *EX REL.* DEPARTMENT OF CORRECTIONS' MOTION FOR SUMMARY JUDGMENT ON SOVEREIGN IMMUNITY** 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

Christian Gabroy, Esq.
Kaine Messer, Esq.
GABROY LAW OFFICES
The District at Green Valley Ranch
170 South Green Valley Parkway, Suite 280
Henderson, NV 89012
Telephone: (702) 259-7777
Fax: (702) 259-7704
Attorneys for Plaintiffs

By: */s/ Lani Maile*
An Employee of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

Sheri M. Thome, Esq.
Nevada Bar No. 008657
James T. Tucker, Esq.
Nevada Bar No. 012507
Cara T. Laursen, Esq.
Nevada Nar No. 014563
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP
300 South 4th Street - 11th Floor
Las Vegas, NV 89101-6014
Telephone: (702) 727-1400
Facsimile: (702) 727-1401
Sheri.Thome@wilsonelser.com
James.Tucker@wilsonelser.com
CaraT.Laursen@wilsonelser.com
Attorneys for Defendants The State of Nevada, ex rel. its Department of Corrections

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' MOTION FOR SUMMARY JUDGMENT ON THE MERITS OF PLAINTIFFS' FLSA CLAIMS**

Defendant The State of Nevada, *ex rel.* Nevada Department of Corrections ("NDOC"), by and through undersigned counsel, moves for summary judgment on the merits of Plaintiffs' claims under the Fair Labor Standards Act ("FLSA").[1]

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

That the FLSA does not require omniscience on the employer's part is firmly entrenched in Ninth Circuit precedent. *Forrester v. Roth's I.G.A. Foodliner, Inc*., 646 F.2d 413 (9th Cir. 1981). But, that is what Plaintiffs' FLSA theory requires this Court to accept.

[1] NDOC respectfully submits that the Court need not even reach the merits of Plaintiffs' FLSA claims, which are barred by Nevada's sovereign immunity under the authority of *Allen v. Cooper*, 2020 U.S. LEXIS 1909 (Mar. 24, 2020) (No. 18-877), *Alden v. Maine*, 527 U.S. 706 (1999), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

"Every day is different…[e]very different post is different."[2] These same plaintiffs testified that, regardless of post, the time it took to complete even common tasks such as getting through operations could take mere seconds depending on the day.[3] NDOC has no way of knowing *ex ante* on any particular day that a particular plaintiff may work overtime compensable under the FLSA. Plaintiffs' act of discarding NDOC's administrative rules and procedures for reporting overtime bars Plaintiffs' FLSA claims under *Forrester*, *supra.*

NDOC also did not sit idly by and accept uncompensated work. Plaintiffs' sworn testimony confirms that NDOC affirmatively paid for all overtime requested by Plaintiffs. Plaintiffs cannot, under *Forrester*, build an FLSA case in an infinitely variable work environment by violating NDOC's policies and procedures by failing to accurately and timely report the hours they claimed they worked, including any alleged overtime, in violation of NDOC's policies and procedures.

Accordingly, NDOC is entitled to summary judgment on Plaintiffs' FLSA claims, which are barred by *Forrester* and its progeny. Those claims should be dismissed with prejudice.

II. Statement of Undisputed Facts

A. NDOC's comprehensive regulatory and administrative system for overtime

1. The State of Nevada has a comprehensive regulatory and administrative system in place for overtime and overtime alternatives at NDOC. *See*, *e.g.*, Ex. K, A.R. 320; Ex. L, Variable Work Schedule Request; Ex. M, Election of Compensatory Time; Ex. Q, A.R. 326; Ex. S, Documents Acknowledging Overtime Requirements; Ex. T, State of Nevada Employee Handbook Excerpts; Ex. GG, A.R. 322.

2. The overarching principle guiding the use of overtime within NDOC is for Wardens and Facility Managers "to ensure there is sufficient staff on duty to safely operate their institutions and facilities." [Ex. Q, A.R. 326.] Thus, the safety of the public, the inmates, and Corrections employees drives overtime decisions. [*See id.*]

---

[2] Exhibit HH Testimony of Plaintiff, Francisco Bautista at 31:8-18.

[3] Exhibit O Testimony of Plaintiff, Timothy Carlman, at 88:18-89:5.

3. One of the essential functions of the Correctional Officer position is that "Extended hours may be required on short notice." [Ex. R, Correctional Officer Position Essential Functions; *see also* Ex. K, A.R. 320.01(4) ("As a condition of employment, employees may be required to work overtime as required by a supervisor and as stated in AR 326, Posting of Shifts/Overtime."); Ex. Q, A.R. 326.03(6) ("If overtime is required to maintain a safe and secure operation and insufficient staff voluntarily agrees to work, mandatory overtime will be initiated.").]

4. Every Corrections employee, including each Plaintiff, is required to sign an acknowledgment that one of the essential functions of their position is that "Extended hours may be required on short notice." [*See* Ex. S, Documents Acknowledging A.R. 320, at Table (summarizing documents attached to Ex. S that include the Plaintiffs' signed acknowledgments, such as the acknowledgment of Aaron Dicus at D002326).][4]

5. "Overtime must be authorized by the Director, appropriate Deputy Director, Division Head, Warden, or their designees." [Ex. K, A.R. 320.01(1).]

B. NDOC Employee Requirements for Accurately Reporting Overtime

6. Each Plaintiff is responsible for truthfully reporting the time they work, including all overtime. Specifically, "an employee shall provide an accurate accounting of the hours worked and leave used during a pay period in the NEATS Timekeeping System ("NEATS"), to include the specific times at which their shift starts and ends and regular days off." [Ex. Q, A.R. 326.06(1).]

7. NDOC'S pay reporting is an "exception" reporting system. NEATS assumes that an employee has worked all hours in their scheduled shift, unless the employee has reported an exception. "Requests for Overtime must be submitted and approved on the Authorization for Leave and Overtime Request Form DOC-1000 or in NEATS as directed by the Human Resource Administrator." [Ex. GG, A.R. 322.08(2).]

[4] For the sake of brevity in light of the voluminous record, examples of documentation by Plaintiffs that they have received, read, and understand NDOC's overtime requirements are provided from the personnel file of Aaron Dicus. A table summarizing the documentation for all of the Plaintiffs is provided in a Table at the beginning of Exhibit S, and is followed by the actual documentation for each of the Plaintiffs.

8. If there is an exception because of overtime for a non-exempt employee, that employee "must document this time on an Authorization for Leave and Overtime Request form (DOC-1000)." [Ex. K, A.R. 320.01(2).]

9. Employee exceptions are reported on timesheets, which the employee is required to input and submit into NEATS "at the conclusion of each reporting cycle (pay period) no later than 12 PM, Wednesday, of the non-pay week for each pay period." [Ex. Q, A.R. 326.06(4).]

10. Employees are subject to discipline under A.R. 339 if they falsify their timesheets. [*See* Ex. Q, A.R. 326.06(6).]

C. Overtime Eligibility depends on if a Plaintiff is on a Variable Schedule or has elected to Accept Compensatory Time in Lieu of Overtime Wages

11. Eligibility for overtime for a particular shift depends on whether the employee has opted to work a standard workweek or a variable (innovative) work schedule using either a 40-hour or 80-hour variable. [*See* Ex. K, A.R. 320.01(5)-(6).]

12. Employees who work a standard workweek are eligible for overtime if they work more than eight hours in one calendar day. [*Id.* at A.R. 320.01(5).]

13. Employees working a variable (or innovative) work schedule "do not accrue overtime until either (1) they have worked the 41st hour if they signed a 40-hour variable agreement or (2) they have worked the 81st hour, if they have signed the 80-hour variable agreement." [*Id.* at A.R. 320.01(6); *see also* Ex. L, Variable Work Schedule Request.]

14. Overtime eligibility also can depend on whether a particular employee has elected to accrue up to 120 hours of compensatory time off in lieu of a cash payment pursuant to 29 C.F.R. § 553.23. [*See* Ex. M, Election of Compensatory Time.]

15. Exhibit N demonstrates the many variations in work schedule and compensatory time choices among just the seven named Plaintiffs:

/ / /

/ / /

/ / /

Plaintiff	Type of Variable Work Schedule That Plaintiff Opted			Compensatory Time Opted in lieu of Cash under 29 C.F.R. § 553.23		
	40 hours	80 hours	Both	Yes	No	Both
Aaron Dicus		X		X		
Nathan Echeverria			X			X
Brent Everist			X			X
Timothy Ridenour			X	X		
Daniel Tracy			X			X
Donald Walden, Jr.			X	X		
Travis Zufelt		X			X	

16. Although all seven named Plaintiffs worked a variable (innovative) schedule, just two, Plaintiffs Dicus and Zufelt, used the same type of variable work schedule throughout their employment; the remaining five named Plaintiffs (Echeverria, Everist, Ridenour, Tracy, and Walden) switched between the 40-variable and 80-variable schedules multiple times. [*See* Exhibit N, Variations in Plaintiffs Work Schedules and Compensatory Time.]

17. Three of the named Plaintiffs (Dicus, Ridenour, and Walden) opted to receive compensatory time throughout their employment and three (Echeverria, Everist, and Tracy) switched between the options one or more times. Only one named Plaintiff (Zufelt) opted not to participate. [*See* Exhibit N, Variations in Plaintiffs Work Schedules and Compensatory Time.]

18. Even if claimed time is compensable, Plaintiffs may not be entitled to any overtime payments depending on their work schedule arrangement. [*See* Ex. K, A.R. 320.01; Ex. L, Variable Work Schedule Request; Ex. M, Election of Compensatory Time; Exhibit N, Variations in Plaintiffs Work Schedules and Compensatory Time.]

D. Plaintiffs' Acknowledgments of Receiving, Reading, and Understanding the Requirements for Overtime and How to Request it

19. Each one of the Plaintiffs has acknowledged on multiple occasions that they received, read, and understood these procedures for when they are eligible for overtime and how to report it. [*See* Ex. S, Documents Acknowledging Overtime Requirements.]

20. At the time of hire, a New Employee Checklist was completed for each Plaintiff to include going over the Administrative Regulations. [*See* Ex. S, Documents Acknowledging Overtime Requirements, Table; *see also* D002324 (Dicus example).]

21. Plaintiffs initialed that they had received and reviewed the State of Nevada Employee Handbook, which includes a summary of the policy requiring accurate reporting of all hours and overtime worked. [*See* Ex. S, Documents Acknowledging Overtime Requirements, Table; *see also* D002336 (Dicus example); Ex. T, State of Nevada Employee Handbook Excerpts.]

22. Although NDOC has no records indicating that two of the named Plaintiffs, Walden and Zufelt, initialed receiving and reviewing the Handbook, all of the Plaintiffs including Walden and Zufelt acknowledged receiving, reviewing and understanding NDOC's overtime requirements and procedures through other documents. [*See* Ex. S, Documents Acknowledging Overtime Requirements.] The Handbook also is available on the Internet from Human Resources at http://hr.nv.gov/uploadedFiles/hrnvgov/Content/Resources/Publications/Employee_Handbook.pdf.

23. On one or more occasions, Plaintiffs signed and dated an Administrative Regulations Acknowledgment in which they acknowledged, "It is my responsibility to read and familiarize myself" with regulations including A.R. 320 and A.R. 339. [*See* Ex. S, Documents Acknowledging Overtime Requirements, Table; *see also* D002303, D002335, D002376 (Dicus examples).]

24. Throughout their employment, on multiple occasions, each Plaintiff signed and dated the Employee Work Performance Standards Form for their position including Element #3, which provides that they "Have proficient knowledge of A.R.'s, I.P.'s and Administrative Directives." [*See* Ex. S, Documents Acknowledging Overtime Requirements, Table; *see also* D002305-2307, D002321-2323, D002439-2441 (Dicus examples).]

25. Every time each of the Plaintiffs received their written appraisal, they again acknowledged and were rated on whether they had proficient knowledge of the Administrative Regulations, including those pertaining to accurately reporting overtime.[5]

E. Plaintiffs Request and Receive Compensatory Time When They Work Longer Than Scheduled

26. Plaintiffs who opt into the program receive compensatory time, or "comp time," in

[5] *See* Ex. S, Documents Acknowledging Overtime Requirements, Table; *see also* D002259-2260, D002261-2264, D00269-2272, D002403-2406, D002407-2410, D002411-2414, D002415-2418, D002419-2422, D002423-2426, D002427-2430, D002431-2434, D002435-2438 (Dicus examples).

lieu of overtime wages.[6]

27. Compensatory time works both ways. When employees leave early, they do not notate that on their time report and are still paid for their full shift. [7]

28. Supervisors rely upon employees to tell them the amount of comp time to which they believe they are entitled for working longer than their scheduled shift. Paul Kluever's supervisors took him at his word on his "guesstimate" of how much comp time he was owed. [Ex. II, Kluever Dep., 68:23-69:5.]

29. Jason Hanski explained, "…. There have been times where I was relieved late and maybe 15 to 20 minutes late and talked to my supervisor directly. Now, when I say this, this is something that happened a few good years ago, and the supervisor would say, oh, okay, I'll tell you what … I'll let you go 15 or 20 minutes early in exchange for that." [Ex. JJ, Hanski Dep., 125:22-126:3.]

F. Plaintiffs Were Paid Overtime When They Were Eligible and They Complied with NDOC's Reporting Requirements

30. Nearly all of the Plaintiffs took advantage of overtime opportunities. Payroll data for 563 NDOC employees for the period of 12/31/2007 to 2/15/2016 was analyzed and compared with timekeeping data entered into NEATS. [*See* Ex. F, Crandall Decl. ¶ 7.] "Of the 555 Correctional Officers in the data, 529 or over 95% recorded some overtime totaling 125,726.9 hours." [*Id.* at ¶ 32.]

31. According to that analysis, "the average total Overtime hours recorded was 226.5 hours," with the top three officers each reporting more than 2200 hours. [*Id.*] The average total dollars paid in overtime was $7,746. [*Id.* at ¶ 33.] "Across all [Correction Officer] periods, overtime was recorded on 10,904 of the 51,959 pay periods or 21.0%." [*Id.* at ¶ 34.] Every NDOC facility paid overtime. [*Id.* at ¶ 36.] The reasons for the overtime varied considerably between

---

[6] *See* Exhibit N, Variations in Plaintiffs Work Schedules and Compensatory Time (identifying which of the seven named Plaintiffs have opted to receive compensatory time).

[7] Ex. KK, Banks Dep., 54:24-55:19; Ex. HH, Bautista Dep., 26:18-25; Ex. P, Riggs Dep., 31:21-32:14.

facilities and employees. [*See id.* at ¶¶ 37-39.]

32. All seven of the named Plaintiffs were paid overtime, as shown by each Plaintiff's Employee Paycheck Analysis.[8]

33. All of the opt-in Plaintiffs who were deposed likewise were paid overtime.[9] When they complied with A.R. 320.01(2) by submitting an Authorization for Leave and Overtime Request Form ("Form DOC-1000"), their requests were approved and they were paid for that overtime.[10]

34. For example, on May 20, 2014, Plaintiff Echeverria completed a Form DOC-1000 requesting one quarter hour of leave after he apparently worked 15 minutes past his scheduled shift ending at 1:00 p.m. His request for overtime was approved. [Ex. F, Nathan Echeverria Employee Personnel File, D002741.]

35. Similarly, "Plaintiff Walden received 15 minutes of Overtime on November 26, 2010 and the timesheet note associated with the entry was 'HOLIDAY WORKED 15 MINUTES OF OVERTIME FOR BEING RELIEVED LATE.'" [Ex. F, Crandall Decl. at ¶ 31.]

36. Likewise, Plaintiffs Everist,[11] Ridenour,[12] and Tracy[13] were approved for multiple instances of overtime after submitting their Form DOC-1000s.

---

[8] *See* State of Nevada Human Resources Data Warehouse, Employee Paycheck Analysis, Ex. U, D204-209 (Dicus); Ex. V, D390-396 (Echeverria); Ex. W, Brent Everist Employee Personnel File, D685-691 (Everist); Ex. X, Timothy Ridenour Employee Personnel File, D937-942 (Ridenour); Ex. Y, Daniel Tracy Employee Personnel File, D1177-1191 (Tracy); Ex. Z, Donald Walden, Jr. Employee Personnel File, D1438-1445 (Walden); Ex. AA, Travis Zufelt Employee Personnel File, D1797-1801 (Zufelt).

[9] *See* Ex. BB, State of Nevada Human Resources Data Warehouse, Employee Paycheck Analysis, D007386-007395 (Tyning), D007406-007415 (Valdez), D005676-005684 (Arias), D005695-005703 (Arnold), D005968-005975 (Carlman), D006145-6152 (Day), D006586-006595 (Jones), D006656-006659 (Krol), D006660-006669 (Lai), D006680-006687 (Ledingham), D006889-006898 (Natali), D007029-007037 (Radke), D007240-007249 (Shultz), D009645-009654 (Tremblay), D007656-007664 (Allen), D008421-008429 (Hanski), D008678-008688 (Kluever), D008796-008806 (Maguire), D009283-009288 (Riggs), D009317-009322 (Rocho).

[10] *See* Ex. JJ, Hanski Dep., 68:15-69:8; Ex. MM, Jones Dep. 44:3-10; Ex. NN, Lai Dep., 24:24-25:2, 29:24-30:7, 34:6-15; Ex. OO, Ledingham Dep., 58:18-59:7; Ex. PP, Ridenour Dep., 44:25-45:14; Ex. P, Riggs Dep., 84:24-85:4, 97:11-16; Ex. QQ, Rocho Dep., 37:12-14; Ex. RR, Tremblay Dep., 37:12-24; Ex. SS, Tyning Dep., 27:3-6.

[11] *See* Ex. CC, D2989-3013, 3021-3022, 3025, 3028-3029, 3035, 3039-3042, 3051-3052, 3057, 3069.

[12] *See* Ex. DD, D3239, 3411-3414.

[13] *See* Ex. EE, D3774-3776.

37. What is particularly notable about the NEATS data is that over ten percent of the segments recorded by Correctional Officers represented "time at or below an hour in duration," showing that even overtime of short duration was recorded. [Ex. F, Crandall Decl. at ¶ 40.]

G. Supervisors Put in Some Overtime Requests for Plaintiffs

38. Supervisors prepare some overtime requests for Plaintiffs as part of their reports, such as when Corrections Officers have to respond to security incidents that extend their shift.[14]

39. Andre Natali testified, "And if you respond to [a security] incident everybody's name has to be taken down, whoever comes into the incident area, whoever leaves, what inmates were involved, the location, the time, and the place. All that stuff is put into reports. And generally I would come back to work that night and have one waiting for me. I didn't even have to request it…. [A] DOC-1000." [Ex. FF, Natali Dep. 41:3-12.]

H. Plaintiffs Are Paid Overtime or Comp Time When They Request It

40. Plaintiffs consistently are paid overtime or given comp time when they request it.[15]

41. Donald Riggs "always got paid for my time. Sometimes you were offered time off in lieu of being paid … I always got my overtime…. I would file the Doc 1000 and turn it in to my supervisor…. ***I have never seen a form that I turned in rejected***." [Ex. P, Riggs Dep., 31:13-20, 33:5-15 (emphasis added); *see also id.* at 84:24-85:4 (same).]

42. Jan Shultz admitted, "***Whenever I asked for it, I would get it***." There has never been an occasion when he requested it and did not receive it. [Shultz Dep., 46:14-16 (emphasis added).]

43. Andre Natali's testimony highlights the absence of any unified policy or practice by NDOC to deny Correctional Officers overtime:

> Q: …Have you ever requested overtime pay or comp time for that time [when your relief is late]?

---

[14] *See*, *e.g.*, Ex. O, Carlman Dep., 18:24-19:9; Ex. II, Kluever Dep., 62:7-17; Ex. OO, Ledingham Dep., 40:18-41:17; Ex. FF, Natali Dep. 41:3-12; Ex. TT, Radke Dep., 58:8-59:6; Ex. QQ, Rocho Dep., 32:6-11; Ex. UU, Shultz Dep., 43:12-18; Ex. VV, Tracy Dep. 69:16-18.

[15] *See*, *e.g.*, Ex.WW, Arnold Dep. 49:3-7; Ex. KK, Banks Dep., 45:2-14; Ex. JJ, Hanski Dep., 120:13-122:7; Ex. GG, Jones Dep., 88:2-9; Ex. II, Kluever Dep., 59:16-60:13, 61:3-24, 62:25-63:7; Ex.NN, Lai Dep., 25:13-26:3; Ex. OO, Ledingham Dep., 59:3-7; Ex. SS, Tyning Dep., 44:3-17, 45:20-46:1.

A: Sure.

Q: And have you been paid for it or given comp time for it?

A: ***I would have to tell you that 99 percent of the times, yes, I was***. There was only a couple of times that I caught attitude from somebody. I was like, you know what, I don't feel like arguing with you about it so I would have to say it's, yes, I have been when I requested it, yes. [Ex. FF, Natali Dep., 62:1-11 (emphasis added).]

I. Plaintiffs have not submitted requests for most overtime they claim to be owed

44. The Plaintiffs' sworn testimony establishes that in the overwhelming majority of the instances in which they allege that they have not been paid overtime or other compensation they claim they are owed, it is because they did not follow NDOC's policies and procedures and submit an overtime request on a DOC-1000.

45. Plaintiffs have not submitted overtime requests to NDOC for the activities for which they are seeking compensation in this litigation.[16]

46. Many of the Plaintiffs have not applied for overtime for responding to security incidents when their supervisor does not do it for them.[17]

47. Similarly, many of the Plaintiffs have not applied for overtime for being relieved late,[18] with some Plaintiffs like Timothy Carlman admitting they have never reported it to their supervisors.[19]

---

[16] *See*, *e.g.*, Ex. XX, Allen Dep., 27:19-24, 36:17-37:4; Ex. YY, Arias Dep., 29:20-31:17; Ex. KK, Banks Dep., 17:23-25, 18:19-22, 19:2-12, 41:9-22; Ex. ZZ, Baros Dep., 44:6-13, 57:18-58:1; Ex. HH, Bautista Dep., 26:18-27:7, 56:13-20; Ex. O, Carlman Dep., 17:5-14, 19:23-20:4; Ex. AAA, Day Dep., 28:2-10; Ex. BBB, Dicus Dep., 39:4-9; Ex. CCC, Echeverria Dep., 41:14-17, 43:3-6; Ex. JJ, Hanski Dep., 69:13-16, 122:21-123:13; Ex. MM, Jones Dep., 31:25-32:2; Ex. II, Kluever Dep., 64:1-5; Ex. DDD, Krol Dep., 36:5-6; Ex. NN, Lai Dep., 22:6-13, 23:8-15, 24:10-16; Ex. OO, Ledingham Dep., 26:20-27:3, 30:2-9; Ex. FF, Natali Dep. 18:15-17, 23:4-6, 60:14-17, 72:9-25; Ex. TT, Radke Dep., 24:21-23, 36:15-37:3, 44:8-25, 47:9-18; Ex. PP, Ridenour Dep., 35:6-13; Ex. QQ, Rocho Dep., 16:4-6, 19:6-7; Ex. VV, Tracy Dep., 48:4-8; Ex. RR, Tremblay Dep., 28:17-24; Ex. SS, Tyning Dep., 19:19-20:1, 20:6-8, 25:14-17; Ex. EEE, Walden Dep., 44:24-45:10, 47:17-18; Ex. FFF, Zufelt Dep., 51:6-21.

[17] *See*, *e.g.*, Ex. ZZ, Baros Dep., 26:2-22, 27:23-28:13, 36:12-37:8; Ex. HH, Bautista Dep., 24:24-25:5; Ex. O, Carlman Dep., 25:24-26:15; Ex. BBB, Dicus Dep., 45:22-46:14; Ex. DDD, Krol Dep., 29:8-12; Ex. OO, Ledingham Dep., 42:2-4; Ex. QQ, Rocho Dep., 26:12-14; Ex. UU, Shultz Dep., 43:8-23; Ex. GGG, Valdez Dep., 30:20-31:35; Ex. FFF, Zufelt Dep., 50:15-51:21.

[18] *See*, *e.g.*, Ex. XX, Allen Dep., 36:17-37:4; Ex. YY, Arias Dep., 29:20-30:19; Ex. ZZ, Baros Dep., 57:18-58:1; Ex. O, Carlman Dep., 19:23-20:1, 40:10-41:7; Ex. DDD, Krol Dep., 36:2-4; Ex. FF, Natali Dep., 60:14-17.

J. Plaintiffs have not complied with administrative procedures for appealing any overtime requests they have made that have been denied

48. Administrative law governs the rate of overtime pay for NDOC employees. [*See* NAC 284.250(1).]

49. 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).]

50. 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.

51. Plaintiffs admit that they have not followed the procedure for appealing overtime decisions by speaking to their supervisor or other managers in their chain-of-command or by filing a grievance.[20]

52. Travis Zufelt illustrates the point. He admitted that he was able to obtain overtime compensation by speaking with his supervisor after one request was initially denied:

> Q: Do you remember what you've requested overtime for?....
>
> A: I – right now I work overtime just about every day, so I fill out – put NDOC-1000s every day just about right now.
>
> Q: So you know the process pretty well –
>
> A: Yes, sir.
>
> Q: … And what's that process? You just fill out the … DOC-1000?
>
> A: Fill out the DOC-1000. Take it to have a supervisor sign it. Get a copy of it.

---

[19] Ex. O, Carlman Dep., 19:23-20:1, 40:10-41:7.

[20] *See*, *e.g.*, Ex. YY, Arias Dep., 31:2-23, 59:7-9; Ex. JJ, Hanski Dep., 123:18-124:1; Ex. II, Kluever Dep., 74:1-3; Ex. FF, Natali Dep., at 22:1-3; Ex. P, Riggs Dep., 88:6-8; Ex. PP, Ridenour Dep., 49:18-20; Ex. RR, Tremblay Dep., 37:22-39:1; Valdez Dep., 33:18-20, 47:5013; Ex. EEE, Walden Dep., 46:13-47:8, 79:25-80:5, 88:19-21.

Put that copy in payroll's box. And out one in your box.

Q: Okay. Have you ever had an overtime request denied?

A: ***It was denied at first, but after I argued with the supervisor of why I wanted the overtime, then it wasn't***…. So, yes, it was – denied it once. [Zufelt Dep., 118:1-119:3 (emphasis added)]

53. Nevertheless, for subsequent overtime or other compensation issues, Zufelt admitted that he has not spoken about them with the Assistant Warden, or AWO. [Ex. FFF, Zufelt Dep., 131:25-132:2.] He also has not filed a grievance over any concerns he has with his compensation or overtime. [*Id.* at 60:17-21, 141:17-19.]

54. The decision of these individuals not to comply with A.R. 320.01(2) by requesting overtime or compensatory time, or to appeal any request that is denied pursuant to NAC Chapter 284 is typical of the evidence before the Court at this time.

III. Legal Analysis

A. Plaintiffs failed to report claimed overtime to NDOC contrary to the procedures they acknowledged receiving, barring their FLSA claims under *Forrester*

"An employee seeking to recover unpaid minimum wages or overtime under the FLSA 'has the burden of proving that he performed work for which he was not properly compensated.'" *Brock v. Seto*, 790 F.2d 1446, 1447-48 (9th Cir. 1986) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)). To establish a claim for uncompensated wages or overtime, Plaintiffs must demonstrate: (1) that they worked regular or overtime hours without compensation; (2) the amount and extent of the work as a matter of just and reasonable inference; and (3) that their employer "suffered" or "permitted" them to work uncompensated. *See* 29 U.S.C. § 203(g); *Lindow v. United States*, 738 F.2d 1057, 1061 (9th Cir. 1984).

NDOC moves for summary judgment on the third element of Plaintiffs' prima face case.[21] Plaintiffs' claims are barred under the controlling authority of *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d at 413, by their own admissions that they violated NDOC's comprehensive policies

[21] In moving for summary judgment on the third element NDOC does not concede Plaintiffs have established the first two elements, which are not material to the instant Motion.

and procedures by failing to accurately and timely report the hours they claimed they worked, including any alleged overtime.

1. *Forrester* and its progeny bar FLSA recovery for employees like Plaintiffs who fail to report their time worked to their employer

In *Forrester*, the employer required all of its employees to report overtime on time sheets. *Id.* at 414. The plaintiff knew about the policy and that he was routinely paid all time that he reported to his employer on the timesheets. *Id.* The plaintiff admitted that he had been paid for all of the overtime he had claimed on his timesheets. *Id.* He also acknowledged that he would have been paid all of the overtime that he was seeking in his lawsuit if he had submitted it to his employer. *Id.* Nevertheless, the plaintiff testified in his depositions that he "did not mention any unpaid overtime to any store official prior to filing his complaint." *Id.* The Ninth Circuit held that under those facts, the district court properly granted summary judgment for the employer. *Id.*

The *Forrester* court focused its analysis on the FLSA's definition of "employ," which "includes to suffer or permit to work." *Id.* (quoting 29 U.S.C. § 203(g)). Those words mean "with the knowledge of the employer." *Forrester*, 646 F.2d at 414 (citation omitted). The purpose of this knowledge requirement is to provide an employer with "an opportunity to comply with the provisions of the FLSA." *Id.* But that is not possible when an "employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work." *Id.* Where "the acts of an employee from acquiring knowledge," such as the plaintiff's claimed uncompensated overtime hours, "the employer cannot be said to have suffered or permitted the employee to work in violation of § 207(a)." *Id.* at 414-15.

The Ninth Circuit subsequently elaborated on the *Forrester* rule in a table opinion, *Raczkowski v. TC Construction Co., Inc.*, published at 1993 U.S. App. LEXIS 26257 (9th Cir. 1993) (mem.). There, the court affirmed the district court's ruling that an employer was not liable under the FLSA for unreported time. *Id.* In reaching that conclusion, the Ninth Circuit rejected the plaintiff's contention that his employer had seen him perform the work for which he was seeking compensation. It explained:

> Although, as in *Forrester*, the employer in the present case might have seen Raczkowski while he was allegedly working on unreported time, the issue is whether the employer knew that the time was unreported. ***The relevant knowledge is not "I know that the employee was working," but "I know the employee was working and not reporting his time…."*** In this case, Raczkowski has not adduced evidence that the employer knew that Raczkowski was failing to report overtime, so the district court correctly rejected this claim.

Id. at *3 (emphasis added).

Judge Siler, who was on the Ninth Circuit's *Raczkowski* panel, subsequently authored a Sixth Circuit opinion that applied the *Forrester* rule and its elaboration in *Raczkowski*. *See White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869 (6th Cir. 2012). In *White*, the employer hospital used an "exception log" requiring employees to document instances in which their meal break was interrupted by compensable work. *Id.* at 872. The plaintiff signed a document stating that she understood the policy and that she was required to record her time worked in an exception log to receive compensation. *Id.* The plaintiff admitted that when she completed the exception log, she was paid. *Id.* The plaintiff also told her supervisors and human resources periodically that she was not getting a meal break; however, she did not tell them that she was not being compensated for those missed meals. *Id.* The plaintiff eventually stopped completing the exception log, and did not use a procedure she knew about to correct any payroll errors. *Id.*

White rejected the plaintiff's claim, which it found barred by *Forrester*. The court held that "[u]nder the FLSA, if an employer establishes a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process." *Id.* at 876. *Forrester* therefore imposes certain obligations on an employee seeking to recover alleged compensation under the FLSA:

> [T]he employee bears some responsibility for the proper implementation of the FLSA's overtime provisions. An employer cannot satisfy an obligation that it has no reason to think exists. And an employee cannot undermine his employer's efforts to comply with the FLSA by consciously omitting overtime hours for which he knew he could be paid.

Id. (citation omitted). By failing "to follow the reasonable time reporting procedures" established by an employer, the employee "prevents the employer from knowing its obligation to compensate the

employee and thwarts the employer's ability to comply with the FLSA." *Id.* Because the plaintiff prevented the employer from knowing that she was not being paid for missed meal breaks, her FLSA claims failed. *Id.* Absent a viable claim under the FLSA, the plaintiff therefore could not serve as a representative for opt-in plaintiffs in the collective action. *Id.* at 877-78.

Other federal courts agree with the logic of the *Forrester* rule and have adopted it as a bar to FLSA recovery by law enforcement plaintiffs that fail to follow an employer's reasonable procedures for reporting their time. *See*, *e.g.*, *Allen v. City of Chicago*, 865 F.3d 936, 944 (7th Cir. 2017) (rejecting claim where police agency knew officers were working on mobile devices after hours but "did not know that such work was not being reported and paid"); *Hertz v. Woodbury Cty.*, 566 F.3d 775, 781-82 (8th Cir. 2009) (constructive knowledge of overtime could not be imputed to a police department because police officers were "in the best position" to prove they were performing compensable work); *Newton v. City of Henderson*, 47 F.3d 746, 749 (5th Cir. 1995) (rejecting argument that city was responsible for confirming police officer accurately completed payroll forms, which improperly denied the city "the right to require an employee to adhere to its procedures for claiming overtime"); *Maciel v. City of Los Angeles*, 542 F. Supp. 2d 1082, 1090 (C.D. Cal. 2008) ("This Court, however, does not understand it is an employer's burden to hold each employee's hand and ensure that they take their breaks" to ensure compensation).

2. Plaintiffs all knew about and acknowledged NDOC's exception-based system for reporting overtime

The State of Nevada has a comprehensive regulatory system in place for overtime at NDOC. The overarching principle guiding the use of overtime within NDOC is for Wardens and Facility Managers "to ensure there is sufficient staff on duty to safely operate their institutions and facilities." [SOF ¶¶ 1-5.]

Each Plaintiff is responsible for truthfully reporting the time they work, including all overtime. Specifically, "an employee shall provide an accurate accounting of the hours worked and leave used during a pay period in the NEATS Timekeeping System ("NEATS"), to include the specific times at which their shift starts and ends and regular days off." Ex. A, A.R. 326.06(1).

NEATS is an exception-based system, which assumes that an employee has worked all hours in their scheduled shift, unless the employee has reported an exception. [SOF ¶¶ 6-7.]

If there is an exception because of overtime for a non-exempt employee, that employee "must document this time on an Authorization for Leave and Overtime Request form (DOC-1000)." Ex. A-2, A.R. 320.01(2). Employee exceptions are reported on timesheets, which the employee is required to input and submit into NEATS "at the conclusion of each reporting cycle (pay period) no later than 12 PM, Wednesday, of the non-pay week for each pay period." Ex. A, A.R. 326.06(4). Employees are subject to discipline under A.R. 339 if they falsify their timesheets. *See* Ex. A, A.R. 326.06(6). [SOF ¶¶ 8-10.]

Overtime eligibility depends on whether the employee has opted to work a standard or an innovative workweek, using either a 40-hour or 80-hour variable. Overtime eligibility also depends on whether the employee has elected to receive compensatory time, or "comp time," in lieu of cash wages for any extra hours worked. At one time or another, all seven of the named Plaintiffs have worked on a variable (innovative) schedule, and six of the seven named Plaintiffs have agreed to receive comp time instead of overtime. Plaintiffs have admitted they are not eligible for overtime for claimed work time that falls under one of these exceptions. [SOF ¶¶ 11-18.]

All of the Plaintiffs have acknowledged on multiple occasions that they received, read, and understood these procedures for reporting overtime. Their acknowledgments are well-documented in: new hire checklists; receipts for their employee handbook; acknowledgments that they will "read and familiarize" themselves with all regulations, including those pertaining to overtime and the exceptions-based reporting system; their Employee Work Performance Standards Form, in which they state they are proficient in all applicable rules and procedures; and their acknowledgment to the same effect on each written appraisal they receive from NDOC. [SOF ¶¶ 19-25.]

3. Plaintiffs admit they received comp time and were paid overtime when they complied with NDOC's exception-based reporting system

Plaintiffs who opted into NDOC's comp time system were given time off when they reported that they worked longer than their scheduled shift. [SOF ¶¶ 26-29.]

In addition, nearly all of the collective action members took advantage of overtime opportunities. Payroll data for 563 NDOC employees for the period of 12/31/2007 to 2/15/2016 was analyzed and compared with timekeeping data entered into NEATS. Of the 555 Correctional Officers in the data, 529 or over 95% recorded some overtime totaling 125,726.9 hours." According to that analysis, "the average total Overtime hours recorded was 226.5 hours," with the top three officers each reporting more than 2200 hours. The average total dollars paid in overtime was $7,746. "Across all [Correction Officer] periods, overtime was recorded on 10,904 of the 51,959 pay periods or 21.0%." Every NDOC facility paid overtime. The reasons for the overtime varied considerably between facilities and employees. [SOF ¶¶ 30-31.]

All seven of the named Plaintiffs were paid overtime, as shown by each Plaintiff's Employee Paycheck Analysis. All of the opt-in Plaintiffs who were deposed likewise were paid overtime. In some cases, supervisors put in overtime requests for Plaintiffs, such as when overtime was incurred as a result of responding to a security incident. For all other time, when Plaintiffs complied with A.R. 320.01(2) by submitting an Authorization for Leave and Overtime Request Form ("Form DOC-1000"), their requests were approved and they were paid for that overtime. [SOF ¶¶ 32-33, 38-39.]

For example, on May 20, 2014, Plaintiff Echeverria completed a Form DOC-1000 requesting one quarter hour of leave after he apparently worked 15 minutes past his scheduled shift ending at 1:00 p.m. His request for overtime was approved. Similarly, "Plaintiff Walden received 15 minutes of Overtime on November 26, 2010 and the timesheet note associated with the entry was 'HOLIDAY WORKED 15 MINUTES OF OVERTIME FOR BEING RELIEVED LATE.'" Likewise, Plaintiffs Everist, Ridenour, and Tracy were approved for multiple instances of overtime after submitting their Form DOC-1000s. What is particularly notable about the NEATS data is that over ten percent of the segments recorded by Correctional Officers represented "time at or below an hour in duration," showing that even overtime of short duration was recorded. [SOF ¶¶ 34-37.]

Jason Hanski explained that NDOC's process for reporting overtime is straight-forward:

Q: …What's the process to request overtime, as you understand it?

A: Well, there's what they call DOC-1000, Department of Corrections Form

1000. That is utilized to file for overtime.

Q: Okay. And you're familiar with that process?

A: Yes.

Q: …[I]s it fair to say you've used it many, many times in the past?

A: Well, every time you do overtime you have to have one filled out.

Q: ….So I don't hear any hesitation that you have in asking for it if you feel you're entitled to it?

A: ***I'll ask for it if I feel I'm entitled to it, yes***.[22]

Plaintiffs admit receiving overtime in most instances in which they have requested overtime by complying with NDOC's exception-based reporting system, using NEATS and the DOC-1000. [SOF ¶¶ 40-43.] Plaintiff Donald Riggs testified that he "always got paid for my time. Sometimes you were offered time off in lieu of being paid … I always got my overtime…. I would file the Doc 1000 and turn it in to my supervisor…. ***I have never seen a form that I turned in rejected***."[23]

4. Plaintiffs admit that they have not followed NDOC policy and have not submitted requests for overtime they claim they have not received

Plaintiffs who allege that they were not paid overtime admitted that it was because they failed to follow A.R. 320.01(2) by completing a Form DOC-1000. Many have never completed a DOC-1000 or otherwise reported overtime. What is especially startling is that several Plaintiffs have not reported overtime for even those activities that they admit are routinely paid: responding to security incidents and working past a scheduled shift time because of late relief. [SOF ¶¶ 44-47.]

Equally troubling, on the infrequent occasions when Plaintiffs have been denied overtime after submitting a DOC-1000, they have not complied with NDOC's administrative procedures in NAC Chapter 284 for appealing the denial – by either speaking to supervisors in their chain-of-command or by filing a grievance. That is true even for Plaintiffs like Travis Zufelt, who admitted

---

[22] Ex. JJ, Hanski Dep., 121:6-16, 122:17-20 (emphasis added).

[23] Ex. P, Riggs Dep., 31:13-20, 33:5-15 (emphasis added).

that on the one occasion when his overtime request was denied, "after I argued with the supervisor of why I wanted the overtime, then it wasn't…"[24] [SOF ¶¶ 48-54.]

Plaintiffs offer a wide variety of excuses for not following NDOC's overtime reporting policy. Some, like Adrian Arias and Francisco Bautista maintain that they do not know the process of reporting their overtime,[25] despite their written acknowledgments of receiving, reading and understanding the procedures for doing so. [SOF ¶¶ 1-10.] Other explanations for not completing a DOC-1000, like Donald Walden, Jr.'s, border on the absurd: "I don't believe I did because, I mean, it's not like the NDOC 1000 states that your request is for pre-time. I mean, it's strictly for overtime…. How can I get overtime before my shift?"[26] Indeed, Walden contradicted himself when asked why he did not seek overtime for an hour of pre-shift activities he completed when filling in for a supervisor: "Don't know" why he did not report it, "It's a good question. I don't know."[27] Other Plaintiffs agreed that they "[d]on't know" why they failed to report their overtime.[28]

One of the most common excuses given by the Plaintiffs for not complying with NDOC's overtime reporting procedures is that it was, in the words of Travis Zufelt, "too much of a hassle."[29] Daniel Tracy "didn't want to hassle" with talking to his supervisor about an overtime request. Tracy admitted that "…I should have, but … I just wanted to get home. I ride a motorcycle to work, so I know the ride home is going to be miserable because it was so hot out."[30] Andre Natali did not bother to report his overtime because "I'm not going to start a federal case over something small."[31]

---

[24] Ex. FFF, Zufelt Dep., 118:1-119:3.

[25] Ex. YY, Arias Dep., 63:2-5; Ex. HH, Bautista Dep., 56:21-23.

[26] Ex. EEE, Walden Dep., 99:16-100:3.

[27] Ex. EEE, Walden Dep., 71:18-72:3.

[28] Ex. RR, Tremblay Dep., 28:17-21.

[29] Ex. FFF, Zufelt Dep., 130:12-18; *see also id.* at 126:3-9.

[30] Ex. VV, Tracy Dep., 79:4-80:16.

[31] Ex. FF, Natali Dep., 22:21-22.

Yet, this is precisely what Natali has done. He has made a federal case out of "something small," to use his own words, all without reporting his time to NDOC as he is required to do.

Another excuse Plaintiffs give for not reporting overtime is that they were instructed that time that was *de minimis*, such as periods of less than six minutes, was noncompensable and could not be reported to NDOC.[32] That would comport with federal law because "[m]ost courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable," particularly where it is administratively difficult to track the time. *Lindow v. United States*, 738 F.2d 1057, 1062-64 (9th Cir. 1984). But even Darius Krol admitted this excuse was not true. He was specifically told that "you can actually write DOC 1000 by the minute."[33]

Some Plaintiffs have taken a different tack. A few contend that when they first started working for NDOC many years earlier, they were told not to request overtime.[34] Others say that they asked for overtime once, were denied – and did not grieve the issue or elevate it to other supervisors – and then never applied for it again.[35] One of the Plaintiffs, Terry Day, contradicted this testimony through his own personal knowledge and experience training new recruits. "***[W]hen they are staying over seven minutes or more after the end of their shift" they are told to submit an overtime request***. "I also instruct them to hold their shift commanders to task on those things."[36] Another, Jason Hanski, has no personal knowledge of any practice by NDOC to discourage its employees from reporting overtime, admitting, "I haven't spoken directly to individual supervisors so much because it's been a common practice in corrections." However, ***Hanski does have personal knowledge of one thing: he has not ever known anyone who requested overtime for pre- and post-shift activities who did not receive it***.[37]

---

[32] Ex. AAA, Day Dep., 40:9-12; Ex. DDD, Krol Dep., 19:3-11; Ex. SS, Tyning Dep., 25:22-26:8.

[33] Ex. DDD, Krol Dep., 19:3-11.

[34] Ex. KK, Banks Dep., 18:1-19:1; Ex. BBB, Dicus Dep., 86:2-17; Ex. MM, Jones Dep., 32:2-24.

[35] Ex. YY, Arias Dep., 29:20-30:19, 62:7-63:1; Ex. VV, Tracy Dep., 47:17-48:3, 55:5-22; Ex. SS, Tyning Dep., 19:19-20:1, 54:2-15.

[36] Ex. AAA, Day Dep., 57:5-12 (emphasis added).

[37] Ex. JJ, Hanski Dep., 123:18-124:19.

The wide variety of excuses Plaintiffs give for not reporting their overtime refutes any contention NDOC has some sort of "unwritten" policy to not pay them. The only common policy, plan, or scheme NDOC has is specified in the comprehensive regulatory system and administrative procedures establish by Nevada law, which Plaintiffs have acknowledged that they have received, read, and understand on numerous occasions throughout their employment. [SOF ¶¶ 19-25.]

5. NDOC is entitled to summary judgment under *Forrester*

The undisputed facts, as stated above, establish that NDOC is entitled to summary judgment on Plaintiffs' claims for overtime under the FLSA. NDOC's exception-based system for reporting overtime is established under Nevada law, with comprehensive administrative regulations governing how time and attendance including overtime and compensatory time is to be reported. [SOF ¶¶ 1-18.] Such an exception-based system complies with the FLSA if it provides an opportunity to report exceptions such as overtime, as NDOC's does. *See White*, 699 F.3d at 872-73.

On multiple occasions throughout their employment, including in their most recent work performance evaluations, Plaintiffs acknowledged that they received, read and understood all of NDOC's administrative rules and procedures, including the procedure for reporting overtime through NEATS by documenting the claimed overtime through an Overtime Request Form DOC-1000. [SOF ¶¶ 6-10, 19-25.] When Plaintiffs followed this procedure, they admit that they were given compensatory time or paid overtime. [SOF ¶¶ 26-43.] If their overtime request is denied, for whatever reason, Nevada law provides an administrative procedure for them to grieve their compensation dispute, beginning with their supervisor. [SOF ¶¶ 48-50.]

The compensation Plaintiffs seek in this litigation is for overtime they admit they did not report to NDOC contrary to its policies and procedures [SOF ¶¶ 44-47.] and outside of the administrative grievance process. [SOF ¶¶ 51-54.] If they had reported time that was compensable, NDOC would have paid them. That is confirmed by the vast volume of overtime requests Plaintiffs did submit which NDOC approved, totaling an average of hundreds of hours of overtime for each Plaintiff. ***Over ten percent of all overtime NDOC approved was for a duration of one hour or less. Several of the Plaintiffs' files document receipt of overtime for small segments such as just fifteen***

minutes. [SOF ¶¶ 30-37 (emphasis added).]

These undisputed facts fall squarely under the *Forrester* rule. "An employer must have an opportunity to comply with the provisions of the FLSA." 646 F.3d at 414. It is true that an employer cannot "escape responsibility by negligently maintaining records required by the FLSA, or by deliberately turning its back on a situation." *Id.* But those narrow exceptions to the rule do not apply here. This is not a case of NDOC negligently maintaining records. To the contrary, all of the Plaintiffs admitted that they knew how to apply for and receive overtime pay, had done so in the past, and were paid when they complied with NDOC's system. [SOF ¶¶ 1-43.]

Second, far from turning its back on Plaintiffs' overtime work, Plaintiffs acknowledged that their own actions in not submitting their overtime requests, was responsible for the compensation they are seeking in this litigation. [SOF ¶¶ 44-54.] Plaintiffs deliberately violated NDOC policy and failed to report overtime they now claim is owed to them. They cannot circumvent that requirement by denying NDOC "the right to require an employee to adhere to its procedures for claiming overtime." *Newton*, 47 F.3d at 749; *see also Thompson v. Pima Cty.*, 2009 U.S. Dist. LEXIS 140470, at **9-11 (D. Ariz. Mar. 30, 2009) (granting employer summary judgment on overtime claim where the employee "deliberately prevent[ed] the employer from acquiring knowledge of the overtime work" by failing to comply with county policy).

Third, the undisputed record evidence is that the nature of Plaintiffs' FLSA theory is highly variable. Plaintiffs' testimony throughout this case has been that the time it takes to perform an alleged task varies from a few seconds to a few minutes, as Timothy Carlman explained:

> Q: Okay. So is it fair to say the least amount of time that it would take to basically get through operations and to verify what my assignment was for the day and to go out to the post would be three minutes?
>
> A: Well, I can't swear to that too. If I'm not talking to two or three other people, and you just come in and I look at you across the room and you're squared away, I'll go, "Unit 12A," and you can just go.
>
> Q: So it could be a matter of seconds; is that fair?

A: It could be, yes.[38]

Under such circumstances, Plaintiffs never explain how NDOC would have any way of knowing when an employee works overtime without the employee's assistance. ***The "reasonable diligence" that Forrester requires an employer to exercise in its payroll practices "is not an expectation of omniscience."*** *Craig v. Bridges Bros. Trucking, LLC*, 823 F.3d 382, 389 (6th Cir. 2016) (emphasis added). That is precisely why NDOC requires the Plaintiffs to use its comprehensive administrative system to request overtime, which NDOC always paid. *See generally Newton*, 47 F.3d at 749 (an employer has "the right to require an employee to adhere to its procedures for claiming overtime").

In conclusion, NDOC "cannot be said to have suffered or permitted the employee to work in violation of § 207(a)." *Forrester*, 646 F.2d at 414-15; *accord Raczkowski*, 1993 U.S. App. LEXIS 26257 at *3. Accordingly, Plaintiffs have failed to prove their prima facie case, requiring entry of summary judgment for NDOC on all of their FLSA claims. *See Forrester*, 646 F.2d at 414-15; *see also Allen*, 865 F.3d at 944*; Hertz*, 566 F.3d at 781-82; *Newton*, 47 F.3d at 749; *Maciel*, 542 F. Supp. 2d at 1090.

B. The undisputed facts show that NDOC has not knowingly and recklessly violated the FLSA's overtime provisions

Generally, there is a two year statute of limitations for claims under the FLSA. 29 U.S.C. § 255(a). That period can be extended to three years, but only if the claims arise out of a "willful violation." *Id.* This Court cannot presume any conduct is willful in the absence of evidence. *Alvarez*, 339 F.3d at 909. To prove willfulness, Plaintiffs must establish their employer acted in "knowing or … reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (citation omitted). Plaintiffs cannot meet their burden.

For the reasons explained already, NDOC's exception-based reporting system complies with the FLSA. On multiple occasions throughout their employment, Plaintiffs admitted they had received, read and understood the requirements for reporting overtime under that system. [SOF ¶¶ 6-

[38] Carlman Dep., Ex. O at 88:18-89:5.

10, 19-25.] When Plaintiffs followed this procedure, they concede they were paid overtime that they earned. [SOF ¶¶ 26-43.] The only times that Plaintiffs were not paid overtime that they allege they earned were when they violated NDOC's procedures for reporting it under NDOC's exception-based system [SOF ¶¶ 44-47.] and took no action to raise their compensation issues with their supervisors as required by Nevada's administrative grievance process. [SOF ¶¶ 51-54.] In other words, it was the Plaintiffs who acted in "knowing or … reckless disregard" for their overtime reporting requirements under the policies and procedures that govern their employment, not NDOC.

Under these circumstances, in the unlikely event that any of Plaintiffs' FLSA claims survive summary judgment on the various grounds asserted by NDOC in this and its other dispositive motions, as a matter of law Plaintiffs cannot establish NDOC's actions were willful. *See SEIU Local 102 v. County of San Diego*, 60 F.3d 1346, 1355-56 (9th Cir. 1994). As such, the Act's default two year limitations period applies. *See* 29 U.S.C. § 255(a).

For the same reasons, Plaintiffs are not entitled to liquidated damages, if any of their FLSA claims remain. Pursuant to 29 U.S.C. § 260, double-damages under the Act are not to be awarded "despite the failure to pay appropriate wages" where "the employer acted in subjective 'good faith' and had objectively 'reasonable grounds' for believing that the acts or omissions giving rise to the failure did not violate the FLSA." *Alvarez*, 339 F.3d at 909. Where, as is the case here, the undisputed facts show the absence of a willful violation, liquidated damages should not be awarded. *See SEIU Local 102*, 60 F.3d at 1356.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

IV. Conclusion

For all of the foregoing reasons, NDOC respectfully submits that it is entitled to summary judgment on the merits of Plaintiffs' FLSA claims, which should be dismissed with prejudice. In the alternative, in the unlikely event any of those claims survive summary judgment, Plaintiffs have failed to establish any proven violation was in knowing or reckless disregard of the Act's requirements, precluding use of a three-year limitations period for willful violations and any award of liquidated damages.

DATED this 8th day of April, 2020.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

BY: */s/ James Tucker*

James T. Tucker
Nevada Bar. No. (12507)
300 South 4th Street - 11th Floor
Las Vegas, NV 89101-6014
Attorneys for Defendants 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 the 8th day of April, 2020, I electronically filed and served a true and correct copy of the foregoing **DEFENDANT STATE OF NEVADA *EX REL.* DEPARTMENT OF CORRECTIONS' MOTION FOR SUMMARY JUDGMENT ON THE MERITS OF PLAINTIFFS' FLSA CLAIMS** 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

Christian Gabroy, Esq.
Kaine Messer, Esq.
GABROY LAW OFFICES
The District at Green Valley Ranch
170 South Green Valley Parkway, Suite 280
Henderson, NV 89012
Telephone: (702) 259-7777
Fax: (702) 259-7704
Attorneys for Plaintiffs

By: */s/ Lani Maile*
An Employee of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

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

Attorneys for Plaintiffs

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' OPPOSITION TO DEFENDANT STATE OF NEVADA *EX REL.* DEPARTMENT OF CORRECTIONS' MOTION FOR SUMMARY JUDGMENT ON SOVEREIGN IMMUNITY

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

I. INTRODUCTION

Defendant State of Nevada *Ex Rel.* Its Nevada Department of Corrections' ("Defendant" or "NDOC" or "State of Nevada") Motion for Summary Judgment on Sovereign Immunity is fatally flawed by the Nevada Legislature's clear and unequivocal waiver of the State of Nevada's sovereign immunity codified in NRS 41.031. The title of the section in NRS Chapter 41 that contains NRS 41.031 is "Waiver of Sovereign Immunity." The text of the statute plainly states that the Nevada Legislature has decided to waive the State of Nevada's sovereign immunity from liability in *all civil actions*, except for certain specifically enumerated exceptions:

> 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

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

> 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.

A claim for wages under the FLSA does not fall within one of the specifically enumerated exceptions.

In addition to the fact the plain language of NRS 41.031 forecloses NDOC's argument in favor of immunity, the legislative history of Nevada's sovereign immunity waiver illuminates the Nevada Legislature's desire to totally abolish sovereign immunity in the state.[1] Therefore, the plain language of the statute, in tandem with the clear legislative history to abolish sovereign immunity *in toto*, destroys NDOC's sovereign immunity from liability defense to FLSA claims. Other states that have similar sovereign immunity waivers have similarly concluded that such waivers include claims for wages under the FLSA. *See, e.g.*, N.Y. Ct. Cl. Act § 8 (McKinney); *Speers v. State*, 2000, 183 Misc.2d 907, 705 N.Y.S.2d 858, *affirmed* 285 A.D.2d 872, 728 N.Y.S.2d 302, *amended on reconsideration* 288 A.D.2d 651, 739 N.Y.S.2d 203.

Alternatively, NDOC has waived its right to assert such its sovereign immunity from liability defense by its own litigation conduct. In rejecting NDOC's 11th Amendment Immunity defense, the Ninth Circuit recognized that NDOC had waived its sovereign immunity defense by its own litigation tactics:

> Here, Nevada only points to one place in the first four years of active litigation where it arguably raised the issue of state sovereign immunity: the line in the Answer that said, "Defendant is immune from liability as a matter of law." This line does not even mention "state sovereignty" or "the Eleventh Amendment." The issue of state sovereign immunity was not raised early enough in the proceedings to provide fair notice to Plaintiffs.

Walden v. Nevada, 945 F.3d 1088, 1095 (9th Cir. 2019). Accordingly, for these reasons and for all the reasons set forth more fully below, NDOC's Motion for Summary Judgment on Sovereign

---

[1] https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1965/SB185,1965.pdf (last visited Oct. 28, 2018) at p. 9 (requesting "[t]he doctrine of sovereign immunity be abolished.").

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

Immunity must be denied and Plaintiffs' Motion for Partial Summary Judgment on Liability for Unpaid Wages Under the FLSA (ECF No. 256) should be granted.

II. QUESTIONS PRESENTED

Whether the State of Nevada has waived its sovereign immunity in civil actions, such as claims brought under the Fair Labor Standards Act (FLSA).

III. QUESTIONS ANSWERED

The State of Nevada has waived its sovereign immunity in civil actions, such as claims brought under the FLSA:

(1) Through NRS 41.031(1), the Nevada Legislature has waived the State of Nevada's sovereign immunity to liability in civil actions, subject to certain statutory exceptions[,] *see Boulder City v. Boulder Excavating*, 124 Nev. 749, 756 (Nev. 2008), none of which are applicable to a claim for unpaid wages under the FLSA.

(2) The State of Nevada has waived the sovereign immunity defense by failing to affirmatively raise the defense for more than 6 years of litigation.

IV. STATEMENT OF FACTS

A. Relevant Procedural Background

On May 12, 2014, 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 including four causes of action. (ECF No. 1 at 7-21.)[2] Plaintiffs alleged that NDOC required correctional officers and other non-exempt

[2] There is no issue with compliance with the procedural requirements for asserting a claim against the State or one of its political subdivisions. 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:

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

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.

NDOC removed the action to federal court and filed an answer on June 24, 2014 (ECF Nos. 1, 3). Plaintiffs filed their motion for conditional certification under § 216(b) of the FLSA on August 6, 2014, (ECF No. 7), which this Court granted on March 16, 2015 (ECF No. 45). Out of a total potential Opt-In Class of Three Thousand and Seventy-Five (3,075 potential class members, seven-hundred and eighteen (718) similarly situated persons joined the FLSA portion of this action after the initial mailing. (ECF No. 95 at ¶52 fn. 2). Since the initial mailing of the FLSA Notice, an additional 182 similarly situated employees have attempted to join in this action. As of the filing of this brief, Defendant has refused and continues to refuse to change its employment policies and practices of not compensating COs for work performed before and after arriving at their post. ECF Nos. 217, 225, 226, 228, 229, 231-239, 244-246, 248, 250, 252, 262, 263, 267, 268.

On March 26, 2018, shortly after Plaintiffs filed their first motion for partial summary judgment, the Court denied Defendant's motion to dismiss Plaintiffs' FLSA claims. ECF No. 166. In doing so, the Court concluded that activities such as reporting for duty, receiving

---

(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 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* ECF No. 1, Exhibit A (Plaintiffs' Complaint).

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

assignments, and passing a uniform inspection (these activities are also collectively known as "muster"), were compensable work activities, stating:

> 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 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.

Id. at pp. 12-13.

The Court further concluded that retrieving tools and gear was also compensable:

> 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.

Id. at 13.

The Court stated that since the muster activities and retrieval of tools/gear was compensable, walking to the assigned post was also a compensable work activity under the continuous workday doctrine:

> 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.").

Id. at 14.

Lastly, the Court concluded that the post shift activities of the CO briefing and returning of tools/gear were also compensable work activities:

> 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.

Id.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

In its Order, the Court concluded that Plaintiffs had alleged sufficient facts to support a claim under the FLSA. Plaintiffs then filed a motion for partial summary judgment on liability because the facts that have been developed in this case align and support the facts alleged in the Complaint. ECF No. 256. Plaintiffs have not moved for summary judgment on the question of damages because that issue remains in dispute.

B. 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.[3] 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:

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

2. **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

[3] 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.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

including sub-parts). Twenty-eight (28) opt-in Plaintiffs have each responded to Interrogatories (10 distinct requests).

3. **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.

4. **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.

5. **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. ARGUMENT

NDOC's primary relevant contention in support of its Motion for Summary Judgment on Sovereign Immunity rests upon the faulty assertion that the Nevada Legislature only waived the State of Nevada's sovereign immunity for tort claims.[4] The plain language of NRS 41.031(1)

[4] Most of NDOC's brief is completely irrelevant to the question presented by its Motion. *See* ECF No. 276, pp. 3-10. The question presented is not whether the United States Congress has abridged Nevada's sovereign immunity by passing the FLSA. That question has already been decided by the United States Supreme Court in *Alden v. Maine*, 527 U.S. 706 (1999). The relevant question presented for this Court to decide is whether the Nevada Legislature has waived the State

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

rejects such a limited reading of Nevada's sovereign immunity waiver. Furthermore, legislative history and common rules of statutory construction reject the notion that the Nevada Legislature intended to place a tort limitation on NRS 41.031's waiver. Lastly, other states with similar extraordinarily broad statutory sovereign immunity waivers have concluded that such statutory language waives claims brought under the FLSA.

A. Nevada State Law Governs The Question Of Whether The Nevada Legislature Has Waived The State of Nevada's Sovereign Immunity In Civil Actions

State law, not federal, guides courts in determining whether a state has waived its sovereign immunity and consents to be sued. "[S]overeign immunity is a privilege that each state may waive at its pleasure." *See College Savings,* 527 U.S. at 675, 119 S.Ct. 2219. "[C]ourts must look to the law of the particular state in determining whether it has established a separate immunity against liability for purposes of waiver." *Meyers ex Rel. Benzing v. Texas*, 410 F.3d 236, 253 (5th Cir. 2005) ("Whether Texas has retained a separate immunity from liability is an issue that must be decided according to that state's law.").

Nevada's sovereign immunity waiver under NRS 41.031 "is to be broadly construed" in favor of finding a waiver of sovereign immunity from liability. *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***." (emphasis added)); *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.").

---

of Nevada's sovereign immunity and consented to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

While it is true that the Nevada Supreme Court has never directly addressed the precise question of whether NRS 41.031's "Waiver of Sovereign Immunity" applies to civil actions, such a claims for unpaid wages under the FLSA it is likewise true that the Nevada Supreme Court has never held that Nevada's sovereign immunity waiver is limited to tort actions only. Contrary to NDOC's arguments, *In Boulder City v. Boulder Excavating*, 124 Nev. 749, 756 (Nev. 2008), the Nevada Supreme Court recognized that "[t]hrough NRS 41.031(1), the Nevada Legislature has waived the State of Nevada's sovereign immunity to liability in ***civil actions***, subject to certain statutory exceptions." Emphasis added. The Nevada Supreme Court then stated that the relevant "exception" to Nevada's sovereign immunity waiver in *In Boulder* City, NRS 41.032(1), was limited to certain individual government actors with respect to common law torts: "NRS 41.032(1) provides that ***government actors*** following statutory guidelines or exercising their discretion are ***immune from common law tort actions*** in connection with their statutory duties or their discretion[.]" *Id.* (emphasis added). If the Nevada Supreme Court thought the general waiver was limited to torts only, the limitation on the carve back for individual actor liability only in tort alone would be redundant and/or surplusage. Thus, while the Nevada Supreme Court has not directly addressed the question presented in this case, it has stated publicly that the waiver applies to "civil actions" and the only exception under NRS 41.032(1) only applies to individual "government actors" when based on tort.

B. The Nevada Legislature Has Waived The State of Nevada's Sovereign Immunity From Liability And Consented To Have Its Liability Determined In Accordance With The Same Rules As Are Applied To Civil Actions Against Natural Persons And Corporations

1. The plain language of NRS 41.031(1) states that the State of Nevada and all political subdivisions of the State waive their sovereign immunity from liability

Courts construing Nevada statutes must "first look[] at the plain language of a statute." *See Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 513-14 (2000). Courts only look beyond the plain language if it is ambiguous or silent on the issue in question. *Id.*; *see also Delucchi v. Songer*, 133 Nev. 290, 297, 396 P.3d 826, 831 (2017) ("When the language of a

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

statute is unambiguous, this court will give that language its plain and ordinary meaning and not go beyond it."). The relevant portion of NRS 41.031(1) states as follows:

> 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, …

The first clause—"The State of Nevada hereby waives its immunity from liability and action"—does not contain any limitation as to the type of "liability" being waived. There is no distinction between "tort" liability or "contract" liability or "statutory" liability. A court cannot read into a statute words that are not there. *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc) The plain language simply states "liability" and "action". This is to be construed broadly and not limited to certain types of liability for certain types of actions. *See* Cannon of Construction *casus omissus pro omisso habendus est* ("Nothing is to be added to what the text states or reasonably implies.").

The second clause—"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"—likewise does not contain any limitation as to the type or origin of liability, nor does it limit the claim to any particular type of civil action. Rather, the plain meanings of the words contained in that clause indicate that the State of Nevada "consents" to have its liability determined by courts under the exact same rules of law as any other defendant—whether public or private in nature. NDOC cannot, and does not, dispute that the FLSA applies to public employees such as those persons employed by the State of Nevada. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56 (1985); ECF No. (NDOC's Answer to the FAC, at ¶ 50) ("Answering Paragraph 63 of Plaintiffs' FAC on file herein, NDOC admits that the Fair Labor Standards Act (FLSA) applies generally to state employees[.]"). The State of Nevada has thus consented to have its liability under the FLSA determined in the same fashion as it if was any private person or corporation. A private person or corporation who acts as an employer is subject to the laws of the FLSA and potentially liable for damages as a result of any violations of these

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

federal wage-hour laws. The Nevada Legislature did not want the State of Nevada to be immune from violations for which private individuals and corporations would be held liable.

2. The only "exceptions" to Nevada's waiver of sovereign immunity from liability are for certain torts

Ironically, the only exceptions to Nevada's waiver of sovereign immunity from liability for civil actions are for certain tort actions, which is the direct opposite of NDOC's apparent understanding. As stated directly above, NRS 41.031(1) waives the State of Nevada's sovereign immunity from liability in all civil actions, with the sole exception of (1) limitations found in statutory sections NRS 41.032 to 41.038, inclusive, (2) NRS 485.318(5), and (3) any statute which expressly provides for governmental immunity. The doctrine of expressio unius est exclusio alterius as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions. *Thomas ex rel. Situated v. Nev. Yellow Cab Corp.*, 327 P.3d 518 (Nev. 2014), *Poole v. Nev. Auto Dealership Invs.*, 449 P.3d 479 (Nev. App. 2019)

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.[5] *Goldman v. Bryan (II),*106 Nev. 30, 37, 787 P.2d 372, 377 (1990) (noting "the 'well-recognized rule that an express constitutional provision requiring a certain thing to be done in a certain way is

[5] 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.").

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

exclusive to like extent as if it had included a negative provision to the effect that it may not be done in any other way'" (quoting *Robison v. First Judicial Dist. Court*,73 Nev. 169, 175, 313 P.2d 436, 440 (1957))); Ramsey v. City of N. Las Vegas, 392 P.3d 614, 619 (Nev. 2017) quoting *State ex rel. O'Connell v. Slavin*,75 Wash.2d 554, 452 P.2d 943, 946 (1969) ("For purposes of constitutional interpretation, the express mention of one thing implies the exclusion of another which might logically have been considered at the same time.").Despite this clear lack of exclusion for FLSA claims among the numerous other exclusions in the statute, NDOC argues that NRS 41.032(1) excepts claims for unpaid wages from Nevada's sovereign immunity waiver. Once again, NDOC misreads the plain language of the statute. NRS 41.032(1) only applies to certain actions against an "officer, employee or immune contractor" of the State or any of its agencies or political subdivision. In other words, the State wants to protect innocent officers, employees and agents from personal liability because these state actors followed the instruction of their superiors in good faith, but did not intend to exclude the State itself from responsibility and/or liability for its own wrongs. NRS 41.032(1) specifically states:

> Except as provided in NRS 278.0233 no action may be brought under NRS 41.031 or against ***an immune contractor or an officer or employee*** of the State or any of its agencies or political subdivisions which is:
>
> > 1. Based 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;

NRS 41.032(1) (emphasis added).

This Action has not been brought against individual persons employed by NDOC or the State of Nevada. This Action names the State of Nevada Ex Rel Its Nevada Department of Corrections as the Defendant. As a result, NDOC's reliance on NRS 41.032(1) as an escape hatch from liability is grossly misplaced. NRS 41.032(1) simply says that while the State itself bears complete legal responsibility for its wrongful action, the individual actors are not individually liability for simply obeying orders and doing their jobs in good faith.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

Apart from limiting immunity only to officers, employees or immune contractor, NRS 41.032(1) is also inapplicable in a wage and hour collective action that seeks unpaid overtime against a subdivision of the State of Nevada for systematic pay policies that violate the law. Plaintiffs' FLSA claim is not based on an "act or omission" of an individual person; it is based on the policies of NDOC to not 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. Accordingly, NRS 41.032(1)'s exception from Nevada's general waiver of sovereign immunity is not the State's salvation.[6]

3. The legislative history supports the Nevada Legislature's intent to waive the State of Nevada's sovereign immunity on liability for all claims

Although the plain language of the NRS 41.031 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.

[6] NDOC also argues that "[r]eading 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." Mot. at pp. 12-14. Just because Nevada has a grievance process and regulates compensation under state statutes/regulations does not mean that the FLSA does not apply or that it does not fall under NRS 41.031(1)'s broad waiver. Indeed, there are state laws that protect employees in both the private (NRS Chapter 608) and public (NRS Chapter 284) sector that exceed the protections afforded by federal law. This does not mean that an employer does not have to comply with, and potentially be liable under, both sets of laws. 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.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

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." 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 along with other civil actions in the State's broad and express "abolishment" of its general sovereign immunity, subject of course to the limited tort exceptions mentioned above.[7] *See also* https://www.leg.state.nv.us/Statutes/53rd/Stats196507.html#Stats196507page1413, § 5(2) (last visited Apr. 24, 2020) (recognizing a "claim against the state arising in contract").

This conclusion is further supported by the Legislature's decision to specifically permit the State to seek insurance for "any liability" that may arise under NRS 41.031 and separately authorize the State to seek insurance for "tort liability" for individual alleged tortfeasors. *See* NRS 41.038. Under NRS 41.038(1), "The State and any local government may:

> (a) Insure itself against ***any liability*** arising under NRS 41.031.
>
> (b) Insure any of its officers, employees or immune contractors against tort liability resulting from an act or omission in the scope of the person's employment."

The Legislature's decision to permit the state to seek insurance for "any liability" and then separately specify "tort liability" indicates that Nevada's sovereign immunity waiver encompasses more than just a waiver from tort liabilities. NDOC's position leads to the statutory

---

[7] 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.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

impermissible conclusion that NRS 41.038(1)(b) is redundant and/or inconsistent with NRS 41.038(1)(a),

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.").[8] In addition, the Nevada 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). 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).[9]

4. New York's substantially similar sovereign immunity statute and caselaw supports Plaintiffs' position

[8] *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.").

[9] NDOC 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, NDOC 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. NDOC'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.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

While not dispositive, it can be helpful to see how other states have answered the question presented here. New York's sovereign immunity waiver statute, for instance, is almost verbatim to Nevada's. New York's sovereign immunity waiver statute states as follows:

> The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article. Nothing herein contained shall be construed to affect, alter or repeal any provision of the workmen's [fn] compensation law[,]

N.Y. Ct. Cl. Act § 8 (McKinney). The New York Supreme Court has held that the New York Legislature intended to waive the State of New York's sovereign immunity for all "actions" as if they were brought against "individuals or corporations", which necessarily includes claims under the FLSA. *See, e.g.*, *Speers v. State*, 2000, 183 Misc.2d 907, 705 N.Y.S.2d 858, *affirmed* 285 A.D.2d 872, 728 N.Y.S.2d 302, *amended on reconsideration* 288 A.D.2d 651, 739 N.Y.S.2d 203, attached hereto as Exhibit A. The *Speers* court further held that the State could be held liable for liquidated damages under the FLSA because "section 8 of the Court of Claims Act subjects the State to liability in the same manner as a private person or corporation." *Id.*[10]

C. NDOC Has Waived Its Sovereign Immunity Defense By Failing to Affirmatively Raise It After More 6 Years of Litigation

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, NDOC has nonetheless waived its sovereign immunity defense by failing to raise the defense of its own volition and actively litigating this case for more than six years.

[10] Similarly, in Colorado, the Colorado Governmental Immunity Act (CGIA), § 24–10–101, et seq., C.R.S.1999, grants immunity to all public entities for claims of injury that "lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant." *See* § 24–10–106(1), C.R.S.1999; *City and County of Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759 (Colo.1992). In *Hartman v. Regents of the Univ. of Colo*, a Colorado appellate court held that Colorado lacked immunity from FLSA claims because its waiver statute only immunized the state from tort claims. 22 P.3d 524 (Co. Ct. App. 2000).

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

The Nevada Supreme Court has held that a "party may nevertheless be liable for failing to timely raise an affirmative defense even if that defense is a creature of statute." *Webb v. Clark Cty. Sch. Dist., 125 Nev. Adv. Op. No. 47, 51170 (2009)*, 218 P.3d 1239, 11 (Nev. 2009); see also *Boulder City v. Boulder Excavating*, 124 Nev. 749, 754-55 (Nev. 2008) ("[D]iscretionary-act immunity is waived unless affirmatively pleaded, tried by consent, or otherwise litigated in a matter."). As the Ninth Circuit recognized in its opinion affirming this Court's decision that NDOC waived its immunity from suit, NDOC failed to timely raise its sovereign immunity defense:

> Here, Nevada only points to one place in the first four years of active litigation where it arguably raised the issue of state sovereign immunity: the line in the Answer that said, "Defendant is immune from liability as a matter of law." This line does not even mention "state sovereignty" or "the Eleventh Amendment." ***The issue of state sovereign immunity was not raised early enough in the proceedings to provide fair notice to Plaintiffs.*** Therefore, to allow Nevada to assert Eleventh Amendment immunity now would give Nevada a significant tactical advantage in this litigation and would "generate seriously unfair results." *Lapides*, 535 U.S. at 619, 122 S.Ct. 1640.

Walden v. Nevada, 945 F.3d 1088, 1095 (9th Cir. 2019) (emphasis added).

Here, NDOC made a voluntary decision to litigate this case over the course of the last six years without pursuing the sovereign immunity defense. Rather than raise the sovereign immunity defense at the outset of this litigation in 2014, NDOC vigorously litigated the Action and repeatedly asked this Court to bless its wage and hour practices. *See* ECF No. 49 (Motion for Judgment on the Pleadings); ECF No. 86 (Renewed Motion for Judgment on the Pleadings); ECF No. 99 (Motion to Dismiss). For instance, in its Renewed Motion for Judgment on the Pleadings, NDOC argued that the pre/post shift activities were non-compensable "preliminary and postliminary" activities under the Portal-to-Portal Act (*see* ECF No. 86 at pp. 8-10), and that it was not liable for "travel time" under the FLSA (see ECF No. 86 at pp. 10-14). Ultimately, NDOC asked this Court for a legal opinion holding that the pre/post shift activities were not compensable under federal and state law. Later, in its Motion to Dismiss, NDOC again asked this Court to hold, as a matter of law, that the pre/post shift work alleged in Plaintiffs' First

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

Amended Complaint is not compensable work under the FLSA. ECF No. 99, at pp. 11-15. NDOC also (successfully) moved to dismiss Plaintiffs' state law claims. *Id.* at pp. 15-24. In addition to seeking multiple judicial determinations on the legality of its pay policies by way of motion practice, NDOC substantially invoked the litigation machinery in the discovery process. *See* supra § II(B), at pp. 7-8.

NDOC's litigation conduct is at odds with its position that it enjoys sovereign immunity on Plaintiffs' claims. NDOC never mentioned the words "sovereign immunity" prior to this Court's request for briefing. *See* ECF No. 147. Instead, NDOC sought to have its wage and hour policies and practices blessed by this Court. NDOC sought an unfair legal advantage to first seek to have its pay practices upheld by this Court and then, only after receiving an Order contrary to its position, seek to have the case dismissed on sovereign immunity grounds. This type of gamesmanship is impermissible. *See, e.g.*, *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).

Presumably NDOC never raised the sovereign immunity defense on the merits before because it knew that NRS 41.031(1) waived this defense. Otherwise, NDOC was acted disingenuously by not raising this issue immediately upon removal. If NDOC's delay was merely tactical, then it "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. NDOC's unexplained delay in raising a sovereign immunity defense should render the defense waived.

D. NDOC Has Waived Its Sovereign Immunity From Liability Under Federal Statute By Removing The Action To A Federal Jurisdiction

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

While the State of Nevada has waived its sovereign immunity from liability both by statute (*see supra* § IV(B)), and by its own litigation conduct (*see supra* § IV(C)), it also waived its sovereign immunity from liability by removing this Action to federal court. The Ninth Circuit has already ruled that NDOC waived its Eleventh Amendment immunity by removal but it did not opine as to whether it waived its sovereign immunity from liability. *See Walden v. Nevada*, 945 F.3d 1088, 1092 at n.1 (2019).

Federal Circuit Courts are split on whether removal to a federal jurisdiction waives a states sovereign immunity from liability. *See, Bergemann v. Rhode Island Dept. of Environmental Management*, 665 F.3d 336, 342 (2011). The *Bergemann* Court recognized that the Seventh, Ninth, and Tenth Circuits "take the position that, regardless of the circumstances, removal always waives immunity." *Bergemann*, 665 F.3d at 342 (*citing Bd. of Regents of Univ. of Wis. Sys. v. Phx. Int'l Software, Inc.*, 653 F.3d 448, 461 (7th Cir. 2011); *Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004); *Estes v. Wyo. Dep't of Transp.,* 302 F.3d 1200, 1206 (10th Cir. 2002)).[11]

In *Estes*, the Tenth Circuit was confronted with an ADA claim originally brought in state court, where the state had undeniably preserved its sovereign immunity. Since Congress's abrogation of a state's sovereign immunity has been considered invalid under the ADA, the Tenth Circuit "proceed[ed] to consider whether [the state's] removal of the case to federal court constitutes a waiver of its sovereign immunity." 302 F.3d at 1203. The Tenth Circuit concluded that the state "ha[d] waived its sovereign immunity for the ADA claim." 302 F.3d at 1204. That conclusion, the Tenth Circuit explained, followed from *Lapides*'s reasoning and "[t]he jurisprudence in this area," which "'stands for the unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts.'" *Id.* at 1206

[11] The Ninth Circuit's decision in *Embury* admittedly seemed to be limited to the question of Eleventh Amendment immunity, as opposed to questions involving a states immunity from liability. Therefore, even though *Embury* is frequently cited for the proposition that the Ninth Circuit "take[s] the position that, regardless of the circumstances, removal always waives immunity[,] (*see Bergemann*, 665 F.3d at 342), it does not appear that *Embury* supports such a broad statement. Plaintiffs admittedly are unaware of a Ninth Circuit opinion that has addressed the precise question of whether removal waives a state's sovereign immunity from liability.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

(*quoting* College Sav. Bank, 527 U.S. at 681 n.3). Accordingly, the Tenth Circuit remanded for consideration of the ADA claim on the merits. *See id.*, at 1206-1207.

The Ninth Circuit would likely follow its prior jurisprudence in this area of the law and follow *Estes'* reasoning that waiver by removal waives all sovereign immunity defenses—immunity from suit ***and immunity from liability***. By removing an action to a federal jurisdiction, a state that is otherwise bound and beholden to follow a federal statute (see *Garcia v.* 469 U.S. at 555-56), has subjected itself to a ruling on liability (and damages) by the federal sovereign. The State of Nevada has decided to take advantage of another sovereign's courts; it must now abide by the sovereign's laws, regardless of whether it previously retained its immunity from liability in its own courts. For example, if the State of Nevada decided to take advantage of the courts of a separate state sovereign, like Arizona, the defense sovereign immunity from liability would be inapplicable. Hypothetically, if the State of Nevada filed suit against a natural person in the courts of Arizona, and said natural person filed a counterclaim under Arizona against the State of Nevada in the same Arizona court, the State of Nevada would not be able to then defend on the basis of sovereign immunity from liability. Having voluntarily availed itself to the courts of Arizona by initiating an action against the natural person, the State of Nevada is now stuck with having to defend the counterclaim filed against it on the merits. The same result should apply when a state sovereign removes a case to another sovereign's courts—it cannot now hide behind sovereign immunity defenses to liability.

Here, NDOC voluntarily removed this Action from state court; it has litigated this Action for more than 6-years before raising the defense of sovereign immunity from liability; and seeks affirmative relief from this Court in the form of an award of attorneys' fees and costs for defending the Action (*see* ECF No. 175 (Answer to Amended Complaint), at pp. 19-20). NDOC cannot, on the one hand, seek rulings in this Court to affirm its wage-hour practices and monetary damages against Plaintiffs while, on the other hand, say that it is immune from liability. Accordingly, NDOC's removal of this Action from state court provides yet another basis for denying NDOC's Motion for Summary Judgment on Sovereign Immunity.

VI. CONCLUSION

For all the reasons set forth above, NDOC's Motion for Motion for Summary Judgment on Sovereign Immunity must be denied and Plaintiffs' Motion for Partial Summary Judgment on Liability for Unpaid Wages Under the FLSA (ECF No. 256) should be granted.

DATED: May 11, 2020.

Respectfully Submitted,

THIERMAN BUCK LLP

/s/Joshua D. Buck
Joshua D. Buck
Mark R. Thierman
Leah L. Jones

Attorneys for Plaintiffs

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of THIERMAN BUCK, LLP and that on this 11th day of May, 2020, I electronically filed and served a true and correct copy of the forgoing **PLAINTIFFS' OPPOSITION TO DEFENDANT STATE OF NEVADA *EX REL.* DEPARTMENT OF CORRECTIONS' MOTION FOR SUMMARY JUDGMENT ON SOVEREIGN IMMUNITY** to all parties on file with the CM/ECF:

Shrei M. Thome, Esq.
James T. Tucker, Esq.
Cara T. Laursen, Esq.
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
300 South Fourth Street, Eleventh Floor
Las Vegas, NV 89101
Tel: (702) 727-1400

Attorneys for Defendants

By: /s/ *Araceli Chavez-Garcia*
An Employee of THIERMAN BUCK LLP

EXHIBIT A

Speers v. State,
183 Misc.2d 907,
705 N.Y.S.2d 858 (2000)
Affirmed
285 A.D.2d 872, 728 N.Y.S.2d 302
Amended on Reconsideration
288 A.D.2d 651, 739 N.Y.S.2d 203

EXHIBIT A

New York Official Reports

183 Misc.2d 907, 705 N.Y.S.2d 858, 2000 N.Y. Slip Op. 20167

Craig E. Speers et al., Individually and on Behalf of All Others Similarly Situated, Claimants,
v.
State of New York, Defendant. (Claim No. 97790.)

Court of Claims,
97790, M-60545
February 17, 2000

CITE TITLE AS: Speers v State of New York

HEADNOTES

State
Claim against State
Fair Labor Standards Act--Applicability of Court of Claims Act Six-Month Statute of Limitations

(1) A claim against the State seeking unpaid overtime compensation, liquidated damages and attorneys' fees pursuant to the Fair Labor Standards Act of 1938 (29 USC § 201 et. seq. [FLSA]) is subject to the six-month Statute of Limitations contained in Court of Claims Act § 10 (4). The State's waiver of its sovereign immunity, which extends to claims for wages under the FLSA, is conditioned upon compliance "with the limitations of this article" (Court of Claims Act § 8). Thus, the State's waiver of immunity is expressly conditioned upon meeting the jurisdictional limitations contained in Court of Claims Act article II, including the limitations in section 10 as to timely service and filing of a claim.

State
Claim against State
Fair Labor Standards Act--Availability of Liquidated Damages

(2) In a claim brought by State employees seeking to recover unpaid overtime compensation pursuant to the Fair Labor Standards Act of 1938 (29 USC § 201 et. seq. [FLSA]), claimants' request for liquidated damages is proper and will not be dismissed. Liquidated damages under the FLSA may be recovered against a private employer. They constitute compensation, not a penalty or punitive damages, and except as otherwise limited by its express terms, Court of Claims Act § 8 subjects the State to liability in the same manner as a private person or corporation.

State
Claim against State
Fair Labor Standards Act--Availability of Attorneys' Fees

(3) In a claim brought by State employees seeking to recover unpaid overtime compensation pursuant to the Fair Labor Standards Act of 1938 (29 USC § 201 et. seq. [FLSA]), claimants' request for attorneys' fees is proper and will not be dismissed. The State, having waived its sovereign immunity with regard to FLSA actions except as otherwise conditioned in Court of Claims Act article II, is subject to the provisions of the FLSA authorizing the recovery of counsel fees. The proscription against the award of attorneys' fees contained in Court of Claims Act § 27 is inapplicable, because section 27 is contained in article III, not article II of the Court of Claims Act.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Municipal County, School, and State Tort Liability, §§ 75, 78-80, 83, 660.

Carmody-Wait 2d, Actions in the Court of Claims §§ 120:6, 120:9, 120:18, 120:24, 120:40-120:42, 120:115. ***908**

McKinney's, Court of Claims Act arts I, II; §§ 8, 10 (4); § 27.

29 USCA § 201 *et seq.*

NY Jur 2d, Government Tort Liability, §§ 261, 266, 269, 271, 274.

ANNOTATION REFERENCES

See ALR Index under Limitation of Actions; Privileges and Immunities.

APPEARANCES OF COUNSEL

Eliot Spitzer, Attorney General (*Kevan J. Acton* of counsel), for defendant. *Chamberlain, D'Amanda, Oppenheimer & Greenfield* (*Matthew J. Fusco* of counsel), for claimants.

OPINION OF THE COURT

Francis T. Collins, J.

The motion of the defendant for an order pursuant to CPLR 3212 granting it summary judgment dismissing those portions of the claim which accrued more than six months prior to February 10, 1998 is granted. In all other respects the motion is denied.

Claimants, persons who currently hold or in the past have held the title of Senior Examiner for the Department of Audit and Control, filed this claim on February 10, 1998. The claim seeks to recover unpaid overtime compensation for the period of June 1992 to the present, together with liquidated damages and attorneys' fees pursuant to the Fair Labor Standards Act of 1938 ([FLSA] 29 USC § 201 *et seq.*). Claimants allege that their homes are designated as their "official stations" and that they commute from their homes to various political subdivisions on a daily basis in order to conduct audits of the municipal books and records. While the claimants are paid mileage for travel between their homes and the audit sites, it is alleged that the defendant has denied their request for payment for the hours spent traveling to and from the assigned audit location (*see, Manners v State of New York,* 183 Misc 2d 382 [Collins, J.] [a State employee is not entitled to overtime compensation for the time spent commuting between his official station and his work station]).

Claimants originally pursued their FLSA claim through an action filed on June 23, 1994 in the United States District Court for the Western District of New York (*Speers v State of* ***909** *New York,* 94-CIV-6331C). On February 12, 1997, the District Court dismissed that action upon the ground that the Eleventh Amendment of the US Constitution barred the litigation pursuant to the decision of the United States Supreme Court in *Seminole Tribe v Florida* (517 US 44). Claimants chose not to pursue an appeal to the United States Court of Appeals for the Second Circuit and instead commenced this claim. The third affirmative defense in the answer alleges with the requisite specificity (*Villa v State of New York,* 228 AD2d 930) that the Court of Claims lacks subject matter jurisdiction of the claim as it was not timely served and filed within 180 days of accrual as required by Court of Claims Act § 10 (4).

By this motion, the defendant seeks to dismiss the claim in its entirety for failure to adequately set forth the time and place of the claim's accrual as required by Court of Claims Act § 11 (b). Alternatively, the defendant moves for dismissal of so much of the claim as pertains to matters arising more than six months preceding the date of service and filing of the claim as well as the claimants' request for liquidated damages and attorneys' fees. Claimants argue that the claim adequately states the time and place of the claim's accrual and that the claim is timely in that the time limitations contained in section 10 of the Court of Claims Act may not be applied at the expense of a Federal right (*see, Ahern v State of New York,* 174 Misc 2d 123, *affd* 244 AD2d 7).

With respect to the timeliness defense, analysis begins with a review of the Third Department decision in *Ahern* (*supra*). *Ahern* was a claim brought by New York State Police investigators and senior investigators to recover unpaid overtime compensation, liquidated damages and counsel fees pursuant to the FLSA. The *Ahern* claimants originally brought suit in Federal District Court but the action was dismissed based upon the *Seminole Tribe* decision (*supra*). The claimants then commenced a claim in this court within 30 days following dismissal of the Federal court action. The State moved to dismiss upon the ground that the Court of Claims lacked jurisdiction in that the claim was not filed within six months of accrual as required by Court of Claims Act § 10 (4). The Appellate Division described the defendant's position (at 10-11) as follows: "[B]orrowing liberally from 11th Amendment analysis and applying its own creative construction of *Seminole Tribe v Florida* (*supra*), the State reasons that '[i]f, in the absence [of] a waiver, Congress lacks the power to abrogate state sovereign immunity from FLSA suits in federal court, then it must also ***910** lack the power to define or expand the conditions of a State's waiver of immunity to FLSA suits in the State's own courts.' "

The Appellate Division rejected the State's position upon the grounds that the Eleventh Amendment dealt only with Federal jurisdiction to hear suits against a State in Federal court, and the United States Supreme Court decision in the case of *Felder v Casey* (487 US 131) held that a State could not impose a time limitation upon a Federal cause of action created by Congress (*see, Mitchell v La Barge,* 257 AD2d 834). Defendant argues that the decision of the United States Supreme Court in the case of *Alden v Maine* (527 US 706) undermines *Ahern* (*supra*) and requires that the time limitations contained in section 10 of the Court of Claims Act be applied to FLSA claims. The court agrees.

At the outset, the court recognizes that it is bound by determinations of the Appellate Division in the absence of an overriding decision by a higher court (*Miller v Miller,* 109 Misc 2d 982). *Alden* (*supra*) is such a ruling. *Alden* was a suit by probation officers brought against the State of Maine in State court to recover overtime, counsel fees and liquidated damages pursuant to the FLSA. Maine argued that on the basis of sovereign immunity, which it had not waived, it was immune from a FLSA lawsuit in its own court. The Supreme Court undertook an extensive review of the history of sovereign immunity and the Eleventh Amendment and held (527 US, at 754) as follows: "In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation."

Thus, the attempt by Congress, pursuant to its article I powers, to abrogate a State's sovereign immunity from FLSA suits in its own court was unconstitutional. The Supreme Court in *Alden* (*supra*) went on to hold that the State of Maine had not waived its sovereign immunity with respect to FLSA claims and, of critical importance in this case, specifically held (527 US, at 758) that: "To the extent Maine has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit."

In the above-quoted language, the United States Supreme Court specifically recognized that a State has the right to determine the parameters of its waiver of sovereign immunity ***911** by permitting certain classes of suits while prohibiting others. At page 2 of its memorandum of law, the State concedes that its waiver of sovereign immunity extends to a claim for wages under the FLSA. It contends, however, that the waiver is conditioned upon compliance with the time limitations for service and filing of a claim contained in sections 10 and 11 of the Court of Claims Act which constitute jurisdictional conditions precedent to an action against the State in the Court of Claims. Citing *Felder* (*supra*) claimants argue at page 1 of their memorandum of law that where "the State has chosen to subject itself to suit in its courts for violations of the Fair Labor Standards Act, it cannot mold the contours of the rights conferred by the Act to suit itself."

In *Felder* (*supra*), an arrestee allegedly beaten during the course of his arrest by police officers employed by the City of Milwaukee failed to meet the requirements of the Wisconsin notice of claim statute in bringing his State court action against the City and certain of the arresting officers under 42 USC § 1983. The Supreme Court held that the Supremacy Clause preempted the Wisconsin notice of claim requirement in a section 1983 action brought in State court.

Claimants' reliance upon *Felder* (*supra*) in the context of the instant action, and subsequent to the Supreme Court's decision in *Alden* (*supra*), is misplaced. First, a State is not subject to suit in section 1983 actions (*Cavanaugh v Doherty,* 243 AD2d 92) and, therefore, issues relative to a State's immunity from suit in its own courts were not directly relevant in an action such as *Felder* which involved a municipal defendant.

Furthermore, the Federal rights protected in *Felder* (*supra*) arise under 42 USC § 1983 which was enacted pursuant to the enforcement powers granted in section 5 of the Fourteenth Amendment which accords far greater power to Congress to override the sovereign immunity of the States than does article I of the US Constitution. The Supreme Court in *Alden* (*supra*) specifically recognized the power of Congress to override the sovereign immunity of the States in enforcing the Fourteenth Amendment when it stated (527 US, at 756) as follows: "We have held also that in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power. *Fitzpatrick v. Bitzer,* 427 U. S. 445 (1976). By imposing explicit limits on the powers of the States and granting ***912** Congress the power to enforce them, the Amendment 'fundamentally altered the balance of state and federal power struck by the Constitution.' *Seminole Tribe,* 517 U. S., at 59. When Congress enacts appropriate legislation to enforce this Amendment, see*, City of Boerne v. Flores,* 521 U. S. 507 (1997), federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution."

Indeed, section 5 of the Fourteenth Amendment specifically provides that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Clearly, under the *Alden* holding (*supra*), Congress possesses the authority to abrogate the sovereign immunity of the States in enforcing rights protected by the Fourteenth Amendment, including the power to vitiate State time limitations which act to burden or impede such rights. Under *Alden,* Congress does not have the same power to abridge a State's sovereign

immunity when exercising its article I authority in attempting to protect rights created by the FLSA. Simply put, under the Fourteenth Amendment Congress has the authority to override a State's sovereign immunity in protecting a Federal cause of action while under article I it does not. As a result, *Ahern* (*supra*) provides little guidance in determining the scope of the State's sovereign immunity from suits against it in State court under the FLSA.

As *Alden* (*supra*) specifically holds that it is up to each State to determine under what conditions it consents to waive its sovereign immunity from suit the issue becomes whether compliance with the time limitations set forth in section 10 of the Court of Claims Act constitutes an integral part of the waiver and a condition precedent to the pursuit of FLSA claims in this court. When the State consents to suit in a single enactment waiving its sovereign immunity premised upon compliance with time requirements, those time requirements are an integral part of the waiver (*Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.,* 93 NY2d 375). It is axiomatic "that a statute in derogation of the sovereignity [*sic*] of a State must be strictly construed, waiver of immunity by inference being disfavored" (*Sharapata v Town of Islip,* 56 NY2d 332, 336).

(1) Section 8 of the Court of Claims Act expressly provides that the State "hereby waives its immunity from liability ... provided the claimant complies with the limitations of this article" (*see,* Court of Claims Act § 9 [2] [conditioning this ***913** court's jurisdiction to hear and determine a claim upon the requirement that "the claimant complies with the limitations of this article"]). Applying a strict construction to the foregoing requires a conclusion that the State's waiver of immunity is expressly conditioned upon meeting the jurisdictional limitations contained in article II of the Court of Claims Act, including the limitations as to timely service and filing of a claim in section 10. As such, the limitations represent an integral part of the waiver, the failure to comply with which deprives this court of jurisdiction to entertain the claim (*Lichtenstein v State of New York,* 93 NY2d 911; *Dreger v New York State Thruway Auth.,* 81 NY2d 721; *Crair v Brookdale Hosp. Med. Ctr.,* 259 AD2d 586; *Selkirk v State of New York,* 249 AD2d 818; *Park v State of New York,* 226 AD2d 153). Therefore, this court joins with the decision of its sister States (*Butterfield v State,* 163 Ore App 227, 987 P2d 569; *Allen v Fauver,* 327 NJ Super 14, 742 A2d 599), and Judge McNamara of this court (*Bergmann v State of New York,* claim No. 97565, motion Nos. M-60457, M-60458, filed Nov. 23, 1999) in determining that the claimants' failure to meet the time limitation contained in Court of Claims Act § 10 (4) requires the dismissal of all portions of the claim relative to matters occurring more than six months preceding the date upon which the claim was served and filed.

(2) As to the availability of liquidated damages, except as otherwise limited by its express terms (*see, infra*), section 8 of the Court of Claims Act subjects the State to liability in the same manner as a private person or corporation. Liquidated damages under the FLSA may be recovered against a private employer and constitute compensation, not a penalty or punitive damages (*Brothers v Branch Motor Express Co.,* 60 Misc 2d 835, 840). Consequently, the request for liquidated damages is proper and will not be dismissed.

(3) Nor will the court act to dismiss that part of the claim which seeks to recover attorneys' fees. Court of Claims Act § 8 expressly conditions the State's waiver of immunity upon a claimant's compliance with "the limitations of this article," namely, article II of the Act pertaining to jurisdiction. Section 27 of the Court of Claims Act provides in pertinent part that counsel or attorneys' fees may not be allowed to any party. However, section 27 is part of the practice provisions found in article III of the Act and falls outside the article II limitations referenced in section 8 as conditioning the State's waiver of immunity. As such, the proscription against the award of attorneys' fees contained in section 27 does not represent a ***914** reservation of immunity and the State, having waived its immunity with regard to FLSA actions except as otherwise conditioned in article II, is subject to the provisions of the Federal Act authorizing the recovery of counsel fees.

Finally, defendant's contention that the claim is defective under Court of Claims Act § 11 (b) because it does not set forth the time and place of the claim's accrual lacks merit. All that is required in the claim is substantial compliance with section 11 so as to permit the State to be able to investigate (*Grumet v State of New York,* 256 AD2d 441). The court finds that the claimants have substantially complied with the requirements of the Court of Claims Act in that they have adequately set forth the time when and place where the claim accrued. Since the FLSA requires the defendant as employer to keep all records concerning the incurring of overtime, the defendant was in a position to investigate these claims if it met its obligation under the Federal legislation. ***915**

705 N.Y.S.2d 858, 2000 N.Y. Slip Op. 20167

End of Document

New York Official Reports

285 A.D.2d 872, 728 N.Y.S.2d 302, 2001 N.Y. Slip Op. 06375

Craig E. Speers et al., Appellants,
v.
State of New York, Respondent. (Claim No. 97790.)

Supreme Court, Appellate Division, Third Department, New York
88509
(July 19, 2001)

CITE TITLE AS: Speers v State of New York

HEADNOTE

CIVIL SERVICE
COMPENSATION AND BENEFITS

(1) In claim in which claimants, employees or former employees of State who maintained offices in their homes and traveled to municipalities where they performed their audit duties, seek compensation for their travel time from their homes to their work sites pursuant to Fair Labor Standards Act (see, 29 USC § 201 et seq.; FLSA), Court of Claims properly dismissed portion of claim that accrued more than six months preceding date upon which claim was served and filed since claimants failed to comply with time limitations set forth in Court of Claims Act § 10 (4)--motion for summary judgment dismissing balance of claim should have been denied; while FLSA prohibits employers from requiring their employees to work more than 40 hours per week without compensating them for overtime, employer is not required to pay employee overtime for traveling to and from actual place of performance of principal activity that such employee is required to perform (see, 29 USC § 254 [a]); written decision of arbitrator submitted by State, which addressed issue of overtime compensability pursuant to collective bargaining agreement between claimants' union and State, does not constitute proof in admissible form and, as such, State failed to sustain its burden on motion for summary judgment.

Crew III, J. P.

Appeals (1) from an order of the Court of Claims (Collins, J.), entered February 25, 2000, which, *inter alia,* granted the State's motion for summary judgment dismissing that portion of the claim which accrued more than six months preceding the date upon which the claim was served and filed, and (2) from an order of said court, entered July 20, 2000, which granted the State's motion for summary judgment dismissing the remainder of the claim.

Claimants are employees or former employees of the State and are/were Senior Examiners for the Department of Audit and Control, Division of Municipal Affairs, Bureau of Municipal Examinations. The record reflects that claimants maintained offices in their respective homes and traveled from their homes to the various municipalities where they performed their audit duties. While the State reimbursed claimants for the expenses incurred in traveling from their homes to the various municipalities that they were auditing, it did not credit such time for the purposes of overtime compensation. As a consequence, claimants filed this claim against the State on February 10, 1998 seeking compensation for their travel time from their homes to their various work sites pursuant to the Fair Labor Standards Act of 1938 (*see,* 29 USC § 201 et. seq. [hereinafter FLSA]).

Following the filing of its answer, the State moved for dismissal of the claim, and the Court of Claims granted the motion to the extent of dismissing those portions of the claim that accrued more than six months prior to the filing thereof. Thereafter, the State moved for summary judgment dismissing the remainder of the claim based upon collateral estoppel and claimants' failure to demonstrate a violation of the FLSA. The Court of Claims granted the State's motion and these appeals ensued.

Initially, we have no quarrel with the Court of Claims' dismissal of that portion of the claim that accrued more than six months preceding the date upon which the claim was served and filed. As our prior decisions in *Bergmann v State of New York* (281 AD2d 731) and *Alston v State of New York* (281 AD2d 741, *lv granted* 96 NY2d 714) make clear, claimants were required to comply with the time limitations set forth in Court of Claims Act § 10 (4) and, having failed to do so, cannot be heard to complain. ***873**

We now turn to claimants' appeal from the order entered July 20, 2000 granting the State's motion for summary judgment dismissing the balance of the claim. While the FLSA prohibits employers from requiring their employees

to work more than 40 hours per week without compensating them for overtime, an employer is not required to pay an employee overtime for traveling to and from the actual place of performance of the principal activity that such employee is required to perform (*see,* 29 USC § 254 [a]). Claimants point out that, inasmuch as they are not provided office space at any State location, the State has designated their homes as their official stations. Claimants contend that they travel to various municipalities to gather information, which they then take to their homes and use to prepare their audit reports. Thus, claimants maintain, they are undertaking to perform principal activities at their homes, and travel time between their homes and the municipalities where they gather information constitutes compensable overtime. The State, on the other hand, maintains that the designation of their homes as "official stations" has been done so that claimants may receive mileage reimbursement for travel from their "official stations" to their "official work stations," which are the audit sites. The State further maintains that claimants' homes are not intended to be places where principal activities of employment are performed and that the State is, therefore, not in violation of the FLSA.

Although the State makes a compelling argument in this regard, its evidentiary support primarily consists of the written decision of an arbitrator, which addressed the issue of overtime compensability pursuant to the collective bargaining agreement between claimants' union and the State. While the arbitrator's decision was based upon, *inter alia,* sworn testimony of certain State employees, the decision itself does not constitute proof in admissible form and, as such, the State failed to sustain its burden on the motion for summary judgment. To the extent that the State argues, as an alternative basis for affirming, that claimants should be collaterally estopped from raising an FLSA claim based upon their participation in binding arbitration, we need note only that the State did not appeal from the Court of Claims' July 20, 2000 order rejecting the application of the doctrine of collateral estoppel and, as such, that issue is not properly before us.

Spain, Mugglin, Rose and Lahtinen, JJ., concur.
Ordered that the order entered February 25, 2000 is affirmed, without costs. Ordered that the order entered July 20, 2000 is reversed, on the law, without costs, and the State's motion for summary ***874** judgment dismissing that portion of the claim accruing less than six months preceding the date upon which it was served and filed is denied. [*See, 288 AD2d ___, Nov. 15, 2001.*]

288 A.D.2d 651, 739 N.Y.S.2d 203
(Mem), 2001 N.Y. Slip Op. 09072

Craig E. Speers et al., Appellants,
v.
State of New York, Respondent.

Supreme Court, Appellate Division,
Third Department, New York
(November 15, 2001)

CITE TITLE AS: Speers v State of New York

Motion for reconsideration.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

Ordered that the motion is granted, without costs, and, upon reconsideration, the last sentence on page 3 [slip opinion] of this Court's memorandum and order decided and entered July 19, 2001 (285 AD2d 872, 873) is amended to read as follows: "To the extent that the State argues, as an alternative basis for affirming, that claimants should be collaterally estopped from raising an FLSA claim based upon their participation in binding arbitration, we conclude that, while the issue decided in the arbitration proceeding between claimants' union and the State may be relevant to the FLSA claim, the arbitration decision should not be given preclusive effect under the doctrine of collateral estoppel (*see, Matter of Valentino v American Airlines,* 131 AD2d 6, 9; *see also, Matter of Rourke v New York State Dept. of Correctional Servs.,* 201 AD2d 179, 182)."

Crew III, J. P., Spain, Mugglin, Rose and Lahtinen, JJ., concur.

End of Document

SHERI THOME, ESQ.
Nevada Bar No. 8657
JAMES T. TUCKER, ESQ.
Nevada Bar No. 12507
CARA T. LAURSEN, Esq.
Nevada Bar No. 14563
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, Nevada 89119
Tel: 702.727.1400/Fax: 702.727.1401
Sheri.Thome@wilsonelser.com
James.Tucker@wilsonelser.com
CaraT.Laursen@wilsonelser.com
Attorneys for Defendant The State of Nevada, ex rel. its Department of Corrections

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' REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON SOVEREIGN IMMUNITY

Plaintiffs concede that resolving NDOC's Motion comes down to two points: First, whether Nevada's legislature waived Nevada's sovereign immunity to private actions under the Fair Labor Standards Act (FLSA) when N.R.S. § 41.031 was enacted. Second, whether Nevada's Supreme Court recognizes implied waiver of Nevada's sovereign immunity. The answer to both questions is no. Plaintiffs have a remedy, available through Nevada's comprehensive administrative process.

Plaintiffs' remaining arguments do not change those answers. The Ninth Circuit's decision on appeal explicitly states it made no determination regarding Nevada's immunity from liability. Waiver of sovereign immunity is likewise is not established by the removal of this action to federal court, a proposition that every authoritative Circuit Court decision has rejected, nor can it be since it waiver of sovereign immunity from liability is a pure issue of state law. There is no Nevada authority, in which Nevada's Supreme Court has held that this Court can imply a waiver of

sovereign immunity from liability. Even if there were (there isn't), Nevada placed Plaintiffs on fair notice of its sovereign immunity in the first responsive pleading it filed following removal. Nevada's legislature has not, and NDOC has no power to waive its fundamental constitutional right to be free from private suits under the FLSA.

I. SUPREME COURT DECISIONS MANDATE THE MOST EXACTING SCRUTINY OF ANY ALLEGED WAIVER BY NEVADA OF ITS SOVEREIGN IMMUNITY.

The Constitution recognizes the States as sovereign entities, with an essential attribute of their sovereignty including the constitutional right "'not to be amenable to the suit of an individual *without its consent.*'" *Alden v. Maine*, 527 U.S. 706, 716-17, 728 (1999) (italics in original) (citation omitted); *see also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n.15 (1996) (same). There are only two narrow exceptions. First, Congress can authorize private suits against a non-consenting State through appropriate legislation enacted within the scope of power granted to it under the Constitution. *City of Boerne v. Flores*, 521 U.S. 507, 519-20, 536 (1997). Second, a State may waive its sovereign immunity and consent to be sued. *Alden*, 527 U.S. at 755; *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). As the moving Party, Nevada has established that it has not waived its sovereign immunity from liability and is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a).

Plaintiffs demonstrate their fundamental misunderstanding of both the procedural requirements for summary judgment and the broad sovereign authority that Nevada enjoys. They improperly chide NDOC's discussion of its sovereign immunity from liability – which is the very subject matter of its motion – as somehow being "completely irrelevant to the question presented by its Motion." [ECF No. 299 at 8 n.4.] NDOC applauds Plaintiffs for acknowledging what controlling authority required them to admit: that *Alden v. Maine* held that Congress lacked the constitutional power in its enactment of the Fair Labor Standards Act to abrogate Nevada's sovereign immunity from liability. [*Id.*] But that is where the accolades for Plaintiffs' dissembling brief must end.

The four United States Supreme Court decisions are applicable to this case not just simply for their holding that Congress had no authority to impose the FLSA on non-consenting states like

Nevada.[1] They also emphasize in the strongest of terms why "'[c]ourts indulge every reasonable presumption against waiver' of fundamental rights, a rule that applies with equal force to a State's "constitutionally protected" sovereign immunity from liability. *Florida Prepaid*, 527 U.S. at 682 (citations omitted). Therefore, 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).

Plaintiffs have wholly failed to show any waiver of Nevada's immunity from liability, much less their exacting burden under *Edelman*. As a result, NDOC is entitled to summary judgment.

II. PLAINTIFFS CONCEDE BY OMISSION THAT THERE IS NO NEVADA CASE INTERPRETING N.R.S. § 41.031 AS ANYTHING BUT A WAIVER OF SOVEREIGN IMMUNITY FOR CERTAIN TORT CLAIMS BROUGHT AGAINST THE STATE.

The crux of Plaintiffs' opposition rests on their unfounded contention that in Nevada "all political subdivisions of the State have waived their general immunity from liability" for all purposes under N.R.S. § 41.031. Plaintiffs cite to no Nevada authority to support their interpretation. Moreover, in making their bald assertion, they never grapple with two issues. First, N.R.S. § 41.031 was enacted in 1965, decades prior to the FLSA being applied to the States for a brief time, with nothing in the statute stating in the most express language that Nevada's legislature was opening Nevada up to private suits for any future federal legislation Congress might enact. Second, Plaintiffs offer no explanation – much less point to the most express language in the statute – reconciling Nevada's adoption of a comprehensive administrative system for reviewing compensation issues for current and former State employees that would effectively be nullified if N.R.S. § 41.031 permitted private FLSA suits to be brought against Nevada. Instead, Plaintiffs ignore controlling precedent from the Nevada Supreme Court that limits the waiver to certain tort claims.

A. Plaintiffs cite no Nevada authority showing "in the most express terms" a blanket waiver in N.R.S. § 41.031, which Nevada's Supreme Court has explicitly limited to apply to only certain torts.

Plaintiffs contend that Nevada has made a blanket waiver of its immunity from liability in N.R.S. § 41.031, entitled "Waiver of Sovereign Immunity." Specifically, they argue that the

[1] *Allen v. Cooper*, 140 S. Ct. 994 (2020); *Alden*, 527 U.S. at 706; *Florida Prepaid*, 527 U.S. at 627; and *Seminole Tribe*, 517 U.S. at 44.

statutory text "plainly states that the Nevada Legislature has decided to waive the State of Nevada's sovereign immunity in *all civil actions*, except for certain specifically enumerated exceptions. [ECF No. 299 at 1 (italics in original)]. Yet, later on in their brief, Plaintiffs contradict themselves. They acknowledge "it is true that the Nevada Supreme Court has never directly addressed the precise question of whether NRS 41.031's "Waiver of Sovereign Immunity" applies to civil actions, such as a claims [sic] for unpaid wages under the FLSA…" [ECF No. 299 at 10.] ***In the 55 years since Nevada's legislature enacted N.R.S. § 41.031, not a single decision from Nevada's highest court supports Plaintiffs' contention that Nevada has waived its immunity from liability in all civil cases.*** That is because Nevada's statutory waiver applies only to certain tort claims.

Plaintiffs do not cite to a single decision adopting their interpretation of N.R.S. § 41.031. As they acknowledge, such a case does not exist. [ECF No. 299 at 10.] The reason there is no authority supporting Plaintiffs' argument is because the Nevada Supreme Court has rejected it. As it has explained, "NRS 41.031 contains Nevada's general waiver of sovereign immunity from suits arising from acts of negligence committed by state employees." *Butler v. Bayer*, 123 Nev. 450, 465, 168 P.3d 1055, 1066 (2007). Because Plaintiffs' FLSA claims are not torts, the limited waiver of Nevada's sovereign immunity from liability in N.R.S. § 41.031 is inapplicable.

B. Plaintiffs never grapple with two issues that repudiate their argument that N.R.S. § 41.031 is a blanket waiver for all civil claims.

Plaintiffs bear the burden of showing what they argue is a blanket waiver of Nevada's sovereign immunity from liability through "the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction." *Edelman*, 415 U.S. at 673. Plaintiffs disregard *Edelman*'s mandate by failing to show any language supporting a blanket waiver of *federal claims* that did not even exist when the statute was enacted, much less "express language" or "overwhelming implications" permitting Nevada's comprehensive administrative process for wage claims to be rendered a dead letter.

(i) N.R.S. § 41.031 was enacted decades before *Garcia* applied the FLSA to the states for a brief time

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.

Such a construction is directly at odds with the broad construction of sovereign immunity in the quartet of *Allen*, *Alden*, *Seminole Tribe*, and *Florida Prepaid*. As *Alden* makes clear, "When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States." 527 U.S. at 732. The States retain their "immunity in sweeping terms, without reference to whether the suit was prosecuted in state or federal court." *Id.* at 745. Plaintiffs would turn these constitutional principles on their head, making *Congress* through its enactment of future federal laws – and not the Nevada Legislature – the final arbiter of deciding which federal actions apply to non-consenting states. The United States Supreme Court has expressly rejected that view as an unconstitutional infringement on State sovereignty. [*See* ECF No. 276 at 3-9.]

(ii) Nevada has adopted a comprehensive administrative process for reviewing wage claims, which Plaintiffs ask the Court to discard

Prior to and throughout this litigation, Plaintiffs have demonstrated their utter disdain for Nevada's comprehensive administrative system for resolving their compensation issues. Plaintiffs' refusal to follow these rules is one of the subjects of NDOC's Motion for Summary Judgment on the Merits. [*See* ECF No. 283.] Without citing any applicable law, Plaintiffs contend that the Court should simply ignore that comprehensive administrative system as they have done. [*See* ECF No. 299 at 14 n.6.] The Court need not look any further than the administrative provisions and Nevada's failure to waive its immunity from liability for wage and hour claims to reject Plaintiffs' contention.

Nevada's comprehensive statutory and administrative system addresses state employee "grievances," including "any condition arising out of the relationship between an employer and an employee, including, but not limited to, compensation…" NAC 284.658(2). Employees must first grieve their compensation dispute with their supervisor (NAC 284.678), then to their department head (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 procedure to avoid lawsuits over compensation of the very kind that the Plaintiffs have asserted in this matter. As the First Judicial District Court explained:

> This process requires that claimants first file a grievance within 20 days of the occurrence regarding issues of compensation or working hours, that they then appeal the decision regarding their grievance to the EMC, and that, if still unsatisfied, they obtain judicial review of EMC's decision by filing a petition within 30 days. NRS §§ 284.384, 233B130(2)(d), NAC 284.678, 682, 686, 690, and 695. **Nevada would not have created this complex administrative scheme if a state employee could simply bypass it by filing a civil action.**

Columbus v. Nevada, Order Granting Defs.' Mot. to Dismiss at 3, Case No. 18-15691 (Nev. 1st Dist. Ct. Jan. 17, 2019) (emphasis added) (attached as Exhibit A). The *Columbus* court made findings that are equally applicable here:

> Plaintiffs have failed to allege that they have exhausted their administrative remedies by properly pursuing the grievance procedure. Plaintiffs do not allege they ever asked for overtime, or that NDOC denied their request. Plaintiffs do not allege they timely filed a grievance. Plaintiffs do not allege they have sought judicial review of a final agency decision by the Employee-Management Committee. And the failure to exhaust administrative remedies is fatal to a state employee's claim.

Id. (citing *City of Henderson v. Kilgore*, 122 Nev. 331, 336-37, 131 P.3d 11, 15-16 (2006)); *see also Prost v. Nevada*, Order Granting Defs.' Mot. to Dismiss at 2-3, Case No. 18-15691 (Nev. 1st Dist. Ct. Feb. 1, 2019) (attached as Exhibit B). Other federal courts have held that FLSA claims must be dismissed in the face of similar statutes mandating an administrative process in lieu of the State waiving its sovereign immunity from liability.[2] Therefore, the Court is precluded from rewriting Nevada law to eliminate the administrative process culminating in judicial review, which Nevada has offered Plaintiffs as the exclusive form of redress for their wage claims.

C. Plaintiffs do nothing to distinguish over 40 years of consistent Nevada Supreme Court opinions interpreting N.R.S. § 41.031 as merely a waiver of sovereign immunity for certain torts.

Plaintiffs misrepresent "that the Nevada Supreme Court has never held that Nevada's sovereign immunity is limited to tort actions only." [ECF No. 299 at 10.] Several decisions of the

[2] *See, e.g., Tall v. Maryland Dep't of Health & Mental Hygiene*, 2016 U.S. Dist. LEXIS 180178 at * (D. Md. Dec. 29, 2016) ("Maryland has not waived its immunity to suit in federal court based on the FLSA. Rather, the State's administrative grievance process, including judicial review in a state circuit court, is the exclusive path the Maryland General Assembly has created for a current or former State employee seeking to pursue an FLSA claim.").

Nevada Supreme Court addressing the scope of § 41.031 have done precisely that. Plaintiffs prove that point themselves. Each of the Nevada Supreme Court decisions Plaintiffs cite as construing N.R.S. § 41.031 involved torts.

(i) Controlling Nevada law limits § 41.031 to certain torts

"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*." *Clark Cty. Sch. Dist. v. Richardson Const., Inc.*, 123 Nev. 382, 389, 168 P.3d 87, 92 (Nev. 2007) (emphasis added). No broad waiver was specified nor intended.

Nevada adopted this limited waiver to provide a state counterpart to the Federal Tort Claims Act. *Martinez v. Maruszczak*, 123 Nev. 433, 444, 168 P.3d 720, 727-28 (Nev. 2007). "The 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." *Turner v. Staggs*, 89 Nev. 230, 235, 510 P.2d 879, 882 (Nev. 1973); *see also Jimenez v. State*, 98 Nev. 204, 207, 644 P.2d 1023, 1025 (Nev. 1982) (same); *Glover-Armont v. Cargile*, 134 Nev. Adv. Rep. 49, 54, 426 P.3d 45 (Nev. App. 2018).

"N.R.S. 41.032 conditionally limits this waiver." *Hagblom v. Director of Motor Vehicles*, 93 Nev. 599, 603, 571 P.2d 1172, 1175 (Nev. 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. As the Nevada Supreme Court has explained:

> NRS 41.031 contains Nevada's general waiver of sovereign immunity from suits arising from acts of negligence committed by state employees. The purpose of that waiver is "to compensate victims of government negligence in circumstances like those in which victims of private negligence would be compensated." Nonetheless, NRS 41.032(2) generally precludes maintenance of a suit based in state law against the State, its employees, or any agencies or subdivisions for actions that are "discretionary" in nature.

Butler, 123 Nev. at 465, 168 P.3d at 1066; *see also Franchise Tax Bd. of Cal. v. Hyatt*, 407 P.3d 717,

728 (2017) ("Like most states, Nevada has waived traditional sovereign immunity from tort liability, with some exceptions. NRS 41.031."), *abrogated on other grounds*, 139 S. Ct. 1485 (2019).

Two decisions from Nevada's First Judicial District Court have applied this clear authority from Nevada's highest court to conclude that the State has not waived its sovereign immunity from liability for FLSA claims. In *Columbus v. Nevada*, the First Judicial District Court ruled:

> The Court finds the State of Nevada enjoys sovereign immunity as to FLSA claims in any court, including its own state courts, unless it expressly waives that immunity. *Alden v. Maine*, 527 U.S. 706 (1999), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). **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. Nevada's Supreme Court has consistently construed Nevada Revised Statute 41.031(1) as a waiver to tort liability only.** *Hagblom v. State Dir. of Motor Vehicles*, 93 Nev. 599, 604, 571 P.2d 1172, 1176 (1977); *Franchise Tax Bd. of Cal. v. Hyatt*, 407 P.3d 717, 728 (Nev. 2017). No Nevada case has ever described a claim for overtime compensation under the FLSA as a tort. Therefore, the Court dismisses Plaintiffs' FLSA claim because sovereign immunity bars it.

Ex. A at 2 (emphasis added). In *Prost v. Nevada*, the First Judicial District Court held that under the authority of "the *Butler* and *Franchise Tax* cases the Court concludes Nevada has not waived sovereign immunity as to FLSA actions." Ex. B at 3.

When reviewing Nevada law, this Court is "bound by decisions of the state's highest court." *Teleflex Med. Inc. v. National Union Fire Ins. Co.*, 851 F.3d 976, 982 (9th Cir. 2017). For the 55 years since its enactment, the Nevada Supreme Court has repeatedly and consistently limited the application of the waiver of sovereign immunity in N.R.S. § 41.031 to tort claims. Those decisions expressly repudiate Plaintiffs' contention that Nevada has made a blanket waiver of its immunity from liability "in all civil actions." [ECF No. 299 at 1.] Not having waived its immunity from liability in this FLSA action, NDOC is entitled to dismissal of Plaintiffs' FLSA claims.

(ii) The Nevada waiver cases cited by Plaintiffs each involved torts

As Plaintiffs readily admit, none of the cases they cite support their argument that N.R.S. § 41.031 "applies to civil actions, such as a claims [sic] for unpaid wages under the FLSA…" [ECF No. 299 at 10.] That includes *Boulder City v. Boulder Excavating, Inc.*, in which Plaintiffs pull a quote out of context in an effort to contradict their own concession that § 41.031 is inapplicable to

their FLSA claims. [*See* ECF No. 299 at 10 (quoting 124 Nev. 749, 756, 191 P.3d 1175, 1179 (2008)).] *Boulder City* involved a question not remotely germane to the one before this Court: "whether a government entity can be held liable ***in tort*** for replacing a subcontractor on a public works project bid before accepting the contractor's bid…" *Id.* at 751, 191 P.3d at 1176 (emphasis added). The language that Plaintiffs cite from the decision discussed N.R.S. § 41.032, which was implicated because the government entity established qualified immunity "from the discretionary acts" of the defendant "in his capacity as its agent or employee." *Boulder City*, 124 Nev. at 755-56, 191 P.3d at 1179. That analysis simply has no bearing on this FLSA case, which does not involve a tort and for which Nevada has sovereign immunity under controlling Nevada case law.

The other Nevada decisions Plaintiffs cite likewise involved tort claims. *Martinez* considered "the extent to which sovereign immunity protects publicly employed physicians from common-law liability for medical malpractice," ***a tort***. 123 Nev. at 435, 168 P.3d at 722. *State v. Silva* addressed a claim "to recover damages incurred by reason of the forcible rape of the wife by an inmate," ***a tort***. 86 Nev. 911, 912, 478 P.2d 591 (1970). *Hagblom* asserted a claim for an alleged conspiracy to "harass and annoy" the claimant "into resigning his position as a Nevada Highway Patrol officer," ***a tort***. 93 Nev. at 602; 571 P.2d at 1174. *State v. Webster* involved a negligence claim arising from the decedent's vehicle "colliding with a horse that had escaped and was roaming the highway" due to a lack of a cattle guard, ***a tort***. 88 Nev. 690, 504 P.2d 1316 (1972).

III. PLAINTIFFS CONCEDE BY OMISSION THAT THERE IS NO NEVADA CASE INTERPRETING N.R.S. § 41.031 TO PERMIT IMPLIED WAIVER OF SOVEREIGN IMMUNITY.

Plaintiffs argue that "NDOC has waived its right to assert such [sic] its sovereign immunity from liability defense by its own litigation conduct." [ECF No. 299, at 2.] Stated another way, Plaintiffs urge the Court to find an implied waiver of Nevada's sovereign immunity. Controlling authority rejects their argument. A waiver of Nevada's "sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996); *see also Florida Prepaid*, 527 U.S. at 682 ("'Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights") (citations omitted). Waiver by litigation conduct,

which is akin to constructive consent, is antithetical to Nevada's constitutional right to sovereign immunity from liability. "[C]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights." *Edelman*, 415 U.S. at 673; *see also Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987) (overruling the constructive waiver doctrine in *Parden v. Terminal R. Co. of Ala. Docks Dep't*, 377 U.S. 184 (1964)). Rather, waiver of sovereign immunity "must be unequivocally expressed in statutory text," with its scope no broader than directed by the Nevada legislature. *Lane*, 518 U.S. at 191-92.

Plaintiffs neglect to address several matters that demonstrate why their implied waiver argument fails. They skip the issue of whether state or federal law applies in determining implied waiver. That omission leads to their failure to examine the Nevada law that is determinative, holding that sovereign immunity cannot be implied since it comes from the Legislature. For that reason, no Nevada authority recognizes implied waiver. Even if such authority did exist, it would be of no moment because Nevada asserted its sovereign immunity from liability in its first responsive pleading. Plaintiffs suffered no prejudice from Nevada's early assertion of its immunity, particularly because discovery was conducted simultaneously in pursuit of their failed state law claims.

A. State law determines the nature and scope of any waiver of sovereign immunity.

Sovereign immunity is a "flexible defense" that allows each State to determine the nature and scope of its waivers of that immunity. *Stroud v. McIntosh*, 722 F.3d 1294, 1301 (11th Cir. 2013) (citing *Sossamon v. Texas*, 563 U.S. 277, 284-85 (2010)). "Because immunity is an inherent aspect of sovereignty that the states retained upon entering the Union, it follows that state law should determine the nature and scope of a state's immunity." *Trant v. Oklahoma*, 754 F.3d 1158, 1772 (10th Cir. 2014). Supreme Court precedent requires this approach. *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 253 (5th Cir. 2005). Because Nevada's motion "turns on the State's assertion of its general sovereign immunity from all suits under the FLSA, not just those brought in federal court … any waiver by conduct must be determined by reference to" Nevada law. *Coniff v. Vermont*, 2013 U.S. Dist. LEXIS 143494, at *40 (D. Vt. Sep. 30, 2013), *aff'd by Beaulieu v. Vermont*, 807 F.3d 478 (2d Cir. 2015); *see also Alden*, 527 U.S. at 757-58 (applying Maine law to determine scope of

immunity waiver).

B. Waiver of sovereign immunity in Nevada cannot be implied because it comes from the Legislature.

There is no Nevada authority recognizing Plaintiffs' theory of implied waiver of the State's sovereign immunity. In fact, the Nevada Supreme Court has rejected such a theory. In *Clark County School District v. Richardson Construction, Inc.*, the defendant school district argued that the lower court erred in upholding a jury verdict of $225,000 on a tort claim against it because the district's liability was limited by statute to a maximum of $50,000. 123 Nev. at 389, 168 P.3d at 92. The plaintiff argued the district "waived any defense based upon the statutory damages cap by failing to assert the defense below." *Id.* The Supreme concluded it did not. The Court reasoned that although the defendant "did not assert the statutory damages cap below, the limitation cannot be waived." *Id.* Nevada enjoys "blanket immunity from tort liability," which the "Legislature has waived … on a limited basis." *Id.* The statutory cap functions automatically as a damage limitation … in tort recovery against the State and its political subdivisions" and the defendant "had no duty to assert [it] as an affirmative defense." *Id.* at 390, 163 P.3d at 92. Therefore, it is clear that Nevada does not recognize the waiver by litigation conduct argument advanced by Plaintiffs.

C. Plaintiffs misplace their reliance on waiver by litigation conduct on a single federal decision involving immunity from suit, not immunity from liability.

Plaintiffs' fundamental misunderstanding of controlling authority is apparent in the single citation they offer in support of their misguided argument of waiver based upon litigation conduct. Without any analysis, Plaintiffs maintain that *Johnson v. Rancho Santiago Community College District*, 623 F.3d 1011 (9th Cir. 2010), requires the Court to repudiate Nevada's immunity from liability. [ECF No. 299 at 20.] Nothing could be further from the truth. By its very terms, *Rancho* involved a belated invocation of an "Eleventh Amendment defense" of immunity from suit and not the District's immunity from liability. *See* 623 F.3d at 1021-22. The Ninth Circuit made that clear when it concluded, "Having chosen 'to defend on the merits in federal court,' the District will 'be held to that choice.'" *Id.* at 1022. The Ninth Circuit's other leading decisions addressing waiver by litigation conduct likewise involved the question of whether a state entity waived its Eleventh

Amendment immunity from suit, not a State's sovereign immunity from liability.[3] None involved the issue that is the subject of NDOC's motion: **sovereign immunity from liability**.

Federal courts that have addressed dispositive motions asserting a state's sovereign immunity from liability reject the argument that Plaintiffs make here: that any supposed waiver of Eleventh Amendment immunity from suit (whether through removal or otherwise) also "waived sovereign immunity because they are one and the same." *Grothoff v. Nixon*, 2007 U.S. Dist. LEXIS 66793 at *3 (W.D. Mo. Sept. 10, 2007). They are not. The Supreme Court has determined that Eleventh Amendment immunity from suit is only "one particular exemplification" of sovereign immunity. *Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 753 (2002). In particular, "the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment." *Id.* at 754; *see also Alden*, 527 U.S. at 713 ("the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment"). As one of the cases cited by Plaintiffs explains [ECF No. 299 at 19], the Supreme Court's "cases accommodate the view that 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." *Meyers*, 410 F.3d at 255. Consequently, in cases like this one in which Nevada "possesses an immunity from liability separate from its immunity from suit," NDOC is permitted to show that any alleged "waiver of one does not affect its enjoyment of the other." *Id.* at 253.

D. Nevada asserted its sovereign immunity from liability in its first Answer.

Plaintiffs engage in a protracted and selective recitation of certain procedural history and rulings. They also misstate the scope of this action, as discussed in NDOC's other briefs. Doubtless, the Court is familiar with the procedural history from the motions that have been filed already. That history need not be repeated here beyond the only fact that matters, which Plaintiffs have omitted: NDOC put Plaintiffs on notice immediately upon removal that Nevada was asserting its sovereign immunity from liability under the very statute that is at issue here, NRS § 41.031.

[3] *See, e.g., Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 758 (9th Cir. 1999), *amended by* 201 F.3d 1186 (9th Cir. 2000); *Embury v. King*, 361 F.3d 562 (9th Cir. 2004); *In re Bliemeister*, 296 F.3d 858, 862 (9th Cir. 2002); *Gamboa v. Rubin*, 80 F.3d 1338, 1349-50 (9th Cir. 1996), *vacated on other grounds by Gamboa v. Chandler*, 101 F.3d 90 (9th Cir. 1996) (en banc).

Plaintiffs deliberately misstate the record in their desperation to maintain their FLSA claims against Nevada. In particular, they misrepresent to the Court that "NDOC has nonetheless waived its sovereign immunity defense by failing to raise the defense of its own volition and actively litigating this case for more than six years." [ECF No. 299 at 17.] Plaintiffs further misstate the record, misinforming the Court, "NDOC never mentioned the words 'sovereign immunity' prior to this Court's request for briefing." [*Id.* at 19.] A review of the Court's own records belies Plaintiffs' contentions and firmly establishes that Nevada asserted its immunity from liability and payment of any damages under the FLSA.

On June 17, 2014, the State removed the Complaint to federal court and then answered. In its Answer – its first responsive pleading – NDOC specifically averred that ***"Defendant is immune from liability as a matter of law."*** [ECF No. 3, Answer to Compl. at Aff. Def. ¶ 3 (emphasis added).] Moreover, NDOC's response to Plaintiffs' allegations on its immunity removed any plausible doubts about Nevada's assertion that it is immune from Plaintiffs' FLSA claims. ***In Paragraph 4 of their Complaint, Plaintiffs alleged, "The State of Nevada has waived its sovereign immunity from suit for the claims alleged herein. See NRS 41.031." [ECF No. 1, Compl. at ¶ 4.] NDOC denied that allegation. [ECF No. 3, Answer to Compl. at ¶ 4 (emphasis added).]***

Nevada's invocation of its "immunity from liability" and its denial that it "has waived its sovereign immunity from suit for the claims alleged herein" under "NRS 41.031" could not have been any clearer. [ECF No. 3, Answer to Compl. at ¶ 4 & Aff. Def. ¶ 3.] Not only was this invocation "of its own volition" immediately upon removal [ECF No. 299 at 17], but it plainly put Plaintiffs on notice that Nevada was asserting its sovereign immunity from liability under the very statute that forms the core of Plaintiffs' Opposition Brief, § 41.031. [*See* ECF No. 3, 8-16.]

E. Plaintiffs have failed to articulate any prejudice they have suffered, nor can they since Nevada put them on early notice of their sovereign immunity from liability and discovery had to be simultaneously conducted on Plaintiffs' state law claims.

Nothing in Plaintiffs' overlong and selective procedural history demonstrates any prejudice they have suffered through Nevada's exercise of its constitutional right to sovereign immunity from liability. Plaintiffs clearly had "fair warning of [NDOC's] assertion of immunity" through Nevada's

first responsive pleading [ECF No. 3, Answer to Compl. at ¶ 4 & Aff. Def. ¶ 3]. *Aholelei v. Department of Pub. Safety*, 488 F.3d 1144, 1148-49 (9th Cir. 2007). If Plaintiffs believed that NDOC was not immune under NRS § 41.031, they could have filed their own dispositive motion earlier in this litigation. Their failure to do so means that even if there could be waiver by litigation conduct – the Supreme Court has said there cannot – they "'waive[d] waiver' implicitly by failing to assert it." *Norwood v. Vance*, 591 F.3d 1062, 1068 (9th Cir. 2008) (citation omitted). Plaintiffs also ignore that NDOC had to engage in discovery on their overlapping state law claims. *See, e.g.*, *Marino v. Victor Valley Commty. Coll. Dist.*, 2016 WL 9455628 at *2 (C.D. Cal. July 28. 2016); *Garcia v. Idado Dep't of Health & Welfare*, 2014 WL 5810516 at *9 (D. Idaho Nov. 7, 2014).

Finally, courts consistently rebuff arguments like Plaintiffs' that somehow, by robustly defending itself in this litigation, "NDOC sought an unfair legal advantage." [ECF No. 299 at 19.] The cases cited by Plaintiffs each address "the unfairness that would ensue if a case that could be heard in state court was subsequently dismissed in federal court because of the Eleventh Amendment…. [They] do not address sovereign immunity or hold that a state defendant … loses a defense (other than the forum) that would be valid in state court." *Grothoff v. Nixon*, 2007 U.S. Dist. LEXIS 66793 at *4; *see also Church*, 913 F.3d at 742-43 ("'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.'" (citation omitted). "A state does not gain an unfair advantage asserting in federal court an affirmative defense it would have had in state court." *Trant*, 754 F.3d at 1173.

IV. PLAINTIFFS' LEGISLATIVE HISTORY ARGUMENT LACKS MERIT.

Plaintiffs mistakenly ask the Court to determine that the "legislative history supports the Nevada Legislature's intent to waive the State of Nevada's sovereign immunity on liability for all claims." [ECF No. 299 at 14.] There are several problems with this argument.

First, Plaintiffs' argument is contrary to established United States Supreme Court precedent. A "statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text…" *Lane*, 518 U.S. at 191-92. That is especially true here, when the Nevada Supreme Court already has spoken on the issue. *See Valentine v. Mobile Oil Corp.*, 789 F.2d 1388, 1391 (9th Cir.

1986). The United States Supreme Court expressly prohibits what Plaintiffs ask this Court to do.

Second, Nevada's Supreme Court expressly forbids interpretation of a state statute through legislative history based on a single legislator's vague statement. Plaintiffs seek comfort by making dubious assumptions based on one legislator's vague statement in a committee meeting prior to the bill's enactment. [ECF No. 299 at 14:18-19.] The legislator says, "the doctrine of sovereign immunity *seems* to be out." (emphasis added). This Court must disregard as irrelevant one legislator's expression of personal opinion. *A-NLV Cab Co. v. State of Nevada ex rel Taxicab Auth.*, 108 Nev. 92, 95, 825 P.2d 585, 587 (1992). Plaintiffs' reliance on this statement is all the more problematic because it is unclear from the legislator's remarks what kind and degree of sovereign immunity waiver he is discussing. It could not be sovereign immunity from FLSA private suits since such suits did not exist until decades later. Plaintiffs cannot base a blanket waiver of state sovereign immunity on such a slender, unstable reed as this.

Finally, no precedent supports a waiver of sovereign immunity by policy. Plaintiffs urge the Court to accept their construction of N.R.S. § 41.031 to avoid what they misstate is a "redundant and/or inconsistent" result with other statutory provisions. [ECF No. 299 at 16.] Plaintiffs' contention is little more than a policy argument, and a meritless one at that. Indeed, Plaintiffs specifically refer to what they contend is a "policy of judicial liberality in interpreting the scope of the waiver…" [*Id.*] Sovereign immunity "'is not to be waived by policy arguments…'" *Lane*, 518 U.S. at 191-92 (citation omitted). This Court cannot "extend the waiver of sovereign immunity more broadly" than how Nevada's highest court has construed the statute. *Id.*

V. PLAINTIFFS' RESORT TO OTHER STATES' LAWS IS NOT PERSUASIVE.

In their appeal of this case, Plaintiffs cited an Oregon decision, *Byrd v. Oregon State Police*, 238 P.3d 404 (Or. App. 2010), to urge the Ninth Circuit to construe their FLSA claims as tort claims falling within N.R.S. § 41.031. [*See* Ex. C, Pls.'/Appellees' Answering Br., at 30 & n.7.] Not content with the futility of that argument, in light of Nevada's treatment of overtime claims under the FLSA as arising in the employment bargain,[4] Plaintiffs now invite the Court to apply *Colorado*

[4] *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").

and *New York* law. [ECF No. 299 at 16-17 & n.10.] This Court need not tarry long over this argument. A cursory view of Plaintiffs' New York authority shows why.

Plaintiffs' mistakenly cite to *Speers v. State of New York*, 183 Misc.2d 907 (N.Y. Ct. Cl. 2000. Plaintiffs ignore a key distinction between New York and Nevada made clear by the court in its opinion: "At page 2 of its memorandum of law, the State concedes that its waiver of sovereign immunity extends to a claim for wages under the FLSA." *Id.* at 911. This concession by New York is no mere detail. No precedent in Nevada supports such a concession and NDOC does not make that concession here.

Plaintiffs then turn their eyes to a Colorado intermediate appellate decision, *Hartman v. Regents of the Univ. of Colo.*, 22 P.3d 524 (Colo. Ct. App. 2000). There are several problems with this argument. The decision of an intermediate court of appeal does not establish the law within that state. Plaintiffs cite to no state that agrees with *Hartman*. Worse, it is no effort to find authority that does not agree with Hartman. *See Cockrell v. Bd. of Regents of New Mex. State Univ.*, 45 P.3d 876, 884 (N.M. 2002). In distinguishing *Hartman*, the New Mexico Supreme Court wrote, "[t]his State, by virtue of its sovereign role in the Union, is constitutionally immune from private suits for damages under a federal statute. If the State is to consent to Congress' encroachment on this vital aspect of federalism, it must be a decision of the Legislature. So too Nevada.

But, Plaintiffs' arguments based on other states' laws fails for another reason. Plaintiffs would have this Court ignore controlling authority from Nevada's highest court, contrary to fundamental 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."). NDOC submits that the Court should decline Plaintiffs' invitation. Plaintiffs' citation of case law interpreting another state's law is facially irrelevant to the clear interpretation that the Nevada Supreme Court has given to N.R.S. § 41.031.

VI. CONTRARY TO PLAINTIFFS' ARGUMENT, THE NINTH CIRCUIT DID NOT ADDRESS NEVADA'S SOVEREIGN IMMUNITY FROM LIABILITY.

Plaintiffs misrepresent to the Court that "the Ninth Circuit recognized that NDOC had waived its sovereign immunity defense by its own litigation tactics." [ECF No. 299 at 2.] Plaintiffs

repeat their mischaracterization later in their brief, arguing as "the Ninth Circuit recognized in its opinion affirming this Court's decision that NDOC waived its immunity from suit, NDOC failed to timely raise its sovereign immunity defense." [*Id.* at 18.] Plaintiffs quote the same language from the appellate decision, which includes a selective parsing of the procedural history that the Ninth Circuit considered in assessing the impact of removal on Nevada's immunity from suit in federal court.[5] [*See id.* at 2, 18 (quoting *Walden v. Nevada*, 945 F.3d 1088, 1095 (9th Cir. 2019).]

Conversely, Plaintiffs concede that the Ninth Circuit "did not opine as to whether it waived its sovereign immunity from liability." [*Id.* at 20 (citing *Walden*, 945 F.3d at 1092 n.1.] Indeed, the Circuit Court's opinion could not have been any clearer: "We express no opinion on the claim of immunity from liability." *Walden*, 945 F.3d at 1092 n.1. As the Circuit Court explained, it had "interlocutory appellate jurisdiction only of 'claims of immunity from suit,' and not of 'claims of immunity from liability…'" *Id.* Therefore, "the following discussion – and holding – applies only to the former claim of immunity from suit." *Id.* Nevertheless, Plaintiffs ignore the Ninth Circuit's admonition about the limited scope of its decision and contend that the appellate order already has resolved the question against Nevada that it purportedly "failed to timely raise its sovereign immunity defense." [ECF No. 299 at 18.]

VII. THE NINTH CIRCUIT SUGGESTED IT WOULD JOIN OTHER CIRCUITS IN HOLDING THAT REMOVAL DOES NOT WAIVE IMMUNITY FROM LIABILITY.

Plaintiffs also misrepresent the state of the law on whether removal waives immunity from liability. Plaintiffs argue that Nevada "waived its sovereign immunity from liability by removing this action to federal court." [ECF No. 299 at 20.] According to Plaintiffs, "Federal Circuit Courts are split on whether removal to a federal jurisdiction waives a states [sic] sovereign immunity from liability." [*Id.*] Plaintiffs refer to a decision from the First Circuit, in which Plaintiffs maintain that the court "recognized that the Seventh, Ninth and Tenth Circuits 'take the position that, regardless of the circumstances, removal always waives immunity.'" [*Id.* (quoting *Bergemann v. Rhode Island*

[5] The Ninth Circuit adopted a categorical rule that removal waives immunity from suit in all cases. *See Walden*, 945 F.3d at 1095-96 ("[W]e extend the holding of *Embury* to cover all federal-law claims, even when those federal claims are ones Congress did not apply to the States through unequivocal and valid abrogation of their Eleventh Amendment immunity."). NDOC has filed a petition for certiorari seeking review of the Ninth Circuit's erroneous holding. [*See* ECF No. 314.]

Dep't of Envt'l Mgmt., 665 F.3d 336, 342 (1st Cir. 2011).][6] In a footnote, Plaintiffs concede that "it does not appear that *Embury*, one of the cases cited by *Bergemann*, supports such a broad statement." [ECF No. 299 at 20 n.11.] But Plaintiffs fail to inform the Court that the Seventh and the Tenth Circuits have expressly repudiated the proposition Plaintiffs wrongly attributes to them.[7] That means that contrary to Plaintiffs' misrepresentation to the Court, there is no Circuit split at all on the question of whether removal waives immunity from liability. It does not.

A. The Seventh and Tenth Circuits have not adopted a rule that removal waives immunity from liability.

Plaintiffs attempt to mislead this Court by offering analysis from the Tenth Circuit's decision in *Estes*. According to Plaintiffs, the Tenth Circuit has adopted a rule that applies the reasoning of *Lapides* to reach "'the unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts.'" [ECF No. 299 at 20 (quoting *Estes*, 302 F.3d at 1206).] Although Plaintiffs' quotation is accurate, what they fail to tell the Court is that the Tenth Circuit subsequently clarified that *Estes* applied only to immunity from suit, and not immunity from liability. The Tenth Circuit recognized "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, 1173 (10th Cir. 2014).

Similarly, the Seventh Circuit clarified that its decision in *Phoenix* does not stand for the principal that Plaintiffs attribute to it. In *Hester v. Indiana State Department of Health*, the Seventh Circuit stated conclusively that *Phoenix* did not address the impact of removal on immunity from liability, which remains an open question in that circuit. 726 F.3d 942, 950-51 (7th Cir. 2013).

B. *Redgrave v. Ducey* suggests the Ninth Circuit agrees with all authoritative Circuit decisions holding the removal does not waive immunity from liability.

Plaintiffs "admittedly are unaware of a Ninth Circuit opinion that has addressed the precise question of whether removal waives a state's sovereign immunity from liability." [ECF No. 299 at

[6] Plaintiffs include the sources cited by the First Circuit: *Board of Regents of Univ. of Wisc. Sys. v. Phoenix Int'l Software, Inc.*, 653 F.3d 448, 461 (7th Cir. 2011); *Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004); and *Estes v. Wyoming Dep't of Transp.*, 302 F.3d 1200, 1206 (10th Cir. 2002)).

[7] It is appropriate to question Plaintiffs' lack of candor. The subsequent case law Plaintiffs ignore was discussed in NDOC's appellate briefing, putting Plaintiffs on notice that the argument they are making is meritless. [*See* Ex. D, NDOC's Reply Br. at 4-6 (9th Cir. Dec. 19, 2018) (No. 18-15691)].

20 n.11.] Nonetheless, they maintain, "The Ninth Circuit would likely follow its prior jurisprudence in this area of the law and follow *Estes'* reasoning that waiver by removal waives all sovereign immunity defenses – immunity from suit ***and immunity from liability***." [ECF No. 299 at 21 (emphasis added).] NDOC agrees that the Ninth Circuit "would likely follow its prior jurisprudence," but decidedly not in the way that Plaintiffs maintain. A very recent Ninth Circuit decision is illuminating on the very issue Plaintiffs concede befuddles them.

In *Redgrave v. Ducey*, the Ninth Circuit was confronted with the question it did not address in *Walden*: whether a state's removal to federal court waived its sovereign immunity from liability. 953 F.3d 1123, 1124-25 (9th Cir. 2020). The Circuit Court began by stating that its holding in *Walden* was limited to a waiver of "immunity *from suit*." *Id.* at 1125 (italics in original). Arizona contended "that its removal … did not effect a waiver of its sovereign immunity *from liability*." *Id.* (italics in original). The Ninth Circuit reasoned that authority supported Arizona's argument:

> Indeed, the several circuits to share *Walden*'s conclusion all hold that **removal merely waives immunity from suit but not the defense of immunity from liability**… A state's invocation of sovereign immunity from liability would be an affirmative defense to a congressionally created private right of action for damages, such as those under FLSA. As the Supreme Court explained in *Alden* … because the states retain a "residuary and inviolable sovereignty," it is beyond the power of Congress to authorize private suits for monetary damages against a state without that state's consent to such actions.

Id. (emphasis added) (citations omitted). The Ninth Circuit did not resolve the immunity from liability issue, instead certifying to the Arizona Supreme Court the question "whether Arizona possesses the defense of immunity from FLSA liability in the first place." *Id.*

Nevertheless, the Ninth Circuit acknowledged that contrary to what Plaintiffs argue [ECF No. 299 at 20], there is no split of authority among the federal circuits on the question left unanswered in *Ducey*. Citing an article evaluating the case law, *Ducey* observed "the split of authority" is "between those circuits holding that removal does not waive state sovereign immunity at all and those holding that removal waives immunity from suit but not immunity from liability." 953 F.3d at 1125 (citation omitted).[8] In light of *Ducey*'s favorable citation to several of those

[8] *See Bergemann*, 665 F.3d at 343 (1st Cir. 2011); *Beaulieu*, 807 F.3d at 485-89 (2d Cir. 2015); *Lombardo v. Pennsylvania Dep't of Pub. Welfare*, 540 F.3d 190, 200 (3d Cir. 2008); *Stewart v. North Carolina*, 393 F.3d 484, 490 (4th Cir. 2005); *Meyers*, 410 F.3d at 255 (5th Cir. 2005); *Church v. Missouri*, 913 F.3d 736, 742-43 (8th Cir. 2019);

decisions, and the lengths to which it went to observe the critical distinction between immunity from suit and immunity from liability, it is most likely that the Ninth Circuit will adopt the rule followed by every circuit that has decided it. Removal does not waive Nevada's immunity from liability.

VIII. NDOC'S MOTION FOR SUMMARY JUDGMENT ON SOVEREIGN IMMUNITY SHOULD BE GRANTED.

NDOC respectfully requests that its Motion for Summary Judgment on Sovereign Immunity should be GRANTED. Because all of Plaintiffs' remaining claims are barred by sovereign immunity, this lawsuit should be dismissed with prejudice.

DATED this 3rd day of June, 2020.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

BY: */s/ James T. Tucker*

James T. Tucker
Nevada Bar. No. (12507)
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, NV 89119
Attorneys for Defendants The State of Nevada, ex rel. its Department of Corrections

Trant, 754 F.3d at 1173 (10th Cir. 2014); *Stroud v. McIntosh*, 722 F.3d 1294, 1301 (11th Cir. 2013); *Watters v. Washington Metro. Area Transit Auth.*, 295 F.3d 36, 42 n.13 (D.C. Cir. 2002). The three circuits yet to address the question include the Sixth, Seventh, and Ninth Circuits.

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 3rd day of June, 2020, I electronically filed and served a true and correct copy of the foregoing **DEFENDANT STATE OF NEVADA *EX REL.* DEPARTMENT OF CORRECTIONS' REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON SOVEREIGN IMMUNITY** 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

Christian Gabroy, Esq.
Kaine Messer, Esq.
GABROY LAW OFFICES
The District at Green Valley Ranch
170 South Green Valley Parkway, Suite 280
Henderson, NV 89012
Telephone: (702) 259-7777
Fax: (702) 259-7704
Attorneys for Plaintiffs

By: */s/ Lani Maile*
An Employee of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

INDEX OF EXHIBITS

TO

DEFENDANT STATE OF NEVADA *EX REL*. DEPARTMENT OF CORRECTIONS' REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON SOVEREIGN IMMUNITY

Exhibit	Document Description
A.	Order Granting Defendants' Motion to Dismiss (Columbus v. Nevada, Case No. 18 OC 00188 1B)
B.	Order Granting Defendants' Motion to Dismiss (Prost v. Nevada, Case No. 18 OC 00131 1B)
C.	Answering Brief of Plaintiffs/Appellees (State of Nevada v. Walden, Case No. 18-15691)
D.	Appellant, State of Nevada, ex rel. Nevada Department of Corrections' Reply Brief (State of Nevada v. Walden, Case No. 18-15691)

EXHIBIT A

Order Granting Defendants' Motion to Dismiss

(Columbus v. Nevada,

Case No. 18 OC 00188 1B)

AARON D. FORD
Attorney General
Steve Shevorski (Bar No. 8256)
Head of Complex Litigation
Theresa M. Haar (Bar No. 12158)
Senior Deputy Attorney General
State of Nevada
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
(702) 486-3792 (phone)
(702) 486-3773 (fax)
Attorneys for State of Nevada ex. rel. Nevada Department of Corrections

Affirmation pursuant to NRS 239B.039
The undersigned affirms that this document does not contain the personal information of any person

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

GENE COLUMBUS, DAVID ECKARD, APRIL HILL, and ANDREW MARREO, on behalf of themselves and all others similarly situated,

Plaintiff,

vs.

STATE OF NEVADA, EX. REL. NEVADA SUPREME COURT,

Defendant.

Case No. 18 OC 00188 1B

Dept. No. 2

PROPOSED
ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter comes before the Court on Defendants' Motion to Dismiss. Defendants filed their Motion to Dismiss on September 24, 2018. Plaintiffs filed their Opposition on October 29, 2018. Defendants filed their Reply on November 19, 2018. The Court, having reviewed the pleadings and papers on file, finds as follows:

Plaintiffs' Complaint asserts claims for failure to pay overtime under the FLSA and under Nevada Revised Statute 284.180. Dismissal is required where it appears beyond a

doubt that Plaintiff could prove no set of facts entitling Plaintiff to relief. *Munda v. Summerlin Life & Health Ins. Co.*, 127 Nev. 918, 923, 267 P.3d 771, 774 (2011).

1. First claim for relief under the Fair Labor Standards Act

Questions of sovereign immunity under Chapter 41 present mixed questions of law and fact. *Ransdell v. Clark Cty.*, 124 Nev. 847, 854, 192 P.3d 756, 761 (2008). A question of statutory construction is a question of law. *Id.* Whether Nevada's legislature waived Nevada's sovereign immunity to private lawsuits under the FLSA is a question of law.

The COURT FINDS the State of Nevada enjoys sovereign immunity as to FLSA claims in any court, including its own state courts, unless it expressly waives that immunity. *Alden v. Maine*, 527 U.S. 706 (1999), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). 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. Nevada's Supreme Court has consistently construed Nevada Revised Statute 41.031(1) as a waiver to tort liability only. *Hagblom v. State Director of Motor Vehicles*, 93 Nev. 599, 604, 571 P.2d 1172, 1176 (1977); *Franchise Tax Bd. of Cal. v. Hyatt*, 407 P.3d 717 728 (Nev. 2017). No Nevada case has ever described a claim for overtime compensation under the FLSA as a tort. Therefore, the Court dismisses Plaintiffs' FLSA claim because sovereign immunity bars it.

2. Second claim for relief under NRS 284.180

The question of whether Nevada's legislature intended to create a private right of action under statute is a question of law for this Court. *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007).

The COURT FURTHER FINDS that there is no private right of action under NRS 284.180. Nevada has created a complex administrative scheme to resolve compensation disputes between public employees and the State. The process works as follows. State 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 (EMC) (NAC 284.695). This process requires that claimants first file a grievance within 20 days of the occurrence regarding issues of compensation or working hours, that they then appeal the decision regarding their grievance to the EMC, and that, if still unsatisfied, they obtain judicial review of EMC's decision by filing a petition within 30 days. NRS §§284.384, 233B.130(2)(d), NAC 284.678, 682, 686, 690, and 695. Nevada would have not created this complex administrative scheme if a state employee could simply bypass it by filing a civil action.

The COURT FURTHER FINDS that Plaintiffs have failed to allege that they have exhausted their administrative remedies by properly pursuing the grievance procedure. Plaintiffs do not allege they ever asked for overtime, or that NDOC denied their request. Plaintiffs do not allege they timely filed a grievance. Plaintiffs do not allege they have sought judicial review of a final agency decision by the Employee-Management Committee. And the failure to exhaust administrative remedies is fatal to a state employee's claim. *City of Henderson v. Kilgore*, 122 Nev. 331, 336-37, 131 P.3d 11, 15-16 (2006).

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is GRANTED.

DATED this 16 day of January, 2019.

DISTRICT COURT JUDGE

Prepared by:

AARON D. FORD
Attorney General

Steve Shevorski (Bar No. 8256)
Head of Complex Litigation
Theresa M. Haar (Bar No. 12158)
Senior Deputy Attorney General
Attorneys for Defendants

Approved as to form by:

Mark R. Thierman (Bar No. 8285)
Joshua D. Buck (Bar No. 12187)
Leah L. Jones (Bar No. 13161)
THIERMAN BUCK LLP
Attorneys for Plaintiffs

EXHIBIT B

Order Granting Defendants' Motion to Dismiss

(Prost v. Nevada,

Case No. 18 OC 00131 1B)

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

KELLEN PROST,

Plaintiff,

vs.

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

Defendants.

CASE NO: 18 OC 00131 1B

Dept. No.: 2

ORDER ON DEFENDANTS' MOTION TO DISMISS

Before the Court is Defendants' Motion to Dismiss. Having considered the parties' briefs and arguments, and good cause appearing, the Court hereby finds and orders as follows:

FACTS

Plaintiff Prost is a nurse at the Northern Nevada Correctional Center. She alleges that she is paid on an hourly basis and that she was required to perform certain pre- and post- shift work over 40 hours per week (or over 80 hours every two weeks) for which she was not paid overtime. Prost claims that all other nurses at the facility similarly worked uncompensated overtime and she seeks to certify a class of "All persons who were employed by Defendant as correctional nurses at the Northern Nevada Correctional Center (NNCC) any time during the applicable statute of limitations period."

///

ANALYSIS

Prost advances two causes of action. First, Prost claims that the State has violated the federal Fair Labor Standards Act of 1938's ("FLSA") requirement to pay overtime under 29 U.S.C. § 207. Next, Prost contends that the State has violated NRS 284.180's requirement to pay overtime under state law.

Nevada Rule of Civil Procedure 12(b)(5) permits the court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Under this standard, courts take all allegations in the complaint as true and draw all inferences in the plaintiff's favor. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). The complaint "should be dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief." *Id.* A complaint should be dismissed when it does not state a cognizable claim for relief. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

1. Nevada has not waived sovereign immunity as to FLSA claims and therefore the FLSA claim must be dismissed..

Plaintiff argued Nevada has not warned its sovereign immunity in FLSA cases. Plaintiff argued Nevada has warned sovereign immunity in NRS 41.03/which states in part: "Nevada...waives its immunity from liability and action...except as other wise provided in NRS 41.032 to 41.0328, inclusive...". None of the exception statutes appear to except FLSA cases.

In reply defendant argued Nevada has not waived sovereign immunity on FLSA claims. Defendant argued NRS 41.031 waiver applies to negligence and other tort claims. In support defendant cited *Butler vs. Bayer*, 123 Nev 450, which states in dicta "NRS 41.031 contains Nevada's general waiver of sovereign immunity from suits arising from acts of negligence committed by state employers. The purpose of that waiver is 'to compensate victims of government negligence in circumstances like those in which victims of private negligence would be compensated.'" Defendant also cited *Franchise Tax Brd. v Hyatt*, 407 P.3d 771 which states in dicta: "...Nevada has waived traditional

sovereign immunity from tort liability, with some exceptions. NRS 41.031."

Based upon the *Butler and Franchise Tax cases* the Court concludes Nevada has not waived sovereign immunity as to FLSA actions.

2. Garcia is controlling law.

Because Garcia is the controlling law, plaintiff's arguments regarding *Garcia,* the Commerce Clause, the Tenth Amendment, federalism, a non-delegation arguments are unpersuasive.

3. Prost has not exhausted the available administrative remedies and therefore her Chapter 284 claim must be dismissed.

NRS 284.384 authorizes the State Personnel Commission to adopt regulations which provide for a state-employee grievance process. The grievance process includes disputes over compensation or working hours. NRS 284.384(6). A grievance process has been established in NAC 284.658 *et seq*. After exhausting these administrative remedies, an employee may file a petition for judicial review. NRS 233B.130.

Prost does not allege that she, or any other member of the proposed class, has exhausted the available administrative remedies. "[W]hether couched in terms of subject matter jurisdiction or ripeness, a person generally must exhaust all available administrative remedies before initiating a lawsuit, and failure to do so renders the controversy nonjusticiable." *Allstate Ins. Co. v. Thorpe,* 123 Nev. 565, 571, 170 P.3d 989, 993 (2007). Therefore, Prost's state law claims as set forth in her Second Cause of Action are dismissed.

The Court cannot allow Prost's alternative request for leave to amend to re-add the state law claim after exhaustion because a petition for judicial review is the exclusive means to challenge the result of the administrative process. NRS 233B. 130(6); *Deja Vu Showgirls v. State, Depot of Tax.*, 130 Nev. 711, 715, 334 P.3d 387, 390 (2014).

///

///

///

ORDER

IT IS ORDERED:

Because Nevada has not waived in NRS 41.031 sovereign immunity as to FLSA actions the FLSA claim is dismissed.

Because plaintiff has not exhausted her administrative remedies her claim under NRS Chapter 284 is dismissed.

January 18, 2019.

James E. Wilson Jr.
District Judge

CERTIFICATE OF SERVICE

I certify that I am an employee of the First Judicial District Court of Nevada; that on January 18 2019, I served a copy of this document by placing a true copy in an envelope addressed to:

Mark Thierman, Esq.
7287 Lakeside Drive
Reno, NV 89511

Steve Shevorski, Esq.
Theresa Haar, Esq.
555 E. Washington Ave., Ste 3900
Las Vegas, NV 89101

the envelope sealed and then deposited in the Court's central mailing basket in the Court Clerk's Office for delivery to the United States Post Office at 1111 South Roop Street, Carson City, Nevada for mailing.

Susan Greenburg
Judicial Assistant

EXHIBIT C

Answering Brief of Plaintiffs/Appellees (State of Nevada v. Walden, Case No. 18-15691)

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

ANSWERING BRIEF OF PLAINTIFFS/APPELLEES

THIERMAN BUCK LLP
Mark R. Thierman (CA SBN 72913; NV SBN 8285)
mark@thiermanbuck.com
Joshua D. Buck (CA SBN 258325; NV SBN 12187)
josh@thiermanbuck.com
Leah L. Jones (CA SBN 276448; NV SBN 13161)
leah@thiermanbuck.com
7287 Lakeside Drive
Reno, NV 89511
Telephone: (775) 284-1500
Counsel for Plaintiffs/Appellees

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

---

("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.

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,

THIERMAN BUCK LLP

By: /s/ Mark R. Thierman
Mark R. Thierman
Joshua D. Buck
Leah L. Jones

Attorneys for Plaintiffs/Appellees

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.

3. The foregoing document was caused to be sent by using the appellate CM/ECF system on October 29, 2018, addressed as set forth below:

Richard I. Dreitzer
J. Scott Burris
David Kahn
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
300 S. Fourth Street, 11th Floor
Las Vegas, NV 89101
Tele: (702) 727-1400
Fax: (702) 727-1401
richard.dreitzer@wilsonelser.com
j.scott.burris@wilsonelser.com
david.kahn@wilsonelser.com

Adam Paul Maxalt, Esq.
Attorney General
Ketan D. Bharu
Steve Shivers
Theresa M. Haar
Nevada Attorney General's Office
Bureau of Litigation
Personnel Division
5420 Kietzke Lane, Suite 202
Reno, NV 89511
KBhirud@ag.nv.gov
SShevorsk@ag.nv.gov
THaar@ag.nv.gov

Executed this 29th day of October, 2018, at Reno, Nevada.

/s/ Tamara Toles

EXHIBIT D

Appellant, State of Nevada, ex rel. Nevada Department of Corrections' Reply Brief

(State of Nevada v. Walden,

Case No. 18-15691)

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' REPLY BRIEF

RICHARD I. DREITZER
Nevada Bar No. 6626
JAMES T. TUCKER
Nevada Bar No. 12507
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
300 S. Fourth Street, 11th Floor
Las Vegas, NV 89101
(702) 727-1400; FAX (702) 727-1401

ADAM PAUL LAXALT, Attorney General
STEVE SHEVORSKI
Nevada Bar No. 8256
KETAN D. BHIRUD
Nevada Bar No. 10515
THERESA M. HAAR
Nevada Bar No. 12158
555 E. Washington Avenue, Suite 3900
Las Vegas, NV 89101
(702) 486-3783; FAX (702) 486-3773
Attorneys for Appellant

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*.

---

[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).

Dated: December 19, 2018

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

/s/ Richard I. Dreitzer
RICHARD I. DREITZER
Nevada Bar No. 6626
300 S. Fourth Street, 11th Floor
Las Vegas, NV 89101
(702) 727-1400; FAX (702) 727-1401
Attorneys for Appellant STATE OF NEVADA, *ex rel.* NEVADA DEPARTMENT OF CORRECTIONS

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 4,367 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this brief has been prepared in a proportionally spaced typeface using *(state name and version of word processing program)*_____ *(state font size and name of type style)* _____, *or*

☐ this brief has been prepared in a monospaced spaced typeface using *(state name and version of word processing program)*_____ with *(state number of characters per inch and name of type style)* _____.

Dated: December 19, 2018

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

CERTIFICATE OF SERVICE

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.

/s/ Agnes R. Wong
An Employee of WILSON, ELSER,
MOSKOWITZ, EDELMAN & DICKER LLP

Sheri M. Thome, Esq.
Nevada Bar No. 008657
James T. Tucker, Esq.
Nevada Bar No. 012507
Cara T. Laursen, Esq.
Nevada Nar No. 014563
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, NV 89119
Telephone: (702) 727-1400
Facsimile: (702) 727-1401
Sheri.Thome@wilsonelser.com
James.Tucker@wilsonelser.com
CaraT.Laursen@wilsonelser.com
Attorneys for Defendants The State of Nevada, ex rel. its Department of Corrections

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' REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON THE MERITS OF PLAINTIFFS' FLSA CLAIMS

I. INTRODUCTION.

NDOC is entitled to summary judgment on the merits of Plaintiffs' claims under the Fair Labor Standards Act (FLSA) for the reasons stated in its Motion. [ECF No. 283.] The undisputed material facts demonstrate that: (1) Nevada's policy is to pay overtime generally; (2) Nevada has a policy to pay for the type of overtime claims being brought by Plaintiffs; and (3) Plaintiffs knew about and repeatedly acknowledged that policy. The undisputed material facts further establish that when Plaintiffs followed the policy, they were paid overtime. [ECF No. 283 at 2-12.]

"The FLSA requires covered workers to be paid at least 1.5 times their normal rate for all work in excess of forty hours weekly, 29 U.S.C. § 207(a)(1), provided the employer has actual or

constructive knowledge that the work is occurring." *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1102 (9th Cir. 2018) (citing 29 C.F.R. § 785.11; *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981)). There is no general issue of material fact that NDOC's policy is to pay overtime. One or two unsubstantiated instances of not receiving overtime do not alter that undisputed material fact, which dooms Plaintiffs' collective theory and the merits of their FLSA claims.

II. WHEN PLAINTIFFS WERE ELIGIBLE FOR OVERTIME AND FOLLOWED NDOC'S POLICY, THEY RECEIVED COMPENSATORY TIME OR OVERTIME.

The undisputed materials facts establish that when Plaintiffs were eligible for overtime and followed NDOC's policy for reporting it, they received either compensatory time or overtime for what they reported. Nearly all of the Plaintiffs in this litigation, including all seven of the named Plaintiffs and every deposed opt-in Plaintiff, took advantage of overtime opportunities and were paid for it. [SOF ¶¶ 30-39.][1] Plaintiffs consistently are paid overtime or given compensatory time when they request it. [SOF ¶ 40.]

Plaintiffs' own testimony refutes their argument that "any contention that they were paid when they made a request for these work activities is false." [ECF No. 307 at 20.] Time and again, Plaintiffs admitted under oath that when they requested comp time or overtime, they received it. Plaintiff Riggs has ***"never seen a form that I turned in rejected."*** [SOF ¶ 41 (emphasis added).] Plaintiff Shultz admitted, "***Whenever I asked for it, I would get it.***" [SOF ¶ 42 (emphasis added).] Plaintiff Natali admitted that when he has requested overtime for late relief, "***99 percent of the times***" he was paid or received compensatory time. [SOF ¶ 43 (emphasis added).] Other examples abound from the Plaintiffs' admissions:

- Plaintiff Banks has submitted overtime requests "a few times" and was paid for those requests. [Ex. A-2, Banks Dep. at 45:9-17; *see also* Ex. A at 14.]
- When he applies for 7-10 minutes of overtime, the ***"[m]ajority of the time" Plaintiff Jones is paid***. [Ex. A-10, Jones Dep. at 44:3-10; *see also* Ex. A at 5 (emphasis added).]

[1] The Statement of Facts (SOF) referred to herein are those provided at ECF No. 283 at 2-12.

- At the training facility, Plaintiff Kluever used flex time to receive time off for any overtime he worked. At the Warm Springs facility, he testified, ***"I don't recall ever being turned down for overtime."*** [Ex. A-11, Kluever Dep., 39:17-40:6, 62:25-63:7; *see also* Ex. A at 3-4 (emphasis added).]

- Plaintiff Ridenour testified that "Depending on how late" his relief arrived, he would request overtime or comp time. He "would have" communicated that to his supervisor, and he expected that request to be approved. [Ex. A-14, Ridenour Dep. at 44:25-45:14; see also Ex. A at 10.]

- Plaintiff Zufelt works "overtime just about every day," and submits "NDOC-1000s every day just about right now." ***All of his requests are approved, with Zufelt testifying, "It was denied at first, but after I argued with the supervisor of why I wanted the overtime, then it wasn't***…. So, yes, it was – denied it once." [Ex. A-18, Zufelt Dep., 118:1-119:3; see also Ex. A at 11-13 (emphasis added).]

Plaintiff Hanski has "***never known anyone who has requested overtime for that time and been denied it***,"[2] and has either been paid overtime or given compensatory time for time worked.[3] Plaintiff Hanski said that in his 19 years as an NDOC employee, he had one overtime request that initially was disapproved, which his sergeant approved after Hanski argued with him about it. According to Hanski, ***denial of overtime requests is "definitely" a "rarity."*** [4]

Plaintiff Day testified as both a line employee who has requested overtime and as a supervisor who has approved it. As a line employee at Florence McClure, when he works seven or more minutes past the end of his shift, he is getting paid for it.[5] As acting sergeant, Day has received and approved DOC-1000s for officers seeking to be compensated for post-shift activities that "exceeded the seven minutes" and has not received any that were for less than seven minutes. Day explained, ***"I have received DOC 1000s and approved them…"*** [6] Plaintiff Day instructs trainees on the procedure for requesting overtime and how to complete a DOC-1000. "[W]hen they are staying

---

[2] [Ex. A-9, Hanski Dep. at 124:17-19; *see also* Ex. A at 5-9 (emphasis added).]

[3] [Ex. A-9, Hanski Dep., 120:13-122:7, 125:22-126:3.]

[4] [Ex. A-9, Hanski Dep. at 121:17-122:7 (emphasis added).]

[5] [Ex. A-5, Day Dep. at 41:14-24, 42:11-21, 43:5-8; *see also* Ex. A at 15-16.]

[6] [Ex. A-5, Day Dep. at 62:1-63:4 (emphasis added).]

over seven minutes or more after the end of their shift" they are told to submit an overtime request. "I also instruct them to hold their shift commanders to task on those things."[7]

Confronted by their own admissions and the undisputed facts that they receive compensatory time and overtime, Plaintiffs attempt to create a genuine issue of material fact where none exists. All they have offered are a few instances over a period of many years where overtime was allegedly denied. Those instances are based solely on oral testimony, which Plaintiffs themselves contradict through their admissions that they are paid overtime (examples are provided above). There is nothing in the record to demonstrate that such denials actually occurred, through documentary evidence that the employees making the allegation sent in an overtime request that was denied by NDOC. Instead, the undisputed facts show just the opposite. Plaintiffs have not complied with Nevada's administrative procedures for any of the overtime requests they claim to have made that they say were denied. [SOF ¶¶ 48-54.]

III. PLAINTIFFS MISSTATE THE *FORRESTER* RULE AND IGNORE HOW IT IS APPLIED BECAUSE IT IS FATAL TO THEIR FLSA CLAIMS.

NDOC's Motion for Summary Judgment on the merits of Plaintiffs' FLSA claims could not have been any clearer as to its narrow scope. Controlling Ninth Circuit precedent in *Forrester*, 646 F.2d at 413, does not require that NDOC have omniscience to know "*ex ante* on any particular day that a particular plaintiff may work overtime compensable under the FLSA." [ECF No. 283 at 1-2.] Under the authority of *Forrester*, NDOC moved "for summary judgment on the third element of Plaintiffs' prima face case," that it neither "'suffered' [n]or 'permitted' them to work uncompensated." [*Id.* at 12.] NDOC explicitly did not address the remaining two elements, which are not material to its Motion.[8] [*Id.* at 12 n.21.]

Plaintiffs commence their analysis by ignoring the *Forrester* rule. What they attribute to *Forrester* is not its holding or the legal proposition for which it is known, but instead is nothing

---

[7] [Ex. A-5, Day Dep. at 57:5-12.]

[8] Plaintiffs' "procedural history" pertains to whether their pleadings contained sufficient allegations of the first element of their claim, namely if they were alleging compensable work. It is not in any way relevant to this Motion, which focuses solely on the third element of their claim.

more than the FLSA's definition of "employ," "suffer," and "permit."[9] [*See* ECF No. 307 at 2 (quoting language in *Forrester* referring to the definition in 29 U.S.C. § 203(g)).] But that question is not at issue here. The facts are undisputed that NDOC paid overtime or provided compensatory time when it had actual or constructive knowledge that overtime was performed. *See Campbell*, 903 F.3d at 1102.

What is missing from Plaintiffs' analysis is any response to the *Forrester* rule because the undisputed material facts establish that it bars them from recovery on their FLSA claims. The rule in question is in the very next paragraph following the quotation that Plaintiffs provide:

> However, where an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of § 207.

646 F.2d at 414. The Ninth Circuit followed its statement of the rule by applying it to facts that closely parallel those of this case. Like each of the Plaintiffs in this action [SOF ¶¶ 1-25], the plaintiff "knew that overtime was supposed to be reported on time sheets and that [his employer] regularly paid for such reported overtime." 646 F.2d at 414. Also like the Plaintiffs in this case [SOF ¶¶ 26-43], the plaintiff "was paid for all of the overtime he reported…" 646 F.2d at 414. Finally, the plaintiff acknowledged, as many of the Plaintiffs have in this case, that "had he reported the … overtime work he now claims, he would have been paid." 646 F.2d at 414.

Plaintiffs' analysis begs the very question that *Forrester* answered. Beginning with the quote provided by Plaintiffs, the Ninth Circuit construed the definitions of "employ," "suffer" or "permit" to work to require "the knowledge of the employer." *Id.* (citation omitted). The purpose of this knowledge requirement is to provide an employer with "an opportunity to comply with the

---

[9] Plaintiffs repeat their error on page 3 of their Opposition, citing at length an out-of-Circuit decision, *Aguilar v. Management & Training Corp.*, 948 F.3d 1270 (10th Cir. 2020), which omits any discussion of *Forrester* and expressly rejects the cases that have applied it. *See id.* at 1287 (rejecting the *Newton*, *White* and *Henderson* decisions from the Fifth, Sixth and Eighth Circuits that have adopted the *Forrester* rule). Most of Plaintiffs' other "support" comes in the form of decisions from the 1940s and early 1950s that offer little more than a historical gloss on the statutory definitions. [*See* ECF No. 307 at 27-28.]

provisions of the FLSA." *Id.* But that is not possible when an "employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work." *Id.* Where "the acts of an employee from acquiring knowledge," such as the plaintiff's claimed uncompensated overtime hours, "the employer cannot be said to have suffered or permitted the employee to work in violation of § 207(a)." *Id.* at 414-15. That is precisely the question here that is the subject of NDOC's Motion, which Plaintiffs ignore.

Plaintiffs' silence on the litany of decisions in and out of Circuit that have elaborated on the meaning of *Forrester* is deafening. They do not attempt to respond to those decisions because they have no answer for them. [*See* ECF No. 307 at 2-4, 27-29.]

Plaintiffs fail to address the Sixth Circuit opinion by Judge Siler, who had previously construed the *Forrester* rule on a Ninth Circuit panel and was confronted by the same exception-based reporting system at issue here. In *White v. Baptist Mem'l Health Care Corp.*, the plaintiff – like the Plaintiffs in this case – knew that she was required to complete an exception log for overtime and to use an internal administrative process to report any wage issues. 699 F.3d 869, 872 (6th Cir. 2012). The *Forrester* rule provides that "if an employer establishes a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process." *Id.* at 876. Employees therefore have "some responsibility for the proper implementation of the FLSA's overtime provisions" and "cannot undermine his employer's efforts to comply with the FLSA by consciously omitting overtime hours for which he knew he could be paid." *Id.* (citation omitted). That is precisely what the undisputed facts show here, which is why Plaintiffs have deliberately avoided discussing the *Forrester* rule and its application.

For the same reason, the Court may reasonably conclude that Plaintiffs can offer nothing to explain how other applications of *Forrester* to law enforcement personnel are not equally applicable here. *See*, *e.g.*, *Allen v. City of Chicago*, 865 F.3d 936, 944 (7th Cir. 2017) (rejecting claim where police agency knew officers were working on mobile devices after hours but "did not know that such work was not being reported and paid"); *Hertz v. Woodbury Cty.*, 566 F.3d 775, 781-82 (8th Cir.

2009) (constructive knowledge of overtime could not be imputed to a police department because police officers were "in the best position" to prove they were performing compensable work); *Newton v. City of Henderson*, 47 F.3d 746, 749 (5th Cir. 1995) (rejecting argument that city was responsible for confirming police officer accurately completed payroll forms, which improperly denied the city "the right to require an employee to adhere to its procedures for claiming overtime"); *Maciel v. City of Los Angeles*, 542 F. Supp. 2d 1082, 1090 (C.D. Cal. 2008) ("This Court, however, does not understand it is an employer's burden to hold each employee's hand and ensure that they take their breaks" to ensure compensation).

The Court need not be diverted by any of the other cases cited by Plaintiffs on pages 26-27 of their Opposition, which do not address the question at issue in NDOC's Motion: whether Plaintiffs have established any material question of fact that NDOC was aware that each Plaintiff "was working and not reporting his time." They have not. The undisputed material facts show just the opposite is true. [*See* ECF No. 283 at 2-12.]

IV. ALL OF NDOC'S UNDISPUTED MATERIAL FACTS MUST BE DEEMED ADMITTED, REQUIRING THAT NDOC BE GRANTED SUMMARY JUDGMENT.

Under the authority of *Forrester*, 646 F.2d at 413, NDOC has challenged Plaintiffs' evidence on the third element of their prima facie case that it "suffered" or "permitted" them to work uncompensated. *See* 29 U.S.C. § 203(g); *Lindow v. United States*, 738 F.2d 1057, 1061 (9th Cir. 1984). In particular, NDOC has submitted record evidence supporting 54 undisputed material facts showing that by Plaintiffs' own admissions, any overtime they now claim was not reported to NDOC even though Nevada's policy is to pay overtime or provide compensatory time, and Nevada did so for each of the Plaintiffs. [SOF ¶¶ 1-54.]

To withstand NDOC's Motion for Summary Judgment, Plaintiffs, as the opposing party, must set forth specific facts showing that there is a genuine issue of material fact in dispute. Fed. R. Civ. P. 56(e). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In opposing summary judgment, Plaintiffs are not entitled to rely on the allegations

in their Complaint. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)). Where Plaintiffs, as the nonmoving party, fail to make a showing sufficient to establish the existence of an element essential to their case, and on which they will bear the burden of proof at trial, NDOC, as the moving party, "is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Plaintiffs have wholly failed to meet their burden in opposing NDOC's Motion. They have directly admitted 20 of the facts proffered by NDOC. For some of the other facts, Plaintiffs have made admissions they purport to qualify by bald statements without any record support. For others, they assert that they contest them not with facts or record cites, but with the arguments of their counsel. For some facts, Plaintiffs improperly seek to contradict their own sworn admissions. Consequently, all 54 of the material facts that NDOC has provided in support of its Motion must be taken as true, and NDOC's Motion for Summary Judgment must be granted.

A. Plaintiffs make unqualified admissions of many undisputed facts.

In their Opposition [ECF No. 307 at 8-18], Plaintiffs do not dispute the following facts in NDOC's Motion for Summary Judgment: Statement of Undisputed Fact ("SOF") Nos. 2, 3, 4, 9, 10, 13, 15, 16, 17, 21, 22, 23, 24, 25, 26, 32, 38, 39, 49, and 50[A]. [ECF No. 283 at 2-12]. Therefore, each of these facts is deemed admitted.

B. Plaintiffs cannot dispute facts or qualify their agreement with them by contradicting their own testimony, making those facts admitted.

Plaintiffs purportedly assent to most of the remaining undisputed facts, but qualify their admissions by making improper arguments and misrepresentations of the record. For instance, for SOF No. 35 [ECF No. 307 at 15], Plaintiffs admit that "Plaintiff Walden received 15 minutes of Overtime on November 26, 2010 and the timesheet note associated with the entry was 'HOLIDAY WORKED 15 MINUTES OF OVERTIME FOR BEING RELIEVED LATE.'" Plaintiffs attempt to improperly condition that admission with their statement that Walden would not be approved for overtime for the pre- and/or post-shift activities at issue in this case and complained about it for

years, citing to Walden's deposition at 43:21-44:04. However, a full reading of the transcript reveals that Walden admitted he failed to comply with NDOC policy and never completed a DOC-1000 for any of the overtime activities. [*See* Ex. A-17, Walden Dep. at 45:3-5.] Therefore, this fact must be deemed admitted.

Similarly, Plaintiffs admit SOF No. 36 that Plaintiffs Everist, Ridenour, and Tracy were approved for multiple instances of overtime after submitting their Form DOC-1000s. [ECF No. 307 at 15]. However, Plaintiffs then argue that "they would not be approved for overtime for the pre- and/or post-shift activities at issue in this Action." Plaintiffs cite to the depositions of Everist, Ridenour, and Tracy. Plaintiff Everist did testify that some of his requests were not approved [Ex. A-8, Everist Dep. 48:25-49:3], but also admitted that there were activities like muster for which he never submitted an overtime request [Ex. A-8, Everist Dep. 49:8-9] or simply did not remember submitting one [Ex. A-8, Everist Dep. 58:6-10]. Immediately following the line of Ridenour's testimony cited by Plaintiffs in their Opposition, Plaintiff Ridenour testified to the following:

> Q. So you have never completed a DOC 1000 asking to be compensated?
>
> A. No.

[Ex. A-14, Ridenour Dep. at 35:11-13.] Plaintiff Ridenour further testified that if his relief arrived late, he would request overtime or compensatory time and would expect that request to be approved. [Ex. A-14, Ridenour Dep., 45:8-14.] Plaintiff Tracy testified that he could not "recall off hand" if he reported any of the pre- and/or post-shift activities for which he claims he was not compensated. [Ex. B, Tracy Dep. at 48:4-8.]

Plaintiffs cannot create an issue of fact by contradicting their own prior testimony. *See generally Sudre v. Port of Seattle*, No. C15-0928JLR, 2016 U.S. Dist. LEXIS 166882, at *13 (W.D. Wash. Dec. 2, 2016) (*citing Van Asdale v. Int'l Game Tech*., 577 F3d 989, 998 (9th Cir. 2009); *see also Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991) ("A party cannot create a dispute of fact by an affidavit contradicting prior deposition testimony"); *Foster v. Arcata Assocs.*, 772 F.2d 1453, 1462 (9th Cir. 1985) ("If a party who has been examined at length on deposition

could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact"), *cert. denied*, 475 U.S. 1048 (1986).

Consequently, Plaintiffs have admitted the following statements of fact despite their improper contradictory arguments and misrepresentations of the record: SOF Nos. 1, 6, 7, 8, 19, 20, 28, 29, 33, 34, 35, 36, 46, 47, 53, and 54. Failing to indicate a valid disputed statement of fact, each of those undisputed material facts must be unqualifiedly admitted in its entirety.

C. Plaintiffs cannot dispute facts or qualify their agreement with them through arguments and unsupported statements, making those facts admitted.

In addition, Plaintiffs either dispute facts or admit them with qualifications for which they include commentary unsupported by any evidence. The Court must reject Plaintiffs' superfluous statements and accept the unqualified admission of each of these undisputed facts. "The Court's scrutiny of material statements of facts applies equally to the party seeking summary judgment and the party opposing it. Where a party offers a legal conclusion or statement of fact without proper evidentiary support, the Court, will not consider that statement." *Breeser v. Menta Grp*., 934 F. Supp. 2d 1150, 1156 (D. Ariz. 2013) (*citing Malec v. Sanford*, 191 F.R.D. 581, 583 (N.D. Ill. 2000)).

Unqualified admissions therefore must be applied to SOF Nos. 5, 11, 12, 14, 18, 27, 30, 31, 37, and 54, with Plaintiffs' unsupported commentary and disputes struck from the record.

D. Plaintiffs cannot dispute a fact through a meritless legal argument, making that fact admitted.

Plaintiffs attempt to dispute one statement of fact by making an inappropriate legal argument unsupported by the record. "It is the function of the Court, with or without a motion to strike, to review carefully statements of material facts and to eliminate from consideration any argument, conclusions, and assertions that are unsupported by the documented evidence of record offered in support of the statement." *Breeser*, 934 F. Supp. at 1155.

What Plaintiffs characterize as SOF No. 50[B] (the last sentence of NDOC's SOF No. 50) provides, "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." [ECF No. 283 at 11]. Plaintiffs "dispute" this fact, claiming "[t]here is no basis to assert that Nevada has adopted an employee grievance process 'to avoid lawsuit over compensation of the very kind that the Plaintiffs have asserted in this matter.' To the contrary, the Nevada Legislature has specifically stated that the State of Nevada should be held liable to the same extent as persons and corporations, with the sole exception for certain torts brought against governmental actors." [ECF No. 307 at 19].

Plaintiffs misrepresent how the Nevada Supreme Court has construed N.R.S. § 41.031, as explained in detail in NDOC's Reply in support of its Motion for Summary Judgment on sovereign immunity. [ECF NO. 317 at 3-11.] As the First Judicial District Court explained, "**Nevada would not have created this complex administrative scheme if a state employee could simply bypass it by filing a civil action**." *Columbus v. Nevada*, Order Granting Defs.' Mot. to Dismiss at 3, Case No. 18-15691 (Nev. 1st Dist. Ct. Jan. 17, 2019) (emphasis added) (provided to the Court at ECF No. 315-2 at 4). Thus, this fact must be deemed admitted.

E. Plaintiffs' own deposition testimony directly refutes the remaining facts they purport to "dispute," requiring that those material facts be deemed admitted.

Plaintiffs purport to "dispute" several Statements of Fact by distorting the record and contradicting their own deposition testimony. Specifically, Plaintiffs offer what they inaccurately describe as "additional undisputed facts" they misrepresent as contradicting SOF Nos. 1, 6, 7, 8, 19, 28, 33, 40, 44, 45, 46, 47, 51 and 54. To facilitate the Court's review of Plaintiffs' misrepresentations regarding their first two "additional undisputed facts," NDOC has included a table as Exhibit A summarizing Plaintiffs' many admissions contradicting Plaintiffs' two so-called "facts." Because there are too many examples of Plaintiffs' mischaracterizations of the record to include here, NDOC will provide the Court with highlights of some of Plaintiffs' many misrepresentations.

First, Plaintiffs maintain that "COs have repeatedly requested to be paid for the pre and post-shift work." [ECF No. 307 at 20.] That statement is flatly refuted by Plaintiffs' own contrary

admissions that they have not made such requests. Some illustrative examples, which are supported by many others in Table A, include:

> **Plaintiff Carlman**
> Q. At any time for these pre- and post-shift activities, did you ever request overtime?
> A. No ma'am.
> [Exhibit A-4, Carlman Dep. at 77:1-6; *see also* Ex. A at 1.]
>
> **Plaintiff Dicus**
> Q. Did you ever complete a DOC asking for that time, a DOC 1000?
> A. No….
> [Exhibit A-6, Dicus Dep. at 39:4-9; *see also* Ex. A at 9.]
>
> **Plaintiff Krol**
> Q. Did you request overtime pay or comp time?
> A. No, it's – no.
> [Exhibit A-12, Krol Dep. at 36:5-6; *see also* Ex. A at 2-3.]
>
> **Plaintiff Ridenour**
> Q. So you have never completed a DOC 1000 asked to be compensated?
> A. No.
> [Exhibit A-14, Ridenour Dep. at 35:11-13; *see also* Ex. A at 10.]
>
> **Plaintiff Walden**
> Q. Did you complete a DOC 1000 for any of these activities that we have been discussing?
> A. No.
> [Exhibit A-17, Walden Dep. at 45:3-5; *see also* Ex. A at 11.]

Next, Plaintiffs maintain that "any contention that they were paid when they made a request for these work activities is false." [ECF No. 307 at 20.] That statement likewise is directly contradicted by the Plaintiffs' admissions, as shown in Section II.

Consequently, the remaining SOF Nos. 1, 6, 7, 8, 19, 28, 33, 40, 44, 45, 46, 47, 51 and 54 must be deemed admitted.

V. PLAINTIFFS' "EVIDENCE" ESTABLISHES THEY HAVE NOT EXHAUSTED NEVADA'S ADMINISTRATIVE PROCESS FOR THEIR WAGE CLAIMS.

The remaining six statements that Plaintiffs mischaracterize as "additional undisputed facts" pertain to grievances that just three Corrections Officers have filed since 2013. [ECF No. 307 at 20,

26-27.] Plaintiffs offer little explanation for why they have included the grievances, other than to support their facially inaccurate contention that "Numerous COs have challenged overtime decisions by speaking to their supervisor or other managers in their chain-of-command and several have submitted grievances on this issue." [*Id.* at 19.] An examination of the three grievances establishes NDOC's undisputed facts that Plaintiffs "have not followed the procedure for appealing overtime decisions" by "filing a grievance," requiring that summary judgment be entered for NDOC.

A. Plaintiffs' references to the grievances suggest an attempt to re-litigate the Court's two rulings against them on their claims under N.R.S. § 284.180.

The three grievances provided by Plaintiffs at ECF No. 307-2 appear to be, at least in part, an effort to again raise an issue the Court has twice rejected already. In their First Amended Complaint, Plaintiffs alleged that NDOC failed to pay them overtime in violation of N.R.S. § 284.180. [ECF No. 95 at 32-33.] NDOC moved to dismiss the claim, arguing that Plaintiffs failed to demonstrate they exhausted their administrative remedies, as required by the statute. [ECF No. 99.] On March 26, 2018, the Court agreed and dismissed the claim. [ECF No. 166 at 15-16.] The Court observed that "the Nevada Supreme Court has found that such a claim is not ripe for judicial review unless all state administrative remedies have been exhausted…" [*Id.* at 16 (citing *Henderson v. Kilgore*, 131 P.3d 11, 14-15 (Nev. 2006)).] Because Plaintiffs had failed to exhaust their administrative remedies, the Court could "not address the claim" and dismissed it without prejudice. [*Id.* at 16.]

On April 9, 2018, Plaintiffs moved for reconsideration of the dismissal of their § 284.180 claim. [ECF No. 169.] They argued, "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." [*Id.* at 4.] In support of their motion, Plaintiffs attached the same declaration and supporting materials from opt-in Plaintiff James Kelly that they again have provided in opposition to NDOC's present Motion. [*Compare* ECF No. 169-1 *with* ECF No. 307-2 at 4-37.] The Court denied Plaintiffs' motion, explaining that Plaintiffs had failed "to present this evidence in their opposition to the Prior MTD" and failed "to argue that the administrative process under NRS §

284.180 is futile or inadequate as a matter of law." [ECF No. 192 at 3.] Therefore, the Court denied Plaintiffs' motion, keeping in place its dismissal of their claims under § 284.180.

Plaintiffs now bring this issue before the Court for a third time. Their singular reference to the grievance materials [ECF No. 307 at 19] appears to suggest that any effort to comply with Nevada's comprehensive administrative procedures would, in their words, be "futile or inadequate as a matter of law." [ECF No. 192 at 3.] Not only is their effort procedurally improper, it must be rejected for the reasons the Court has articulated previously. [*See* ECF No. 166 at 15-16; ECF 192 at 3.] Nevada law required Plaintiffs to exhaust their administrative remedies for any wage issues they believe they have, and Plaintiffs failed to do so.

B. The three grievances establish that Plaintiffs have not complied with Nevada's administrative procedures for grieving and appealing any wage issues they have.

The undisputed facts show that Nevada has comprehensive administrative procedures for addressing any wage issues that Plaintiffs may have, and that Plaintiffs have not complied with those procedures. [ECF No. 283 at 11-12.] Plaintiffs purport to dispute these facts by referring to the three grievances, which form the core of six of their eight so-called "additional undisputed facts." [ECF No. 307 at 20, 26-27.] However, these three grievances instead establish the undisputed facts supporting NDOC's Motion.

Of the three grievances that Plaintiffs have included with their opposition brief, only one involves an opt-in Plaintiff currently in this litigation: a 2013 grievance by James Kelly [ECF No. 307-2 at 4-37], who opted into this case on August 8, 2014 [ECF No. 9].[10] In other words, just one grievance has been submitted among the more than 500 timely opt-in Plaintiffs in all of their years of employment. That fact alone proves that Plaintiffs have not complied with Nevada's comprehensive administrative process for grieving any wage issues they may have.

[10] Plaintiffs also have submitted a 2018 grievance filed by David Eckard, whose effort to untimely opt-into this litigation on March 6, 2019 [ECF No. 217], several years after the June 30, 2015 deadline and without Court authorization, is the subject of NDOC's Motion to Strike. [ECF No. 264.] The third undated grievance is by Jesse Haines, who has never opted into this litigation.

Furthermore, the evidence provided by Plaintiffs demonstrates that even Mr. Kelly, the only timely opt-in Plaintiff to have filed a grievance, has not completed the grievance process. His grievance was denied because it did not comply with NAC 284.658, depriving Nevada's Employee-Management Committee (EMC) of jurisdiction over it. As the EMC explained, "Mr. Kelly's request that his pay records and work schedules be reviewed is essentially a request for an investigation, and the EMC has previously determined that it is not authorized to order an investigation." [ECF No. 307-2 at 22.] Moreover, to the extent the EMC's August 8, 2013 letter could be construed as a "final decision" pursuant to NAC 284.695 [*see* ECF No. 307-2 at 36-37], Mr. Kelly failed to seek the only recourse authorized under Nevada law: to timely seek judicial review of that final decision within thirty days after service in the First Judicial District Court in and for Carson City. *See* N.R.S. § 233B.130(2)(d). Therefore, Mr. Kelly, like every other Plaintiff, has failed to complete the grievance process required by Nevada law.

C. The undisputed facts show that none of the Plaintiffs have exhausted Nevada's exclusive remedies for any wage disputes they may have.

Nevada's comprehensive statutory and administrative system addresses state employee "grievances," including "any condition arising out of the relationship between an employer and an employee, including, but not limited to, compensation…" NAC 284.658(2). Employees must first grieve their compensation dispute with their supervisor (NAC 284.678), then to their department head (NAC 284.686), then to the highest administrative level (NAC 284.690), and finally to the Nevada's EMC (NAC 284.695). If an employee is dissatisfied with the final decision they receive from the EMC, they have but one remedy available to them: timely seeking review from the First Judicial District Court in and for Carson City. *See* N.R.S. § 233B.130(2)(d). Plaintiffs' failure to offer admissible evidence that any of them have completed this process establishes that it is undisputed that "they have not followed the procedure for appealing overtime decisions" by "filing a grievance."

/ / /

/ / /

VI. THE UNDISPUTED MATERIAL FACTS ESTABLISH THAT PLAINTIFFS FAILED TO COMPLY WITH REQUIREMENTS FOR ACCURATELY REPORTING TIME, BARRING THEIR FLSA CLAIMS AGAINST NDOC.

Stripped devoid of any facts on which to oppose NDOC's Motion, Plaintiffs instead resort to inappropriate policy arguments and strawmen. They pick and choose which policies they want to apply, namely those they assert "specifically instructed COs to perform this work via written regulations!" [ECF No. 307 at 28.] At the same time, Plaintiffs ask the Court to ignore the regulations requiring them to accurately report their time. [*See id.* at 8.] They attack their time-reporting requirements as "a nonsensical administrative burden on state payroll department." [*Id.* at 29.] Throughout their plea to the Court, they do not cite a single admissible piece of evidence or fact because they have none that supports their untenable position. [*Id.* at 28-29.] What the Court is left with are the undisputed material facts requiring that NDOC's Motion be granted. Because Plaintiff has offered no response, NDOC will summarize those facts.

NDOC's exception-based system for reporting overtime is established under Nevada law, providing for how time and attendance including overtime and compensatory time is to be reported. [SOF ¶¶ 1-18.] NDOC's exception-based system complies with the FLSA because it allows exceptions such as overtime to be reported. *See White*, 699 F.3d at 872-73.

On multiple occasions throughout their employment, Plaintiffs received, read and understood all of NDOC's administrative rules and procedures, including the procedure for reporting overtime. [SOF ¶¶ 6-10, 19-25.] When Plaintiffs followed this procedure, they admit that they were given compensatory time or paid overtime. [SOF ¶¶ 26-43.] If their overtime request is denied, for whatever reason, Nevada law provides an administrative procedure for them to grieve their compensation dispute, beginning with their supervisor. [SOF ¶¶ 48-50.]

The compensation Plaintiffs seek in this litigation is for overtime they admit they did not report to NDOC contrary to its policies and procedures [SOF ¶¶ 44-47] and outside of the administrative grievance process. [SOF ¶¶ 51-54.] If they had reported time that was compensable, NDOC would have paid them. That is confirmed by the vast volume of overtime requests Plaintiffs did submit which NDOC approved, totaling an average of hundreds of hours of overtime for each

Plaintiff. ***Over ten percent of all overtime NDOC approved was for a duration of one hour or less. Several of the Plaintiffs' files document receipt of overtime for small segments such as just fifteen minutes.*** [SOF ¶¶ 30-37 (emphasis added).] Plaintiffs' admissions demonstrate that Nevada pays them for their overtime or provides them with compensatory time. *See* Section II.

These undisputed facts fall squarely under the *Forrester* rule. "An employer must have an opportunity to comply with the provisions of the FLSA." 646 F.3d at 414. First, Plaintiffs admitted that they knew how to apply for and receive overtime pay, had done so in the past, and were paid when they complied with NDOC's system. [SOF ¶¶ 1-43.] Second, Plaintiffs acknowledged that their own actions in not submitting their overtime requests, was responsible for the compensation they are seeking in this litigation. [SOF ¶¶ 44-54.] Third, the undisputed record evidence is that the nature of Plaintiffs' FLSA theory is highly variable. [ECF No. 283 at 22-23.]

Under such circumstances, Plaintiffs never explain how NDOC would have any way of knowing when an employee works overtime without the employee's assistance. To reiterate, ***the "reasonable diligence" that Forrester requires an employer to exercise in its payroll practices "is not an expectation of omniscience."*** *Craig v. Bridges Bros. Trucking, LLC*, 823 F.3d 382, 389 (6th Cir. 2016) (emphasis added). That is precisely why NDOC requires the Plaintiffs to use its comprehensive administrative system to request overtime, which NDOC always paid. *See generally Newton*, 47 F.3d at 749 (an employer has "the right to require an employee to adhere to its procedures for claiming overtime").

In conclusion, NDOC "cannot be said to have suffered or permitted the employee to work in violation of § 207(a)." *Forrester*, 646 F.2d at 414-15. Plaintiffs have failed to prove their prima facie case, requiring entry of summary judgment for NDOC on all of their FLSA claims.

VII. PLAINTIFFS HAVE WHOLLY FAILED TO MEET THEIR BURDEN OF DEMONSTRATING A TRIABLE ISSUE OF FACT ON WILLFULNESS.

Plaintiffs inaccurately argue that the willfulness inquiry is not a proper question for summary judgment. [ECF No. 307 at 2.] That is not true. The "determination of willfulness is a mixed question of law and fact." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908 (9th Cir. 2003). As such, an

employer may be granted summary judgment where the plaintiff has failed to offer admissible evidence showing the employer "intentionally violated the FLSA or recklessly disregarded its provisions." *Roces v. Reno Hous. Auth.*, 300 F. Supp. 3d 1172, 1183 (D. Nev. 2018). The undisputed material facts show Plaintiffs cannot meet their burden.

This Court cannot presume any conduct is willful in the absence of evidence. *Alvarez*, 339 F.3d at 909. To prove willfulness, Plaintiffs must establish their employer acted in "knowing or … reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (citation omitted). The undisputed material facts show just the opposite: (1) Nevada's policy was to pay overtime generally; (2) Nevada had a policy to pay for the type of overtime claims being brought by Plaintiffs; and (3) Plaintiffs knew about and repeatedly acknowledged that policy. When Plaintiffs followed the policy, they were paid overtime. [ECF No. 283 at 2-12; *see also infra* Section II.]

Therefore, as a matter of law, Plaintiffs cannot establish NDOC's actions were willful. *See SEIU Local 102 v. County of San Diego*, 60 F.3d 1346, 1355-56 (9th Cir. 1994). As such, the Act's default two year limitations period applies. *See* 29 U.S.C. § 255(a).

VIII. PLAINTIFFS' FAILURE TO MEET THEIR BURDEN OF DEMONSTRATING A TRIABLE ISSUE OF FACT ON WILLFULNESS BARS LIQUIDATED DAMAGES.

For the same reasons, Plaintiffs are not entitled to liquidated damages, if any of their FLSA claims remain. Pursuant to 29 U.S.C. § 260, double-damages under the Act are not to be awarded "despite the failure to pay appropriate wages" where "the employer acted in subjective 'good faith' and had objectively 'reasonable grounds' for believing that the acts or omissions giving rise to the failure did not violate the FLSA." *Alvarez*, 339 F.3d at 909. Where, as is the case here, the undisputed facts show the absence of a willful violation, liquidated damages should not be awarded. *See SEIU Local 102*, 60 F.3d at 1356.

IX. THE COURT SHOULD GRANT NDOC'S MOTION FOR SUMMARY JUDGMENT ON THE MERITS.

NDOC respectfully submits that it is entitled to summary judgment on the merits of Plaintiffs' FLSA claims, which should be dismissed with prejudice. The undisputed facts establish:

(1) Nevada's policy was to pay overtime generally; (2) Nevada had a policy to pay for the type of overtime claims being brought by Plaintiffs; and (3) Plaintiffs knew about and repeatedly acknowledged that policy. The undisputed material facts further establish that when Plaintiffs followed the policy, they were paid overtime. [ECF No. 283 at 2-12.] NDOC therefore is entitled to summary judgment on the merits of Plaintiffs' claims. The same evidence that bars their FLSA claims under *Forrester* also precludes Plaintiffs from establishing either a willful violation or the availability of liquidated damages.

NDOC believes it will be unnecessary for the Court to reach any of the issues in this Motion because Plaintiffs' FLSA claims are barred by the State of Nevada's sovereign immunity to those claims. [*See* ECF Nos. 276, 315.] That Motion will moot out all remaining motions currently pending before the Court.

DATED this 17th day of June, 2020.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

BY: */s/ Cara T. Laursen*

Sheri M. Thome, Esq.
Nevada Bar No. 008657
James T. Tucker, Esq.
Nevada Bar No. 012507
Cara T. Laursen, Esq.
Nevada Nar No. 014563
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, NV 89119
Attorneys for Defendants 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 the 17th day of June, 2020, I electronically filed and served a true and correct copy of the foregoing **DEFENDANT STATE OF NEVADA *EX REL.* DEPARTMENT OF CORRECTIONS' REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON THE MERITS OF PLAINTIFFS' FLSA CLAIMS** 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

Christian Gabroy, Esq.
Kaine Messer, Esq.
GABROY LAW OFFICES
The District at Green Valley Ranch
170 South Green Valley Parkway, Suite 280
Henderson, NV 89012
Telephone: (702) 259-7777
Fax: (702) 259-7704
Attorneys for Plaintiffs

By: */s/ Agnes R. Wong*
An Employee of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

EXHIBIT A

Plaintiffs' admissions contradicting their "Additional Undisputed Facts" Numbers 1-2

Exhibit B

Deposition Transcript of Daniel Tracy

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

NATHAN ECHEVERRIA, *et al.*, Plaintiffs, v. STATE OF NEVADA, *et al.*, Defendants.	Case No. 3:14-cv-00320-MMD-WGC ORDER

I. SUMMARY

Plaintiffs, who are guards and other employees at Nevada state correctional facilities, sued the State of Nevada, *ex rel.* the Nevada Department of Corrections ("NDOC") in this collective action primarily brought under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* ("FLSA") to recover compensation for time spent allegedly preparing for, or wrapping up, their work shifts. (ECF No. 95.) There are a number of motions pending before the Court (ECF Nos. 256, 264, 274, 275, 276, 278, 279, 280, 281, 282, 283, 304, 308, 310, 318),[1] but this order addresses only NDOC's motion for summary judgment on sovereign immunity from liability for damages ("Motion") (ECF No. 276).[2] Because the Nevada Supreme Court has not ruled on whether Nevada has waived its sovereign immunity from FLSA or analogous state-law claims for damages by

[1]NDOC filed most of these motions. The Court's Local Rules of Practice, amended on April 17, 2020, caution parties against circumventing the page limit on the length of brief by filing multiple motions. *See* LR 7-3(a) ("Parties must not circumvent this rule [governing page limits] by filing multiple motions."); LR 7-2(a) ("The motion and supporting memorandum of points and authorities must be combined into a single document that complies with the page limits in LR 7-3.")

[2]The Court also reviewed Plaintiffs' response (ECF No. 299), and NDOC's reply (ECF No. 315).

enacting NRS § 41.031 or otherwise, the answer to the corresponding question could be case-dispositive, and could have potentially broad application to an important issue of state public policy. Accordingly, the Court will certify this question to the Nevada Supreme Court.[3] *See Redgrave v. Ducey*, 953 F.3d 1123, 1128 (9th Cir. 2020) (taking the same approach in a similar case). The Court will also stay this case and deny all pending motions without prejudice to refiling after the Nevada Supreme Court answers or otherwise responds to the certified question.

II. BACKGROUND

The Court again refers to one of its prior orders in this case, in which it recited the factual background, and does not recite those facts here. (ECF No. 166 ("Prior Order") at 2-5.)

As relevant to NDOC's Motion, the Court found in the Prior Order that NDOC waived its Eleventh Amendment sovereign immunity from suit in removing this case to this Court. (ECF No. 166 at 1-2.) NDOC appealed. (ECF No. 176.) The Ninth Circuit Court of Appeals affirmed. (ECF No. 240 (amended opinion), 241 (mandate), 242 (order on mandate).) *See also Walden v. Nevada*, 945 F.3d 1088 (9th Cir. 2019). However, *Walden* left open two issues that are particularly pertinent to NDOC's Motion. First, the *Walden* court expressed no opinion on NDOC's claim that it is also, and separately, immune from liability for damages under the sovereign immunity doctrine—which is the gist of NDOC's Motion. (ECF Nos. 276, 315 (clarifying some of NDOC's positions and relying on *Redgrave* for the first time).) *See also* 945 F.3d at 1091-92; *id.* at 1092 n.1. Second, the court explained that "[b]ecause we affirm on the waiver-by-removal ground, we do not address Plaintiffs' alternate argument that Nevada has waived sovereign immunity from FLSA claims by enacting Nev. Rev. Stat. § 41.031." *Id.* at 1096 n.4.

In a subsequent opinion in a different case, *Redgrave*, the Ninth Circuit provided a roadmap for the Court to analyze NDOC's Motion. *See* 953 F.3d 1123. Like Plaintiffs

---

[3]The question is more precisely phrased in the conclusion of this order. The Court thus respectfully directs the Nevada Supreme Court's attention to the conclusion.

here, the plaintiff in *Redgrave* argues she is entitled to unpaid overtime from the state of Arizona under the FLSA. *See id.* at 1124. Arizona "removed the case to federal court, asserted its sovereign immunity from such claims, and moved to dismiss the case." *Id.* In discussing *Walden*, the *Redgrave* court explained that it has never addressed, and would not address in *Redgrave*, whether a state's removal of a case to federal court waived its sovereign immunity from liability for damages, as opposed to its immunity from suit, as the Ninth Circuit held in *Walden*. *See id.* at 1125.

Importantly, the *Redgrave* court stated that whether a state has established its separate sovereign immunity from liability for damages—as NDOC argues in its Motion—is a question of state law.[4] *See id.* The *Redgrave* court then decided to certify the following question to the Arizona Supreme Court because it "may be determinative of the cause pending before this court, and there appears to be no controlling precedent in the decisions of the Arizona Supreme Court or the Arizona Court of Appeals[:]" "Has Arizona consented to damages liability for a State agency's violation of the minimum wage or overtime provisions of the federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 206–207?" *Id.* at 1123; *see also id.* at 1125-28.

That brings the Court to NDOC's Motion, where NDOC asks the Court to dismiss all of Plaintiffs' remaining claims under the doctrine of sovereign immunity because Nevada is immune from liability for damages under the FLSA, or otherwise for unpaid wages state employees seek outside of Nevada's comprehensive administrative wage-grievance scheme for state employees. (ECF No. 276 at 15; *see also generally id.*) Said otherwise, NDOC now makes the argument the Ninth Circuit did not resolve in *Walden*. *See* 945 F.3d at 1092 n.1. And *Redgrave* instructs the Court that resolution of NDOC's Motion depends on a question of state law, namely, whether Nevada "is among those states that consent to private suits for damages for violations of FLSA's overtime and minimum-wage provisions or if it is among those states that do not so consent." 953 F.3d

---

[4]The parties also agree it is a question of state law. (ECF Nos. 299 at 9-10, 315 at 10-11.)

at 1125; *see also id.* (again, stating this is a question of state law); *Walden* 945 F.3d at 1096 n.4 (noting Plaintiffs argued Nevada waived its sovereign immunity against FLSA claims in enacting NRS § 41.031, but stating the Ninth Circuit was not reaching that argument).

Both from reviewing the parties' briefs and its own research, it does not appear that the Nevada Supreme Court has definitively resolved this question. And the answer to this question could be case dispositive if the Court were to agree with the positions NDOC advances in its Motion, mooting all of the other pending motions in this case. This reality requires the Court to determine whether certification or prediction of how the Nevada Supreme Court would rule on the key question of state law presented in NDOC's Motion is the best next step in this case.

III. DISCUSSION

The Court may certify questions to the Nevada Supreme Court if proceedings before this Court raise "questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this state." Nev. R. App. P. 5(a). Certification is not obligatory, but is within the sound discretion of the certifying court. *See Lehman Bros v. Schein*, 416 U.S. 386, 390-91 (1974). That said, "when a federal court confronts an issue of state law which the state's highest court has not addressed, the federal court's task typically is to predict how the state's highest court would decide the issue." *Carolina Cas. Ins. Co. v. McGhan*, 572 F. Supp. 2d 1222, 1225 (D. Nev. 2008). Certification is the other route. In making its determination about whether certification is necessary, the certifying court should consider "whether the state law question presents a significant question of important state public policy, whether the issue involved has broad application, whether law from other states is instructive, the state court's case load, and comity and federalism concerns." *Id.* at 1226 (citing *Kremen v. Cohen*, 325 F.3d 1035, 1037-38 (9th Cir. 2003)). The certifying court may also consider "the timing of the certification, and whether

certification will achieve savings to time, money, and resources . . . ." *Id.* at 1226 (citing *Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984)).

Having considered these factors, and in view of *Redgrave*, the Court finds that certification is the best way forward in this case. To start, this apparently unanswered question of state law—whether Nevada has consented to private suits for damages for violations of FLSA's overtime and minimum-wage provisions—would be determinative were the Court to find Nevada had not consented. Next, the parties appear to agree that the Nevada Supreme Court has never definitively answered this question. (ECF Nos. 276, 299, 315.) Further, the Court was unable to locate any such decisions of the Nevada Supreme Court or Nevada Court of Appeals. Thus, the factors in Nev. R. App. P. 5(a) support certification.

Moreover, this is a significant question of important state public policy, which could have relatively broad application. *See McGhan*, 572 F. Supp. 2d at 1226 (stating these factors weigh in favor of certification). NDOC argues that Nevada state employees' only recourse for alleged underpayment of wages is Nevada's comprehensive, administrative wage grievance scheme. (ECF Nos. 276 at 1-2, 315 at 5-6.) Plaintiffs argue they are able to bypass that system and maintain this FLSA collective action because Nevada has waived its sovereign immunity from liability for damages in enacting NRS § 41.031(1). (ECF No. 299 at 3, 9-16.) These positions illustrate that resolution of this issue of Nevada law may have a significant impact on how Nevada state employees can seek redress for allegedly unpaid or underpaid wages.

The main issue created by certification will be more delay in this case that is already six years old, in part because the Court will defer ruling on several other pending motions as it awaits a response from the Nevada Supreme Court. However, the Court finds it will be more efficient in the long run to get a definitive answer to the key legal question at issue here, from the authoritative source—allowing the Court to ensure the just, but not quite as speedy, determination of this case. *See* Fed. R. Civ. P. 1. And after all, it is axiomatic that, "[w]hen interpreting state law, federal courts are bound by

decisions of the state's highest court." *Teleflex Med. Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 851 F.3d 976, 982 (9th Cir. 2017) (citation omitted). Thus, it makes sense to go to the Nevada Supreme Court to answer this important question.

Further, the Court's federalism and comity concerns weigh in favor of certification. Federalism concerns permeate the jurisprudence of sovereign immunity "because the states retain a residuary and inviolable sovereignty[.]" *Redgrave*, 953 F.3d at 1125 (citation and internal quotation marks omitted). Thus, the Nevada Supreme Court has a particularly important interest in resolving the question NDOC presents in its Motion. Further, deferring to the Nevada Supreme Court on this question of Nevada law will "promote cooperative judicial federalism"—in a sense, the Court is inviting the Nevada Supreme Court to collaborate in resolving this case by certifying this potentially dispositive question. *McGhan*, 572 F. Supp. 2d at 1226. Finally, the Ninth Circuit found certification was the appropriate route in the analogous *Redgrave* case, which suggests the Court should follow suit. *See* 953 F.3d 1123. In sum, the Court finds that certification is the best next step in this case.

The Court therefore certifies the following question to the Nevada Supreme Court, and respectfully requests the Nevada Supreme Court answer it: Has Nevada consented to damages liability for a State agency's violation of the minimum wage or overtime provisions of the federal Fair Labor Standards Act, 29 U.S.C. §§ 206-207, or analogous provisions of state law, whether in enacting NRS § 41.031 or otherwise?

The Court recognizes that the Nevada Supreme Court may rephrase the question as it deems necessary. *See Palmer v. Pioneer Inn Assocs. Ltd.*, 59 P.3d 1237, 1238 (Nev. 2002).

IV. 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 issues before the Court.

It is therefore ordered that the following question of law is certified to the Nevada Supreme Court under Rule 5 of the Nevada Rules of Appellate Procedure:

> Has Nevada consented to damages liability for a State agency's violation of the minimum wage or overtime provisions of the federal Fair Labor Standards Act, 29 U.S.C. §§ 206-207, or analogous provisions of state law, whether in enacting NRS § 41.031 or otherwise?

See Nev. R. App. P. 5(c)(1). The nature of the controversy and a statement of the facts are referenced above, but also discussed in the Court's Prior Order (ECF No. 166). *See* Nev. R. App. P. 5(c)(2)-(3). Because Defendant NDOC filed the Motion, the Court designates NDOC as Appellant, and Plaintiffs as Respondents. The names and addresses of counsel are as follows:

Counsel for Plaintiffs/Respondents
Joshua D. Buck, Mark R. Thierman, Leah L. Jones
Thierman Buck LLP
7287 Lakeside Drive
Reno, NV 89511

Counsel for Defendant/Appellant
Shrei M. Thome, James T. Tucker, Cara T. Laursen
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP 300 South Fourth Street, Eleventh Floor Las Vegas, NV 89101

See Nev. R. App. P. 5(c)(5).

It is further ordered that all pending motions (ECF Nos. 256, 264, 274, 275, 276, 278, 279, 280, 281, 282, 283, 304, 308, 310, 318) are denied without prejudice to refiling after the Nevada Supreme Court answers, or responds that it declines to answer, the certified question, but any refiled motions must be updated as appropriate before refiling.

It is further ordered this case is stayed pending the Nevada Supreme Court's response to the certified question.

It is further ordered the parties must file a joint motion within 10 days of the Nevada Supreme Court either answering, or declining to answer, the certified question, which both moves to lift the stay in this case, and proposes an appropriately updated briefing schedule.

The Clerk of Court is directed to administratively close this case as the Court awaits the Nevada Supreme Court's response to the certified question.

The Clerk of Court is further directed to forward a copy of this Order to the Clerk of the Nevada Supreme Court under official seal of the United States District Court for the District of Nevada. The Clerk of Court is further directed to include in the packet it forwards on to the Clerk of the Nevada Supreme Court a copy of the Court's Prior Order (ECF No. 166). Finally, the Clerk of Court is also directed to include in the packet it forwards on to the Clerk of the Nevada Supreme Court copies of the operative Complaint (ECF No. 95), and the parties' relevant briefs (ECF Nos. 276, 299, 315).

DATED THIS 10th day of July 2020.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF NEVADA

NATHAN ECHEVERRIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82030

FILED

DEC 23 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER ACCEPTING CERTIFIED QUESTION AND DIRECTING BRIEFING

The United States District Court for the District of Nevada has certified a question to this court under NRAP 5 regarding whether the State of Nevada has waived its immunity from liability for a State agency's violation of federal and state minimum wage and overtime standards. The certified question is:

> Has Nevada consented to damages liability for a State agency's violation of the minimum wage or overtime provisions of the federal Fair Labor Standards Act, 29 U.S.C. §§ 206-207, or analogous provisions of state law, whether in enacting NRS § 41.031 or otherwise?

As no clearly controlling Nevada precedent exists with regard to this legal question and the answer may determine part of the federal case, we accept the certified question. *See* NRAP 5(a); *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 749-51, 137 P.3d 1161, 1163-64 (2006) (discussing the factors this court considers when determining whether to accept a certified question).

Appellant shall have 30 days from the date of this order to file and serve an opening brief. Respondent shall have 30 days from the date the opening brief is served to file and serve an answering brief. Appellant

shall then have 21 days from the date the answering brief is served to file and serve any reply brief. The parties' briefs shall comply with NRAP 28, 28.2, 31(c), and 32. *See* NRAP 5(g)(2). The parties may file a joint appendix containing any portions of the record before the U.S. District Court that are necessary to this court's resolution of the certified questions. *See* NRAP 5(d), (g)(2).

It is so ORDERED.[1]

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

Cadish, J.
Cadish

Silver, J.
Silver

cc: Thierman Buck LLP
Cara T. Laursen
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP/Las Vegas
Clerk, United States District Court for the District of Nevada

[1]The clerk of this court shall not charge a filing fee in this case. *See* NRS 2.250(1)(d)(1).