No. 82030

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*. ITS NEVADA DEPARTMENT OF CORRECTIONS,

Respondent.

Original Proceeding under NRAP 5 - Certified Question from United States District Court, District of Nevada, Case No. 3:14-cv-000320-MMD-WGC

RESPONDENT'S ANSWERING BRIEF

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STATEMENT OF ISSUE

The question of law certified by the U.S. district court and accepted by this Court 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 [S]tate law, whether in enacting NRS § 41.031 or otherwise?

INTRODUCTION

A waiver of sovereign immunity must be express, it must be narrowly interpreted, and it must be construed in favor of the sovereign. Nevada retains its sovereign immunity from liability absent such an open and express waiver. Because NRS 41.031 cannot properly be interpreted as waiving Nevada's sovereign immunity from statutory claims like those of Plaintiffs, this Court must answer the certified question in the negative.

This Court has already recognized that NRS 41.031 was intended to "compensate victims of government *negligence*," a conclusion it has reaffirmed numerous times since. *Harrigan v. City of Reno*, 86 Nev. 678, 680 (1970) (emphasis added). And it has called NRS 41.031 and accompanying provisions "the tort liability act," which is how this brief will refer to the statute. *Id.*

NRS 41.031's text and structure confirm this Court's previous conclusion that the Legislature intended the statute to address tort liability. Though it does not

specifically mention the word "tort," all of its listed exceptions to the waiver of immunity concern tort claims. That portion of the statute only makes sense if the tort liability act waives immunity from tort liability alone. In 1965, when the statute was passed, the Nevada Legislature would have had no reason to specifically mention tort liability, nor could it have thought to distinguish statutory liability. This is because statutory liability, as claimed by Plaintiffs here, had not yet been conceived of in1965. The Legislature could not have intended to waive immunity from a type of liability that did not yet exist.

This case's facts show the importance of upholding Nevada's sovereign immunity from statutory liability. Nevada has established a comprehensive regime for approving and compensating overtime and resolving overtime disputes. Nearly all correctional officers take advantage of that regime to timely receive compensation for overtime worked. Plaintiffs here seek to circumvent Nevada's established system by suing directly in court for alleged overtime that they never reported. Nevada went great lengths to create this overtime-management regime. Plaintiffs fail to explain why Nevada would have done so if private plaintiffs could simply bypass it.

Plaintiffs' argument that Nevada has waived sovereign immunity by litigation conduct is also without merit. Only legislation, not litigation conduct, can waive

sovereign immunity. And Nevada has preserved the defense of sovereign immunity throughout this case.

This Court should answer the certified question as follows:

> No. Nevada has not 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.[1]

STATEMENT OF THE CASE

Plaintiffs are current and former Nevada correctional officers. 4 JA 849. In the operative complaint, they brought claims under the federal Fair Labor Standards Act, 29 U.S.C. §§ 201-219, and Nevada law. 3 JA 508. Only the FLSA claims remain pending. OB 8.

Nevada moved for summary judgment based on – among other things – its sovereign immunity from liability. *See* 4 JA 849. The district court certified the question of law of whether Nevada has waived its sovereign immunity as to FLSA claims and analogous State-law claims by "enacting [the tort liability act] or otherwise." *Id.* at 855. This Court accepted the certified question and designated Plaintiffs as Appellants. *Id.* at 857-58.[2]

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[1] As discussed below, *see infra* Argument Part II, this Court should not address whether Nevada has consented to damages liability for alleged violations of "analogous provisions of [S]tate law."

[2] Unless otherwise noted, "district court" in this brief refers to the U.S. District Court for the District of Nevada. "NDOC" refers to the Nevada Department of Corrections.

STATEMENT OF THE FACTS

I. Nevada's system for approving and compensating overtime and resolving overtime disputes

A. Nevada statutes and regulations establish a comprehensive regime for approving and compensating overtime

The Legislature has established a statutory scheme governing job and salary classifications and compensation procedures across State government. *See* NRS 284.010(1)(c); *see generally* NRS 284.139 to 284.172, 284.175 to 284.200. The purpose is to fairly compensate employees, attract high-level job applicants and control the executive branch's labor costs. NRS 284.010(1).

Under the personnel statute, "[a]ll overtime must be approved in advance" by an agency's appointing authority or his designee. NRS 284.180(10). The Division of Human Resources Management must prepare and send to the Board of Examiners a quarterly report on the amount of overtime compensation being approved. NRS 284.180(11).

NDOC has promulgated its own administrative regulations ("ARs") on overtime that reflect correctional facilities' unique working conditions. The purpose of NDOC's staffing policies is to always maintain the "minimum staffing" levels necessary to safely operate correctional facilities. AR 326, at 1. The safety of the

public, inmates and correctional staff drives overtime decisions in Department facilities. RA 31.[3]

AR 326 provides that a facility's warden is responsible for approving overtime. AR 326, at 1-2. Ordinarily, overtime will be authorized only if other methods of meeting minimum staffing have not succeeded. *Id.* Even then, only the "minimum amount of overtime" necessary will be approved. *Id.*

Under AR 320, it is employees' responsibility to report the time they worked, including overtime. RA 32. Nonexempt employees must submit a "DOC-1000" form documenting their overtime to receive compensation. AR 320, at 1 (title case omitted); RA 32.

Nearly all correctional officers have received overtime compensation through Nevada's procedure. RA 37. Plaintiffs do not dispute this. *Id.* An analysis of NDOC payroll data showed that 95% of correctional officers recorded at least some overtime; NDOC compensated employees for some 125,727 hours of overtime during the period assessed. *Id.* All seven of the named Plaintiffs received overtime compensation. *Id.*

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[3] The ARs cited in this brief are publicly available at: https://bit.ly/2Q68FFe.

B. Nevada law directs overtime disputes into an administrative grievance procedure, not litigation

Nevada's overtime-management scheme does not end once the employee submits his DOC-1000 and is compensated. It also addresses disputes that arise from overtime work.

Personnel Division regulations establish an administrative procedure for adjudicating employee "grievances," including disputes related to overtime. RA 41; *see generally* NAC 284.658 to 284.607. To formally grieve an overtime dispute, the employee first submits a grievance in writing to his immediate supervisor. NAC 284.678(1). After agency decision makers have adjudicated the grievance, the employee can request that the Employee-Management Committee consider it if it remains unresolved. NAC 284.686(1), 284.690(1)(a), 284.695. A grievance enters the Nevada court system only if a party timely petitions for judicial review of the Employee-Management Committee decision. *See Westergard v. Barnes*, 105 Nev. 830, 832, 834 (1989) (per curiam).

Grievances are intended to be submitted and resolved on a short timeline – they must be filed "within 20 working day after the date of the event leading to the grievance or the date the employee learns of the event leading to the grievance." NAC 284.678(1). Because they have a shorter limitations period and because some remedies like attorney's fees and liquidated damages may be unavailable, grievances are generally less lucrative for plaintiff employees.

II. Relevant procedural history

A. Plaintiffs' claims circumvent Nevada's system for compensating overtime and resolving grievances

The operative complaint alleges that Nevada failed to compensate Plaintiffs for certain pre- and post-shift activities, in violation of the FLSA's minimum wage and overtime provisions. 2 JA 329, 353, 355. With a few exceptions, none of the Plaintiffs has ever submitted a DOC-1000 seeking overtime compensation for the activities they now claim are compensable. 4 JA 733 & n.16; *see also* RA 45-46 (collecting testimony by Plaintiffs that they did not submit DOC-1000s for pre- and post-shift activities). Plaintiffs acknowledge that they knew about the DOC-1000 procedure and received overtime compensation when they followed it. RA 34-39.

Instead of grieving the dispute, Plaintiffs filed this lawsuit directly in court. See 3 JA 518-19. According to Plaintiffs' counsel's website, Nevada's liability for this unreported and ungrieved alleged overtime could be $100 million. *State Might Have to Pay $100M to Correction Officers*, Thierman Buck (Oct. 24, 2019), https://bit.ly/3dH8yI5.

Plaintiffs took the position that they were under no obligation to grieve their claims before suing. RA 22 ("Plaintiffs have not submitted a grievance nor are they required to do so."). They have never alleged that the administrative grievance process would have been futile or inadequate. *See* 2 JA 326-60. They contend

simply that the comprehensive overtime-management regime outlined above does not apply to them. RA 22.

The district court rejected that contention. 3 JA 518-19. Based on this Court's decision in *City of Henderson v. Kilgore*, 122 Nev. 331 (2006), it concluded that the administrative grievance procedure is the exclusive State-law means for a State employee to resolve a wage-and-hour dispute. 3 JA 519.

B. The parties have litigated Nevada's sovereign immunity in the district court and the U.S. court of appeals

In its answer to the original complaint, Nevada affirmatively pleaded that it is "immune from liability as a matter of law" in its answer. 1 JA 35. In addition, in the original complaint Plaintiffs contended that the Nevada "ha[d] waived its sovereign immunity from suit for the claims alleged," citing NRS 41.031. *Id.* at 2. Nevada denied that allegation in its answer. *Id.* at 30; *see also* 3 JA 533 (denying the same allegation in the answer to the operative complaint).

At the district court's invitation, Nevada then filed a supplemental brief asserting its sovereign immunity from Plaintiffs' FLSA claims. 3 JA 498. Nevada argued that two separate forms of sovereign immunity barred the claims. First, Eleventh Amendment immunity from *suit* precluded hearing the case in federal court. *Id.* at 499-501. Second, independent from the Eleventh Amendment, Nevada has sovereign immunity from FLSA *liability* in any court. *Id.* at 501-02 (citing *Alden v. Maine*, 527 U.S. 706, 752 (1999)).

After the district court declined to dismiss the FLSA claims based on sovereign immunity, Nevada appealed. *See Walden v. Nevada*, 945 F.3d 1088, 1090 (9th Cir. 2019), *cert. denied sub nom. Nevada v. Walden*, 141 S. Ct. 871 (2020). The U.S. Court of Appeals for the Ninth Circuit issued a decision affirming the order. 4 JA 707.

Nevada petitioned the Ninth Circuit for panel rehearing and rehearing en banc. *Id.* at 674. In response, the Ninth Circuit withdrew the panel opinion and issued a new one that clarified that its "discussion – and holding – applie[d] only" to the claim of Eleventh Amendment immunity from suit. *Walden*, 945 F.3d at 1090, 1092 n.1. The court "express[ed] no opinion on the claim of immunity from liability." *Id.* at 1092 n.1.

On remand to the district court, Nevada moved for summary judgment based on sovereign immunity from FLSA liability. 4 JA 708-22. The district court certified the instant question to this Court and stayed the proceedings pending this Court's response. *Id.* at 855.

LEGAL STANDARD

The goal of statutory construction is to "ascertain the intent of the [L]egislature in enacting the statute." *McKay v. Bd. of Supervisors*, 102 Nev. 644, 650 (1986). Where the Legislature's intent clashes with the "literal meaning of the words" used in the statute, the Legislature's intent prevails. *Id.* "The starting point

in statutory construction is to read and examine the text of the act and draw inferences concerning the meaning from its composition and structure." *In re Nev. State Eng'r Ruling No. 5823*, 128 Nev. 232, 239 (2012). If a statute is ambiguous, the Court may examine "legislative history, reason, and considerations of public policy to determine the Legislature's intent." *Chanos v. Nev. Tax Comm'n*, 124 Nev. 232, 240 (2008).

A purported waiver of sovereign immunity will be narrowly construed in favor of the sovereign.[4] Arguing to the contrary, OB 29, Plaintiffs cite a line of cases in which this Court narrowly construed exceptions to NRS 41.031's "waiver of sovereign immunity from tort liability," *Martinez v. Maruszczak*, 123 Nev. 433, 439 (2007). Those cases are inapplicable because the dispute here is whether NRS 41.031 waives immunity from non-tort liability in the first place. The dispute does not concern whether this case falls within one of the exceptions to NRS 41.031's waiver of immunity from tort liability.

SUMMARY OF ARGUMENT

Nevada retains its sovereign immunity from statutory claims like the ones Plaintiffs assert here. The tort liability act's text and structure shows that – as this

[4] *See, e.g.*, *Lane v. Pena*, 518 U.S. 187, 192 (1996); *Hardee County v. FINR II, Inc.*, 221 So. 3d 1162, 1165 (Fla. 2017); *Depot Square Pizzeria, LLC v. Dep't of Taxes*, 169 A.3d 204, 207 (Vt. 2017); *Allen v. Fauver*, 768 A.2d 1055, 1058 (N.J. 2001).

Court has repeatedly explained – it was intended to waive immunity from tort, not statutory, liability. Federal statutes imposing liability on the states were virtually nonexistent when the tort liability act was enacted, and the Legislature did not contemplate waiving immunity from claims based on laws that did not exist.

Even if the tort liability act's silence about statutory claims created ambiguity, the legislative history confirms that the tort liability act was not intended to waive immunity from statutory liability. This Court's caselaw and out-of-state precedent also support holding that Nevada retains sovereign immunity from statutory liability.

Plaintiffs' contrary reading of the tort liability act directly conflicts with Nevada's sovereign immunity. The Legislature chose to assign the executive branch the role of managing overtime and resolving overtime disputes. Plaintiffs' reading would undercut that choice by allowing employees to sue directly in court for unapproved overtime. It would also divert up to $100 million in State funds from other competing needs without legislative approval.

This Court should not address whether the tort liability act waives immunity from claims based on provisions of State law that are analogous to the FLSA.

Nevada did not waive its immunity from statutory liability by litigation conduct. Only the Legislature can waive sovereign immunity and, in any case, Nevada has preserved the defense throughout this litigation.

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ARGUMENT

I. Nevada retains its sovereign immunity from statutory liability

Nevada is immune from FLSA liability unless it has waived its sovereign immunity from statutory claims. *Alden v. Maine*, 527 U.S. 706, 712 (1999). As Plaintiffs acknowledge, OB 16, the Legislature controls the scope of Nevada's waiver of sovereign immunity, *see* Nev. Const. art. 4, § 22. The Legislature has not waived Nevada's sovereign immunity from statutory liability.

A. The tort liability act's text and structure show that it does not silently waive Nevada's sovereign immunity from statutory liability

This Court must review the tort liability act as a whole to determine the Legislature's purpose. *Bd. of Cty. Comm'rs v. CMC of Nev., Inc.*, 99 Nev. 739, 751 (1983). The tort liability act's text and structure, taken together, confirms this Court's longstanding conclusion that the Legislature intended to waive immunity from tort liability, not statutory claims.

The tort liability act consists of (among other things) a waiver provision and exceptions to that waiver. *See* NRS 41.031 to 41.0337. The waiver provision, NRS 41.031, reads in relevant part:

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

NRS 41.031(1).

This Court recognized from the start that "[t]he purpose of the [tort liability act] was to compensate victims of government *negligence* in circumstances like those in which victims of private negligence would be compensated." *Harrigan v. City of Reno*, 86 Nev. 678, 680 (1970) (emphasis added). Negligence actions are a species of common-law tort actions. *See Crippens v. Sav On Drug Stores*, 114 Nev. 760, 762 (1998). They are not creatures of statute like FLSA claims. *See Allen v. Fauver*, 768 A.2d 1055, 1059 (N.J. 2001).

1. The exceptions to the waiver show that it was intended to waive immunity only from tort liability

The tort liability act effects a "qualified waiver of sovereign immunity from tort liability." *Martinez v. Maruszczak*, 123 Nev. 433, 439 (2007). It has always contained exceptions to the waiver of immunity. *Fischmann v. City of Henderson*, 92 Nev. 659, 660 & n.1 (1976) (per curiam). Those exceptions prove the rule: the tort liability act was intended to waive immunity from tort liability only.

Plaintiffs concede that all the exceptions apply only to tort claims. OB 23. They do not explain why the Legislature would have developed exceptions to tort liability but not to statutory liability, if it had intended to waive immunity from both types of claims. In truth, there was no need to establish separate exceptions to a waiver of immunity from statutory liability because the tort liability act does not waive immunity from statutory liability.

The specific waiver exceptions reinforce the conclusion that the tort liability act was not intended to waive immunity from statutory claims. Consider the "discretionary exception" from liability set out at NRS 41.032(2). *State v. Webster*, 88 Nev. 690, 694 (1972). That exception is materially identical "to that of the Federal Tort Claims Act, 28 U.S.C. § 2680(a)." *Id.* That makes sense. Both the Federal Tort Claims Act and the tort liability act are intended to compensate victims of government negligence. *Martinez*, 123 Nev. at 444. Neither law is intended to waive sovereign immunity from statutory claims. The United States, like Nevada, still retains its immunity from statutory claims unless its waiver is "unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187, 192 (1996).

Or consider the "gross negligence" limitation to liability that was part of the tort liability act as originally enacted. *See* 1965 Nev. Stat., ch. 505, § 3.6, at 1414. That limitation provided that no claim could be brought against Nevada under NRS 41.031 based on an "act or omission of any peace officer or fireman, unless such act or omission amounts to gross negligence or to willful or wanton misconduct." *Id.*

Applying the gross negligence limitation to a statutory claim would be nonsensical. A statutory claim usually does not turn on the degree of negligence. It turns on whether the statutory elements have been met. Reading the tort liability act as waiving immunity from only tort claims resolves that analytical problem. That reading is straightforward: tort claims based on peace officers and firemen's actions

require showing a more severe degree of negligence than claims based on other Nevada employees' actions.

2. The tort liability act could not have been contemplated to waive immunity from federal statutory liability because such liability did not exist when it was passed

When the Legislature passed the tort liability act, it was reacting to the type of state liability it was familiar with at that time – tort liability. *See infra* Argument Part I.B (discussing the tort liability act's legislative history). Insisting that the Legislature should have used the words "tort" or "negligence" in NRS 41.031 is ahistorical. There was no reason for the Legislature at that time to think such a clarification was needed.

Plaintiffs argue that NRS 41.031's text suggests that the Legislature waived immunity from statutory liability because it "does not contain any limitation as to the type of '[immunity]' being waived." OB 21. But NRS 41.031's laconic language is explained by the fact that it was passed in 1965. *Cf. County of Eureka v. County of Lander*, 26 P. 63, 63 (Nev. 1891) (explaining that the Legislature's intent "must be ascertained from the facts existing at the time of the passage of the law").

In 1965 there was no need to distinguish between tort liability and statutory liability. The U.S. Supreme Court has recognized that federal statutes imposing liability on the states were "all but absent from our historical experience" at that time. *Alden*, 527 U.S. at 744. The era of large-scale state liability under federal

statutes did not begin until the FLSA was extended to apply to state employers. *See id.* Which was after the tort liability act passed. *See Emps. of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 282-83 (1973), *superseded by statute*, 29 U.S.C. §§ 203(x), 216(b).[5]

3. The tort liability act's insurance provision does not suggest that it permits non-tort claims

NRS 41.038, an insurance provision, does not support Plaintiffs' position. The purpose of NRS 41.038 was different from the NRS 41.031's purpose, and the principles for construing the two provisions are different as well.

NRS 41.031 was intended to compensate victims of government negligence. *Harrigan*, 86 Nev. at 680. It achieved that purpose by effecting a "qualified waiver of sovereign immunity from tort liability." *Martinez*, 123 Nev. at 439. And because it is a waiver of sovereign immunity, its terms must be construed narrowly in favor of the sovereign. *See, e.g.*, *Lane*, 518 U.S. at 192; *see generally supra* note 4 & accompanying text (collecting cases).

[5] To be sure, some *Nevada* statutes imposed liability on Nevada in 1965 (just like they do today). But the Legislature accomplished that by waiving sovereign immunity on a statute-by-statute basis. *See, e.g.*, Sec. 4892, § 3, N.C.L. 1929 (authorizing holders of Nevada bonds to sue the State under certain circumstances). A blanket waiver of sovereign immunity from Nevada statutory claims was unnecessary and was not the purpose of the tort liability act.

NRS 41.038, on the other hand, broadly authorizes Nevada to obtain insurance. It provides in relevant part:

> (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.

NRS 41.038(1)(a)-(b).

The Legislature authorized a more limited form of insurance in subsection (b) because Nevada would not want to insure employees for liability unrelated to their work. But there was no reason to limit Nevada's ability to insure itself. Construing NRS 41.038 as a backdoor waiver of sovereign immunity would be a distortion of the Legislature's commonsense decision to use broad language in an insurance provision. And it would violate the principle that waivers of immunity must be explicitly stated and narrowly construed in favor of the sovereign. *Lane*, 518 U.S. at 192.

B. Even if this Court finds ambiguity in the language of the tort liability act, the statute does not waive Nevada's sovereign immunity

Any ambiguity must be resolved in favor of sovereign immunity. *See, e.g.*, *United States v. Williams*, 514 U.S. 527, 531 (1995). So even if this Court determines that the tort liability act is ambiguous, it must still hold that Nevada is

immune from Plaintiffs' claims. If this Court nevertheless wishes to review the legislative history to resolve the ambiguity, that history provides further support for the conclusion that Nevada retains its sovereign immunity from statutory liability.

1. The Legislature did not contemplate authorizing any non-tort claims

To the extent that the tort liability act is ambiguous, the legislative history resolves that ambiguity in Nevada's favor. The principal legislative-history document available is the minutes from the Assembly Judiciary Committee debate on the bill that would become the tort liability act. Minutes of Meeting, 53d session, Nev. Assemb. Judiciary Comm., at 178-80 (Nev. 1965), https://bit.ly/3uQBCE3 [hereinafter *Assemb. Judiciary Comm. Minutes*]. Much of that debate was dedicated to discussing the types of claims that could arise after Nevada waived its sovereign immunity. *See Assemb. Judiciary Comm. Minutes, supra*, at 178-80.

All the potential claims that the participants discussed were tort claims. *See id.* They did not discuss a single non-tort claim. *See id.* For example, they debated whether the waiver would subject the State Highway Department to excessive liability for failure to maintain highways. *Id.* The participants discussed only tort claims because those were the only claims the tort liability act was intended to permit.

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2. The Legislature based the tort liability act on other states' waivers of immunity from tort liability

The out-of-State authorities that the Legislature reviewed in enacting a statute shows the statute's intent. *See Mitchell v. Eighth Judicial Dist. Court*, 131 Nev. 163, 170-72 (2015). The debate participants referred to two other states that had waived sovereign immunity: California and Oregon. *Assemb. Judiciary Comm. Minutes*, *supra*, at 178. Both of those states (at least partially) abolished sovereign immunity from tort liability in the early 1960s. The Legislature's narrow focus on those states shows that it intended to waive immunity from tort liability only.

Specifically, the Supreme Court of California abolished "the rule of governmental immunity from tort liability" in 1961. *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457, 458 (Cal. 1961) (en banc) (Traynor, J.), *superseded by statute as recognized by Gund v. County of Trinity*, 472 P.3d 435, 443 (Cal. 2020). The California State Legislature codified that holding in 1963 in a law commonly known as the "California Tort Claims Act." *Wall v. Sonora Union High Sch. Dist.*, 50 Cal. Rptr. 178, 179 (Ct. App. 1966).

Similarly, in 1961 the Supreme Court of Oregon held for the first time that the Oregon Legislative Assembly had partially waived school districts' "immunity from tort liability." *Vendrell v. Sch. Dist. No. 26C Malheur Cty.*, 360 P.2d 282, 290 (Or. 1961), *superseded by statute as recognized by Espinosa v. S. Pac. Transp. Co.*, 635 P.2d 638, 639-40 (Or. 1981). The Oregon Legislative Assembly built on *Vendrell*

by enacting the Oregon Tort Claims Act shortly after our Legislature enacted the tort liability act. *See* Or. Rev. Stat. §§ 30.260 to 30.300.

In addition, the Federal Tort Claims Act's discretionary exception and Nevada's tort liability act's discretionary exception are materially identical. *See* 1965 Nev. Stat. 1413; *Webster*, 88 Nev. at 694. That shows that the Legislature consulted the Federal Tort Claims Act as well. As its name suggests, the Federal Tort Claims Act waives immunity with respect to tort claims only. *See Terbush v. United States*, 516 F.3d 1125, 1128 (2008).

3. The single statement by a non-legislator that Plaintiffs rely on does not shed light on the statute's meaning or intent

A single statement by a non-legislator is not due any weight. *See A-NLV-Cab Co. v. State*, 108 Nev. 92, 95 (1992) (explaining that an "expression of personal opinion" – even by a legislator – is not entitled to consideration). Thus, Plaintiffs' reliance on the statement by Bill Barker, OB 27-28, is misplaced. Barker was the City of North Las Vegas city attorney, not a legislator. *See Assemb. Judiciary Comm. Minutes, supra*, at 178.

In any case, Barker's statement is too vague to mean anything. He opined that "[t]he doctrine of sovereign immunity seems to be out" because several state courts and legislatures had abolished it. *Assemb. Judiciary Comm. Minutes, supra,* at 178. Nothing in that statement suggests that he was discussing waiving sovereign

immunity from *statutory* liability. *Id*. All of the types of claims that Barker (and the other debate participants) considered while discussing the tort liability act were tort claims. *Id.*

The bill summary cited by Plaintiffs, OB 27-28, is similarly vague and ambiguous. The summary, which was not included in the enacted text, 1965 Nev. Stat. ch. 505, at 1413, stated that the bill "[p]rovides for liability of and actions against the State, its agencies and political subdivisions, including tort claims," *Assemb. Judiciary Comm. Minutes*, *supra*, at 178. A waiver of sovereign immunity must be express. *Lane*, 518 U.S. at 192. Nothing in the bill summary is an express waiver of immunity from statutory liability. It is only an express waiver of immunity from tort claims.

And even if the bill summary purported to expressly waive immunity from statutory liability, it would not be effective. As the U.S. Supreme Court has explained in applying analogous federal principles, a "statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text." *Lane*, 518 U.S. at 192 (quotation marks omitted). The text and structure of the tort liability act foreclose a conclusion that it waived immunity from statutory liability.

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C. In-State and out-of-state authorities reinforce the conclusion that Nevada retains its sovereign immunity from statutory liability

1. This Court has applied the tort liability act solely to tort claims

For over 50 years this Court has characterized the tort liability act as a waiver of immunity from tort liability.[6] That characterization accords with the statute's text, structure and legislative history. Plaintiffs provide no good reason to depart from this Court's half-century long understanding of the tort liability act.

Plaintiffs flatly argue that this Court "has held that the State's immunity waiver applies to actions other than those involving torts." OB 30. They cite a single case for that proposition, *Golconda Fire Protection District v. County of Humboldt*, 112 Nev. 770 (1996), *clarified on petition for rehr'g*, 113 Nev. 104 (1997). But *Golconda* was a tort action, so it undermines their argument.

[6] *See, e.g.*, *Franchise Tax Bd. v. Hyatt*, 133 Nev. 826, 835 (2017), *rev'd and remanded on other grounds*, 139 S. Ct. 1485 (2019) (noting that NRS 41.031 waives Nevada's "sovereign immunity from tort liability"); *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 465 (2007) ("NRS 41.031 contains Nevada's general waiver of sovereign immunity from suits arising from acts of negligence committed by state employees."); *Jiminez v. State*, 98 Nev. 204, 207 (1982) (noting that the intent of NRS 41.031 was to waive immunity from "liability for injuries caused by [governments'] negligent conduct"); *Turner v. Staggs*, 89 Nev. 230, 235 (1973) (same); *Harrigan*, 86 Nev. at 680 (calling NRS 41.031 the "tort liability act").

The primary question in *Golconda* was whether the discretionary exception to NRS 41.031's waiver of immunity applied. 112 Nev. at 770, 772-74. As Plaintiffs concede, the discretionary exception applies only to "certain torts." OB 23 & n.8 (discussing all exceptions to NRS 41.031's waiver of immunity). By their own logic, *Golconda* must have been a tort action to implicate the discretionary exception in the first place.

The *Golconda* allegations confirm that it was a tort action. The plaintiff there had alleged that the defendant had "wrongfully retained" accrued interest that belonged to it. 112 Nev. at 771. That is a conversion claim, which is a tort. *See Larson v. B.R. Enters., Inc.*, 104 Nev. 252, 254-55 (1988). The *Golconda* Court also assessed whether allegations amounted to a breach of fiduciary duty. 112 Nev. at 774-75. Breach of fiduciary duty is another tort. *See Stalk v. Mushkin*, 125 Nev. 21, 28 (2009).

Golconda and the other cases applying the tort liability act are universally tort cases because that is the sum total of the tort liability act's scope. It is a waiver of tort liability alone, so this Court has never applied it to a non-tort claim. Plaintiffs' novel argument that it also waives immunity from statutory claims finds no support in this Court's precedent.

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2. New York law shows that the tort liability act is not a waiver of immunity from statutory liability

The parties agree that New York's waiver of sovereign immunity is textually similar to Nevada's. For that reason, Plaintiffs cite New York law throughout their brief. *Id.* at 4, 7, 31-32. But New York law supports Nevada's position, not Plaintiffs'.

The New York State Legislature has recognized that that state's waiver provision does not waive immunity from federal statutory claims like Plaintiffs'. Both houses of the New York legislature have introduced bills to waive the state's sovereign immunity from liability under the FLSA. S1119, 2021-2022 Reg. Sess. (N.Y. 2021); A1092, 2019-2020 Reg. Session (N.Y. 2019). Those bills would be pointless if the current waiver already waived immunity from federal statutory claims.

Ignoring the New York legislature's judgment, Plaintiffs rely on a single trial-court order for the proposition that New York's current waiver already covers FLSA claims. OB 32 (citing *Speers v. State*, 705 N.Y.S.2d 858 (2000), *aff'd* 728 N.Y.S.2d 302 (2001)). Even assuming that a trial court can speak definitively on New York law, that case has no persuasive value. In *Speers* New York, as a litigant, had declined to contest whether the waiver covered FLSA claims. *Speers*, 705 N.Y.S.2d at 861. As a result, the *Speers* court did not consider and rule on that issue. *Id.*

Nevada, by contrast, has never conceded that the tort liability act waives its sovereign immunity from FLSA claims.[7]

D. Plaintiffs' reading of the tort liability act conflicts with Nevada's sovereign immunity

Maintaining a state's sovereign immunity allows it to "order the processes of its own governance, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts." *Alden*, 527 U.S. at 752. It also "serves the important function of shielding state treasuries." *Sossamon v. Texas*, 563 U.S. 277, 286 (2011). Adopting Plaintiffs' reading of the tort liability act would undermine both of those purposes, another reason to reject it.

1. Sovereign immunity respects Nevada's structuring of its overtime-management regime

The Legislature has assigned overtime management to the executive branch. *See supra* Statement of the Facts Part I. In accordance with that, the executive branch has promulgated extensive policies to control overtime costs, ensure that posts are adequately staffed, compensate employees and resolve wage-and hour

[7] In a footnote, Plaintiffs argue that the tort liability act waives immunity from FLSA claims because (according to Plaintiffs) FLSA claims are tort claims. OB 30 n.12. Wrong. FLSA claims are statutory claims seeking statutory remedies pursuant to rights created by a federal statute. *Allen*, 768 A.2d at 1059. There is no Nevada authority for the proposition that an FLSA claim sounds in tort. *See* OB 30 n.12 (citing only an Oregon case).

disputes. *Id.* Together, the legislation and the regulations create a comprehensive overtime-management regime.

Plaintiffs' reading of the tort liability act would eviscerate Nevada's overtime-management regime. Under Plaintiffs' logic, it does not matter whether a State employee has submitted the obligatory forms, whether the appointing authority or his designee has approved the overtime, whether agency officials have budgeted for the overtime or whether anyone in the executive branch is aware that overtime liability is being accrued. *See* RA 51 (arguing that Nevada is liable if it "should have known the time worked even if [the] employee underreport[ed] hours worked"). All that matters, according to Plaintiffs, is whether a court finds that the employee can meet the elements of an FLSA claim. Plaintiffs' reading would therefore take management of overtime from the executive branch and put it in the courts' hands – against the Legislature's will.

Likewise, Plaintiffs' argument would remove overtime disputes from the speedy and less expensive administrative grievance procedure and put them directly in the courts. That is contrary to Nevada's intent of having grievances reach the courts only after consideration by the agency and the Employee-Management Committee.

The purpose of sovereign immunity is to protect the extensive work that Nevada has put in to establish and run its overtime-management regime. *Alden*, 527

U.S. at 752. This Court should reject Plaintiffs' attempt to overrule the Legislature and the executive branch.

2. Sovereign immunity protects the Legislature's balancing of competing financial needs

The U.S. Supreme Court has recognized that states must allocate "scarce resources among competing needs and interests." *Alden*, 527 U.S. at 751. Nevada has done so by establishing a regime for approving, compensating and monitoring overtime. That regime is not a means for avoiding Nevada's responsibility to pay for overtime – there is no dispute that almost all correctional officers have used Nevada's process to get approved for overtime and receive compensation. *See* RA 37. But it helps Nevada monitor and control overtime costs. *See* NRS 284.180(11); AR 326, at 1-2 (providing that a facility's warden in responsible for approving overtime).

Just as importantly, Nevada's overtime-management regime keeps overtime expenditures predictable. Predictability is essential so that the Legislature can properly budget for all the competing needs and interests like education, social services and law enforcement. *See Alden*, 527 at 751. The Legislature cannot budget in advance for overtime liability that is accrued without the required approvals and imposed outside the administrative grievance procedure. Plaintiffs seek to divert up to $100 million from other parts of Nevada's budget. Sovereign immunity is

designed to keep that budgetary decision where it belongs: in the Legislature. *See id.*

II. Whether Nevada has consented to liability under "analogous provisions of [S]tate law" is not properly before this Court

The district court's certified question asks whether the Legislature has consented to damages liability for the alleged violation of "analogous provisions of [S]tate law." 4 JA 855. Plaintiffs do not make any separate arguments about that portion of the certified question.

Nevada Rule of Appellate Procedure 5 bars answering that portion of the certified question. Rule 5 permits this Court to answer questions only if they "may be determinative of the cause pending in the certifying court." Nev. R. App. P. 5(a). This Court's answer as to analogous provisions of State law would not be determinative of the underlying case. All of Plaintiffs' State-law claims have been dismissed for reasons unrelated to sovereign immunity. *See* OB 8 & n.2 (citing 3 JA 518). This Court's answer would not revive those claims, and it could not result in their dismissal because they have already been dismissed.

III. Nevada did not waive its sovereign immunity by litigation conduct

Plaintiffs contend that Nevada waived its sovereign immunity by litigation conduct. OB 32-36. But as they concede elsewhere, only the Legislature can determine the scope of Nevada's sovereign immunity. *See* OB 3, 15-16, 19.

Allowing a Nevada agency like NDOC to waive sovereign immunity by litigation conduct would usurp the Legislature's role.

In any case, Nevada did not waive its sovereign immunity in this case. In its answer, it denied Plaintiffs' allegation that NRS 41.031 waived its sovereign immunity – the precise issue litigated here. 1 JA 30. And just to be sure, Nevada also pleaded as an affirmative defense its "immunity from liability." 1 JA 35.

The extensive litigation of the sovereign immunity issue in this case is a separate basis for concluding that there was no waiver. As stated in Plaintiffs' own brief, an affirmative defense is not waived if it is "litigated in a matter." OB 33 (quoting *City of Boulder City v. Boulder Excavating*, 124 Nev. 749, 754-55 (2008)). Waiver occurs only "if the opposing party is not given reasonable notice and an opportunity to respond." *Williams v. Cottonwood Cove Dev. Co.*, 96 Nev. 857, 860 (1980).

Plaintiffs have had notice and an opportunity to respond to Nevada's sovereign-immunity defense. Nevada raised it in a supplemental brief, in its Ninth Circuit petition for reconsideration and in a motion for summary judgment. *See supra* Statement of the Facts Part II.B. Plaintiffs have responded on multiple occasions. 3 JA 487, 620-21; 4 JA 750.

Contrary to Plaintiffs' assertion on appeal, *see* OB 35, it is irrelevant that one round of briefing was invited by the district court. A district court's *sua sponte*

resolution of an issue does not result in waiver of the issue. *Boulder Excavating*, 124 Nev. at 755 n.12. Nevada has every right to assert its sovereign immunity from Plaintiffs' statutory claims.[8]

CONCLUSION

The tort liability act allows victims of government negligence to obtain judicial relief. It is not intended to eviscerate Nevada's sovereign immunity from liability for statutory claims nor to disrupt Nevada's carefully crafted regime for compensating overtime work and resolving wage-and-hour disputes. This Court should answer the certified question in the negative by reaffirming that Nevada retains its sovereign immunity from statutory liability.

Dated this 23rd day of April, 2021.

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[8] It appears that this section has been drawn from Plaintiffs' trial-level brief, with references to "this Court" unchanged. *See, e.g.*, OB 34 ("[I]n its Motion to Dismiss, [Nevada] again asked *this Court* to hold, as a matter of law, that the pre/post-shift work alleged in Plaintiffs' First Amended Complaint is not compensable work under the FLSA." (emphasis added)). Nevada responds to Plaintiffs' arguments under the assumption that the term "this Court" in this section refers to the district court, not the Nevada Supreme Court.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt. font and Times New Roman; or

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2. I further certify that this brief complies with the page- or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada

Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd day of April, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on April 23, 2021.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

I further certify that any of the participants in the case that are not registered as electronic users will be mailed the foregoing document by First-Class Mail, postage prepaid.

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