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.	Case No. 82030

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APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

This Court is repeatedly asked to decide Nevada's most novel issues of law and this case is no different; it presents an important certified question from the Nevada federal district court that will affect thousands of hardworking Nevada employees who labor as correctional officers across the state. Respondent's Answering Brief fails to provide any meaningful analysis to aid this Court in answering the certified question. Instead, Respondent misleadingly self-defines the relevant statute at issue here, NRS 41.031, as the "tort liability act" and unilaterally re-defines the question that was certified, and accepted, by this Court.

Defining NRS Chapter 41 as the "tort liability act" does not aid this Court in its very serious deliberations as to how to answer the questions now before it. Instead, Respondent's self-serving definition should be called what it is—a blatant attempt to circumvent the serious statutory analysis that must be done to answer the questions presented. This Court need not be reminded of its statutory duty of review because it has done so on virtually every case that comes before it. *See, e.g.*, *Legislature of State v. Settelmeyer*, 137 Nev. Adv. Op. 21 (May 13, 2021); ___ P.3d ___ (Nev. 2021); 2021 WL 1936551 (Nev. 2021). First, the plain language is reviewed. Second, if the plain language is unclear, the legislative histories are analyzed. Lastly, the statutory scheme is construed to prevent absurdities. These are the steps for determining whether the Nevada Legislature has waived its

immunity from liability for the federal and state wage claims that have been asserted in this action. Upon conducting this analysis, it should become clear to this Court that Respondent's self-serving definition is as wrong as it is unhelpful.

Similarly, Respondent's decision to unilaterally ignore one of the integral parts of the question presented from the federal court, and accepted by this Court, is unhelpful but telling. Respondent has decided, on its own, that this Court should not address whether Nevada employees can seek potentially unpaid wages in Court under Nevada's public employment state wage-hour laws or whether the State is immune from such claims. Respondent refuses to answer the state-law portion of the certified question because doing so would expose the absurdity of its argument and be a radical departure from the current state of law. Indeed, under Respondent's legal position, a correctional officer can toil for countless hours without compensation, be granted relief by a state administrative agency for those unpaid wage, but never be able to actually enforce the collection of those wages. This is not a hypothetical example; it is the outcome that Respondent seeks so as to avoid payment of wages that Respondent knows are owed to employees.

For all the reasons set forth herein, and the arguments expressed in their opening brief, Appellants submit that this Court should answer the certified question in the affirmative: Yes, pursuant to the delegation by the people of the state

of Nevada, the Nevada Legislature has waived its immunity and consented to damages liability for unpaid wages pursued under federal and/or state statute.

II. STANDARD OF REVIEW: THIS COURT HAS CONSISTENTLY CONSTRUED NEVADA'S IMMUNITY WAIVER BROADLY

The Parties disagree as to the correct standard of review for determining whether the Nevada Legislature has waived the State of Nevada's immunity from liability when it enacted NRS 41.031. Respondent argues generally that a waiver of sovereign immunity must be construed narrowly, citing federal case law and case law from other state jurisdictions. *See* Respondent's Answering Brief (hereinafter "RAB") at p. 10 ("A purported waiver of sovereign immunity will be narrowly construed in favor of the sovereign") (*citing* non-Nevada cases at n. 4); pp. 17-18 ("Any ambiguity must be resolved in favor of the sovereign." *citing United States v. Williams*, 514 U.S. 527, 531 (1995)). Appellants disagree. *See* Appellants' Opening Brief (hereinafter "AOB") at p. 3; 19-20; 29-30.

This Court has been clear in its prior decisions with respect to NRS 41.031 and its various subdivisions, that the state of Nevada's waiver of general immunity "is to be broadly construed" in favor of a waiver of immunity and the limits on that waiver are to be construed strictly and narrowly. *See 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 (1970) ("The

apparent legislative thrust was to waive immunity and, correlatively, to strictly construe limitations upon that waiver."). Questions involving whether a state sovereign has decided to waive its sovereign immunity are purely questions of state law. *See, e.g.*, *Redgrave v. Ducey*, 953 F.3d 1123, 1128 (9th Cir. 2020); *see also Byrd v. Oregon State Police*, 238 P.3d 404, 405, 236 Or.App. 555, 559 (Or. App. 2010) ("Whether a state has waived its sovereign immunity against being sued in its own courts presents a state-law question."). Because questions involving whether a state sovereign has decided to waive its sovereign immunity are purely questions of state law, citations to federal cases and caselaw from other states that treat the issue differently are irrelevant. In Nevada, this Court have clearly and consistently mandated that Nevada's waiver of sovereign immunity waiver be interpreted broadly in favor of finding a waiver of immunity, and any constraints on such a waiver must be narrowly construed. Accordingly, Appellants submit that this Court should view this case under the broad lens that it has previously used in other cases involving NRS 41.031.

III. RESPONDENT'S ATTEMPT TO DEFINE NRS 41.031 AS THE "TORT LIABILITY ACT" IS BELIED BY THE STATUTE'S PLAIN LANGUAGE AND LEGISLATIVE HISTORY

In an obvious attempt to avoid dealing with the plain language of the text of NRS 41.031 and its legislative history, Respondent simply makes up a title for NRS 41.031 as the "tort liability act." *See generally* RAB. Respondent's simplistic

attempt to define the enactment of NRS 41.031 as the "tort liability act", intentionally avoids the statutory analysis that this Court requires. As set forth in Appellant's opening brief, and explained more fully below, this Court's long-standing and well-recognized guide for interpreting statutes confirms that the Nevada Legislature enacted a general waiver of immunity in 1965, which would include the state and federal claims asserted in this action.

A. Respondent Is Unable To Undermine NRS 41.031's Plain Language That The State of Nevada Has Waived Its Immunity From Liability With Limited Exceptions Not Applicable Here

This Court recently construed a Nevada constitutional provision wherein the State similarly attempted to ignore the plain language of the provision at issue in that case. *See Legislature of State v. Settelmeyer*, 137 Nev. Adv. Op. 21 (May 13, 2021); ___ P.3d ___ (Nev. 2021); 2021 WL 1936551 (Nev. 2021).[1] In *Settelmeyer*, this Court re-affirmed its well-established principals of construction. *Id.* at *3 ("We must give this provision its plain meaning unless the language is ambiguous."); *see also Rogers v. Heller*, 18 P.3d 1034, 1038, n. 17, 117 Nev. 169, 176 (Nev. 2001) (recognizing that the rules of statutory construction apply when interpreting constitutional provisions). When a statutory provision's language is clear on its face, this Court will not go beyond that language in determining the Legislature's

[1] The Westlaw citation is used hereinafter when referencing the *Settelmeyer* decision.

intent or to create an ambiguity when none exists. *See Settelmeyer*, 2021 WL 1936551, at *3.

Here, Respondent simply ignores the first step of statutory construction and proceeds directly to analyzing NRS 41.031 under the assumption that the Nevada Legislature must have intended to include the word "tort" in NRS 41.031(1). A brief revisit to the actual text of NRS 41.031(1) is helpful before addressing Respondent's argument.

NRS 41.031(1) states, in full, 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, except as otherwise provided in NRS 41.032 to 41.038, inclusive, 485.318, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of NRS 41.010 or the limitations of NRS 41.032 to 41.036, inclusive. The State of Nevada further waives the immunity from liability and action of all political subdivisions of the State, and their liability must be determined in the same manner, except as otherwise provided in NRS 41.032 to 41.038, inclusive, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive.

The statute does not contain the word "tort" or any other limitation to the type of "civil actions" that may be filed against the State. *Id.* Indeed, the statute's first sentence is extremely broad.

Clause one (1) states that "The State of Nevada hereby waives its immunity from liability and action", meaning that the State can be sued in court and is not immune from liability from such a suit. Clause two (2) states that the State "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", meaning that the State may be held liable for the payment of wages just the same as a natural person who hires someone to perform a job and/or a corporation that hires hundreds of employees to perform hundreds of jobs.

Clause three (3) sets forth the "conditions and limitations" on the general waiver of immunity. It states that the State does not waive its general immunity "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." None of these "conditions and limitations" apply to the claims asserted in this action.[2]

Respondent does not argue that the "conditions and limitations" contained in Clause 3 of NRS 41.031(1) cover Appellants' claims. Instead, Respondent argues

[2] As set forth in Appellants' opening brief, Respondent had previously argued in the Nevada federal district court that the "conditions and limitations" found at NRS 41.032(1) excepted claims for unpaid wages from Nevada's general waiver of immunity. *See* AOB at pp. 24-25. This argument was not put forth in Respondent's answering brief and has thus been abandoned.

that because most of the limits to NRS 41.031(1)'s general immunity waiver found in Clause 3 pertain to claims arising from tort, the general waiver itself must have only been intended to apply to torts. RAB at 13 ("[41.031(1)] has always contained exceptions to the waiver of immunity. [citation omitted] Those exceptions prove the rule: [41.031(1)] was intended to waive immunity from tort liability only.").

Herein lies the crux of the dispute between the Parties. Respondent is asking this court to infer that the Nevada Legislature must have only intended to adopt a general waiver of immunity for tort civil actions because most of the exceptions to the general waiver pertain to torts. Appellants, on the other hand, believe that the general waiver is plain on its face and that the Nevada Legislature intended to enact a broad waiver of immunity and only sought to limit the scope of that waiver with respect to certain tort claims.

B. This Court Will Not Read Language Into A Statute That Is Not There

In *Settelmeyer*, the State similarly asked this Court to read words into a constitutional provision that were not there. *See Legislature of State v. Settelmeyer*, 2021 WL 1936551, at *4 (Nev., 2021). In that case, this Court was tasked with construing a constitutional provision that prohibited the passage of tax bills without a 2/3rds majority. *Id.* The State argued in *Settelmeyer* that the constitutional provision's 2/3rds majority requirement was limited to "bills that directly bring about ***new or increased*** taxes". *Id.* (emphasis added). This Court rejected the State's

invitation: "accepting the State's argument that the provision only applies to bills that directly bring about new or increased taxes would require us to read language into the provision that it does not contain—a task we will not undertake." *Id.* (*citing Berkson v. LePome,* 126 Nev. 492, 502, 245 P.3d 560, 567 (2010) (refusing to read language into a statute that the statute did not contain). This Court concluded that there was no "limiting language" that would support the State's interpretation that the 2/3rds requirement was limited to new tax bills. *Id.* ("Indeed, the provision contains no limiting language that supports the State's arguments in these regards.").

There is likewise no "limiting language" in NRS 41.031(1) that would limit the general waiver of immunity to "tort" civil actions. Consistent with this Court's long-standing rules on construction, it would be inappropriate to read the word "tort" into NRS 41.031(1). Indeed, had the Nevada Legislature intended to limit the general waiver of immunity in NRS 41.031(1) to torts, it could have easily added the word "tort" into the statute. It chose not to do so. *See e.g.*, *Thomas ex rel. Situated v. Nev. Yellow Cab Corp.*, 327 P.3d 518 (Nev. 2014) (recognizing that 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).

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C. The Legislative History Confirms That NRS 41.031(1)'s Waiver Of Liability Is Not Limited To Tort Claims

Although the plain language of the statute is clear and this Court need not review the legislative histories or statutory scheme of NRS Chapter 41 at the time of the statute's enactment in 1965, it is nonetheless enlightening to see why the Nevada Legislature did not include the word "tort" in NRS 41.031(1)'s general waiver of immunity. While Respondent would have this Court believe that the Nevada Legislature simply forgot to include the all important limiting word "tort" in NRS 41.031(1)'s general waiver provision, the following legislative history belies Respondent's argument.

1. Senate Bill No. 185, Chapter 505, Enacted in 1965

The Nevada Legislature enacted and approved Senate Bill No. 185, Chapter 505 (hereinafter "SB 185"), on April 14, 1965. A true and correct copy of this bill, as approved and enacted, can be found online at: https://www.leg.state.nv.us/Statutes/53rd/Stats196507.html#Stats196507page1413 (last visited May 19, 2021).

The preamble to SB 185 states, in relevant part, that it is:

> AN ACT to amend chapter 41 of NRS, relating to actions in particular cases concerning persons, by adding new sections providing for liability of and actions against the state, its agencies and political subdivisions, specifying the conditions and limitations on such actions, providing for administrative settlement of such actions, and

> providing for insurance of the state and its political subdivisions against liability[.]

Section 2 of SB 185 contains the general waiver of immunity that is now codified in NRS 41.031(1). Sections 3, 3.3, and 3.6 provide for certain limitations to the general waiver. Section 4 limits the amount of damages with respect to an action sounding in tort. The Legislature's mention of the word "tort" in this section, but not in the general liability waiver of Section 2, means that there was no unintended "omission" in Section 2. When the Legislature wanted to limit the statute to a tort liability statute only, it knew how to do so.

Section 5 is where Respondent's argument that SB 185 was enacted as the "tort liability act" dramatically falls apart. Section 5(2) provides conditions for bringing a "claim against the state arising ***out of contract***", and states in full as follows:

> ***Every claim against the state arising out of contract*** shall be presented in accordance with the provisions of NRS 353.085 to 353.100, inclusive, and every claim for refund in accordance with the provisions of NRS 353.110 to 353.125, inclusive. Every other claim against the state or any of its agencies shall be presented to the ex officio clerk of the state board of examiners within 6 months from the time the cause of action accrues. He shall within 10 days refer each such claim to the appropriate state agency, office or officer for investigation and report of findings to the board. No action may be brought unless the board refuses to approve or fails within 90 days to act upon the claim.

Emphasis added; *see also* AOB, at p. 27-28. Section 5(2) sets forth the conditions a potential plaintiff would have to meet prior to bringing a contract civil action against the state in Court. *See also Frank Briscoe Co., Inc. v. Clark County*, 643 F.Supp. 93, 96 (D. Nev. 1986) ("It should be noted that by NRS 41.031 the state for itself and its political subdivisions waives sovereign immunity and consent to be sued for, among other claims that could be brought against a private person or corporation, ***claims for breach of contract and for tort***. This is unlike the Federal Tort Claims Act, 28 U.S.C. § 1346(b), which, conditionally and with limitations, waives United States sovereign immunity from tort." (emphasis added)).

The fact that the Nevada Legislature set forth certain conditions on "contract" actions, in addition to setting forth certain conditions for "tort" actions, completely destroys Respondent's argument that the general immunity waiver found in Section 2 of SB 185 (and codified in NRS 41.031(1)) must be read as applicable only to claims sounding in tort. Such an interpretation is irreconcilable with Section 5(2)'s recognition of and requirements for contractual claims against the State and would render Section 5(2) and the statutes referenced therein nonsensical and superfluous. *Legislature of State v. Settelmeyer*, 2021 WL 1936551, at *4 (Nev. 2021) ("Adopting the State's contrary interpretation would also violate the settled rule against interpreting a law in a manner that renders part of it superfluous, as it would require us to ignore the constitutional provision's use of the word "any."") (*citing Manuela*

H. v. Eighth Judicial Dist. Court, 132 Nev. 1, 6-7, 365 P.3d 497, 501 (2016) (recognizing that, in applying a statute's plain language, this court will not interpret the law in a manner that renders any of its words superfluous); (citing cases). Respondent's position that NRS 41.031(1) general waiver is limited to "torts" simply cannot be reconciled with the plain language of NRS 41.031(1) and the legislative history of the enactment of the statute.[3]

2. The Date of NRS 41.031's Enactment Does Not Diminish Appellants' Argument

Respondent contends that because the FLSA did not apply to state governments until after the enactment of NRS 41.031 in 1965, Appellants' argument that the Nevada Legislature waived its immunity from liability in all civil actions (not just those sounding in tort) must be rejected. RAB at p. 15-16. Respondent's temporal sequence argument is flawed for two (2) reasons. First, it rests upon the mistaken assumption that the state of Nevada could not be held liable

[3] Respondent attacks Appellants' citation to *Golconda Fire Protection District v. County of Humboldt*, 112 Nev. 770 (1996), *clarified on petition for rehr'g*, 113 Nev. 104 (1997), for not supporting Appellants' position that Nevada's immunity waiver included claims that arise from statutory violations. RAB at pp. 22-23. While the *Golconda* decision is admittedly unclear as to the exact nature of the claim that was filed, the basis for the claim for wrongful apportionment of money interest arose from a statutory violation. *See Golconda Fire Prot. Dist.*, at 771. Therefore, *Golconda* is relevant to the issue presented before this Court because it demonstrates, along with the legislative history set forth above, that NRS 41.031 was not limited to torts and that governmental entities have been sued for, and defended against, claims other than those solely arising out of tort.

for any claim outside of the tort context. As expressed directly above, the Nevada Legislature had already waived its sovereign immunity from certain contractual and statutory obligations at the time of NRS 41.031's enactment. *See* Section 2 of SB 185.

Second, and equally damning to Respondent's argument, is the fact that the State has been subject to statutory overtime obligations for years prior to the enactment of NRS 41.031. Indeed, Nevada's public sector wage-hour laws were first enacted in 1953. *See* NRS 284.180; https://www.leg.state.nv.us/Statutes/46th1953/Stats195304.html#Stats195304page651 (last visited May 19, 2021).[4] While an aggrieved employee arguably may not have been able to file suit against the State for violation of these statutes prior to 1965, the statutory obligations applied to the state pre-enactment of NRS 41.031. Not coincidentally, the Nevada Legislature also passed the right to seek judicial review of any Nevada public sector wage-hour claim in 1965 when it enacted Nevada's Administrative Procedures Act. *See* NRS 233B.130 (enacted in 1965);

[4] Since 1953, public employees have had the right to file suit against an official, board, or commission (*i.e.*, "appointing authority") for the failure to comply with the public employment wage-hour laws set forth in NRS 284.180. *See* NRS 284.195 (enacted in 1953); https://www.leg.state.nv.us/Statutes/46th1953/Stats195304.html#Stats195304page651, at § 55 (last visited May 19, 2021); *see also Walden v. Nevada ex rel. Nevada Department of Corrections*, 2018 WL 1472715, at *8 (D. Nev. 2018) (concluding that the direct private right of action may only be maintained against the "appointing authority" and not the State of Nevada").

https://www.leg.state.nv.us/Statutes/53rd/Stats196505.html#Stats196505page966 (last visited May 19, 2021) (setting up petition for judicial review of agency final decisions). Ultimately, Respondent's argument seeks to immunize the State from any liability arising out of 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.

IV. RESPONDENT'S WILFUL REFUSAL TO FULLY ANSWER THE QUESTION PRESENTED EXPOSES THE ABSURDITY OF ITS ARGUMENT THAT NRS 41.031 IS LIMITED TO TORT ACTIONS

Respondent desperately seeks to avoid fully answering the question presented by the Nevada federal district court, and the question accepted by this Court, because doing so would expose the absurdity of its argument. *See* RAB at p. 3, n. 1 ("[T]his Court should not address whether Nevada has consented to damages liability for alleged violations of "analogous provisions of [S]tate law."); p. 28. Rather than fully answer the question as to whether the state of Nevada has waived its immunity from liability and consented to damages liability for public sector state wage-hour law violations, Respondent simply asks this Court to ignore that part of the question and instead solely focus on the certified question pertaining to the FLSA. *See id.* The reason being, of course, is that Respondent's "tort only"

interpretation would lead to absurd results that would radically alter the current state of the law with respect to governmental liability in Nevada.

A. The State Law Portion Of The Certified Question Is Ripe For Ruling

Respondent seems to suggest that the Court need not address the public sector state wage-hour portion of the certified question because it is no longer an issue in this case. As a threshold matter, that suggestion is wrong. Appellants have retained their right to seek appellate review of the Nevada federal district court's dismissal of those claims, without prejudice. Therefore, following the conclusion of this case, Appellants will be able to appeal the Nevada federal district court's decision with respect to the Nevada public sector state wage-hour claims. A decision here would be determinative in whether those claims would even be viable on appeal.

Also, Appellants have sought to re-assert those claims in the Nevada federal district court following the administrative exhaustion that the Nevada federal district court required. *See* Supplemental Appendix (hereinafter "Supp. App."), at vol 1., pp. 35 - 243. Accordingly, a ruling here would provide the Nevada federal district court with much needed guidance as to whether a motion to re-assert these claims in the instant litigation would be futile.

Moreover, there are current pending cases in the Nevada state district courts that depend upon a ruling by this court. *See* Request to Take Judicial Notice, filed May 27, 2021. Indeed, answering this part of the certified question is not only

important to this case but critical to other cases that will be affected by the Court's ruling here.

B. Accepting Respondent's Construction Of NRS 41.031(1)'s Waiver Of Immunity As Limited To "Torts" Would Radically Alter The Current State Of Law

Respondent seemingly did not wish to even address the certified question as to "analogous state law" because it recognizes that its argument—that NRS 41.031(1)'s waiver of immunity is limited to "torts"—would radically alter the current state of law. Given Respondent's analytical position with respect to the question presented as it relates to the claims under the FLSA, Respondent's position with respect to analogous state public employment wage-hour claims must be the same. In other words, despite having refused to answer this part of the certified question, Respondent's answer must be as follows: *Because NRS 41.031(1) is limited to "torts," the state of Nevada is immune from suit and liability for claims under Nevada's public employment wage-hours law.* Of course, the exact opposite is true under NRS 284.180 *et seq*. The fact that Respondent refused to specifically answer the certified question with respect to analogous public-employment wage-hour claims is telling.

1. Nevada's Public Employment Wage-Hour Laws Would Be Toothless

The Nevada Legislature created public employment wage-hour laws back in 1953, more than twelve (12) years prior to the enactment of Nevada's immunity

waiver statutes. https://www.leg.state.nv.us/Statutes/46th1953/Stats195304.html#Stats195304page651 (last visited May 19, 2021). Then, in the same year that Nevada waived its immunity from liability, the Nevada Legislature provided Nevada public employees with a mechanism to challenge and/or enforce alleged violations of those public employment wage-hour laws by enacting Nevada's Administrative Procedures Act and the right to seek judicial review. *See* NRS 233B.130 (enacted in 1965); https://www.leg.state.nv.us/Statutes/53rd/Stats196505.html#Stats196505page966 (last visited May 19, 2021) (setting up petition for judicial review of agency final decisions). Holding that the state of Nevada only waived its immunity from claims arising from tort would mean that any judicial review for contract and/or statutory claims, and the court's ability to award damages, would be illusory. In that scenario, the state of Nevada could simply refuse to pay any of its obligations, and hide behind the veil of sovereign immunity from suit and liability. There is no purpose to require exhaustion of administrative remedies if there is no right to sue to enforce the claim in court under any circumstances.

As the law currently stands, Nevada public employees can sue the State for payment of unpaid wages arising under NRS Chapter 284 following exhaustion of the legislatively approved grievance procedure. *See* 233B.130. A grievance is defined as "an act or occurrence which an employee . . . feels constitutes an injustice

relating to any condition arising out of the relationship between an employer and employee, including, but not limited to, ***compensation***, working hours, working conditions, membership in an organization of employees or the interpretation of any law, regulation or disagreement." NRS 284.384 (emphasis added).[5] Limiting NRS

[5] Notably, however, this review does not include claims under federal law for which a hearing is provided. *See* NRS 284.384(1) ("The Commission shall adopt regulations which provide for the adjustment of grievances ***for which a hearing is not provided by federal law*** . . .") (emphasis added); NAC 284.658(2) ("For the purposes of NAC 284.341 and 284.658 to 284.697, inclusive, the term "grievance" does ***not include any grievance for which a hearing is provided by federal law*** or NRS 284.165, 284.245, 284.3629, 284.376 or 284.390.") (emphasis added); App. at vol. 3, p. 530. Indeed, Nevada's Employee-Management Committee ("EMC"), the agency charged with making final determinations with respect to public employment wage claims, does not take jurisdiction over claims brought under the FLSA. *See* Supp. App. at vol. 1, pp. 1-34 (ECF No. 169-1) ("The EMC has jurisdiction to adjust grievances, as defined in NRS 284.384(6) and NAC 284.658. For the purposes of the EMC's jurisdiction, "the term 'grievance' does not include any grievance for which a hearing is provided by federal law." NAC 284.658(2).").

Here, as the record proves, the EMC has refused to take jurisdiction over the FLSA claims of an employee who has joined in this action. *See* App. at vol. 3, pp. 526-31 (Plaintiffs' motion for reconsideration based on EMC's refusal to take jurisdiction over wage claims based on the FLSA); Supp. App. at vol. 1, pp. 1-34 (ECF No. 169-1). The reason being is that the FLSA provides for an enforcement mechanism in court, which this State has consented to through its waiver of sovereign immunity, and which is separate and apart from Nevada's public employment wage-hour laws. For this reason, Respondent's argument that it is immune from FLSA claims because of the public employment wage-hour grievance system is inapposite. Just because Nevada has adopted an administrative process for adjudicating public employment state wage-hour claims does not mean that FLSA claims must be subject to the same process. And furthermore, just because the Nevada Legislature has determined that Nevada public employment state wage-hour claims must proceed via this administrative process before proceeding in court does not mean that NRS 41.031(1)'s immunity waiver does not include claims arising

41.031(1) to torts would nullify administrative petitions for judicial review for numerous violations, including wage violations under public employment wage-hour law. This would be an absurd and unacceptable result, which is one of the hallmarks of statutory construction that this Court seeks to avoid.

2. Holding That NRS 41.031(1) Is Limited To Torts Would Not Eliminate Respondent's Liability, It Would Just Create Needless Inefficiencies And Force Appellants To Use The Writ Of Mandate Mechanism Of Enforcement

Prior to Nevada's waiver of sovereign immunity in 1965, the doctrine of sovereign immunity often precluded individuals and entities contracting with the State, including those contracting for employment, from pursuing claims at law for damages against the State. However, even under the State's formerly broad right of sovereign immunity, the State could not simply refuse to pay employees or renege on contracts with impunity. Indeed, as early as 1913, before Nevada waived its sovereign immunity, the Nevada Supreme Court recognized that mandamus may be an appropriate remedy to compel the payment of statutorily required wages to a state employee where no action at law otherwise exists. *See State v. Eggers*, 36 Nev. 364, 136 P. 104, 105-06 (1913); *see also*, 2004 Nev. Op. Att'y Gen. No. 01 (Jan. 7, 2004) ("The Nevada Supreme Court has opined on the use of a writ of mandamus to compel a county to pay statutory obligations" where no other remedy

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from violations of the FLSA. Respondent's arguments in this respect simply do not follow.

exists. (*citing In State ex rel. Walsh v. Buckingham*, 58 Nev. 342, 80 P.2d 910 (1938)).

In this case, artificially limiting NRS 41.031's waiver of sovereign immunity to cover only tort claims may inadvertently impair the State's ability to contract with private parties[6] without actually excusing the State from its continuing obligation to pay its employees wages in compliance with state and federal law. If this Court determines that the State enjoys sovereign immunity from Appellants' claims, leaving Appellants with no adequate remedy at law, Appellants would then be able to compel payment of their wages and associated relief through a writ of mandate. There is no question that the State must pay its employees in compliance with state law, and it is well-established that states are likewise required to comply with the FLSA in their payment of state employees, rendering these claims appropriate for a writ. *See, e.g., Nevada v. United States Dep't of Lab.*, 218 F. Supp. 3d 520, 527–28 (E.D. Tex. 2016) ("Congress was clear in its intention for the FLSA to apply to States." (*citing Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985)).

If Appellants are forced to pursue payment through a writ of mandate, they are confident that they would ultimately prevail in recovering their wages and

[6] Private parties would understandably not wish to enter into contracts for which there would be no potential action to recover damages therefrom.

associated relief. However, these claims are far better resolved through proceedings specifically designed to efficiently manage the resolution of complex actions, where the arguments of the Parties can be fully developed, rather than through the limited jurisdiction afforded in a mandamus proceeding. Indeed, the Legislatures' recognition of this realty and goal of judicial economy may well have played a role in its decision to waive sovereign immunity through NRS 41.031(1).

V. NEW YORK'S IMMUNITY WAIVER STATUTE AND JUDICIAL INTERPRETATION REMAIN HELPFUL TO THIS COURT ANALYSIS

Respondent attempts to diminish the impact of *Speers v. State*, 183 Misc.2d 907, 705 N.Y.S.2d 858 (Feb. 17, 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, wherein the court 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* RAB, at pp. 24-25. Respondent contends that *Speers* must have been wrongly decided and/or is not really the law because the New York Legislature has recently introduced bills to waive the state's sovereign immunity with respect to the FLSA. *See id.*

Respondent misreads the New York Legislature's intent by proposing the cited bills. The recently introduced bills provide for a complete waiver of immunity from other federal statutes, besides just the FLSA, and, most importantly, remove

any conditions on the filing of such claims. As recognized in *Speer*, even though New York's immunity waiver statute included the waiver of immunity for FLSA claims, the "State's waiver of immunity is expressly conditioned upon meeting the jurisdictional limitations contained in article 2 of the Court of Claims Act, including the limitations as to timely service and filing of a claim in section 10." 705 N.Y.S.2d at 862. The immunity waiver statute placed a six-month limitations period on the filing of claims. *Id.* at 863 ("[T]he 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."). Accordingly, not only would the introduced bills legislatively expand *Speers'* holding to other federal statutes, they would also remove the time limitations currently contained in the immunity waiver statute. Therefore, Respondent's argument that this Court should discount the analytical value of *Speers* should be ignored. *Speers* still provides an important cross-reference to the construction of an immunity waiver statute that is substantially similar to NRS 41.031.

VI. CALIFORNIA AND OREGON'S IMMUNITY WAIVER STATUTES DEMONSTRATE THAT CORRECTIONAL OFFICERS HAVE A RIGHT TO SEEK RELIEF FROM THEIR PUBLIC EMPLOYER UNDER FEDERAL AND STATE WAGE-HOUR LAWS

Respondent points to the sovereign immunity waivers from California and Oregon to supposedly support its position that Nevada's immunity waiver is limited

to torts. This argument is seriously flawed and actually supports Appellants' position. As an initial matter, unlike New York's waiver of immunity statute, the language of California's and Oregon's immunity waiver statutes are nothing akin to Nevada's statute. Therefore, their relevance from a statutory interpretation standpoint is limited. Nevertheless, California's statute provides that it has retained its sovereign immunity in all respects unless "liability may be derived only from an express statute." *See, e.g.*, *City of Orange v. Valenti*, 112 Cal.Rptr. 379, 383, 37 Cal.App.3d 240, 245 (Cal.App. 1974); Gov. Code § 815. Critically, though, the state of California does not appear to be immune from wage claims brought by its correctional officers. Indeed, California prison officers recently sued the state of California for statutory wage violations and breach of contract. *See Stoetzl v. Department of Human Resources*, 7 Cal.5th 718 (Cal. 2019) (suing the state of California under various provisions of the applicable California Wage Order and California Labor Code).

In Oregon, unlike Nevada, the immunity waiver specifically contains the word "tort" in its immunity waiver statute: "Every public body is subject to action or suit ***for its torts***." Oregon Rev. Stat. ("ORS") 30.265 (emphasis added). ORS 30.260(8), in turn, defines "tort" for purposes of the OTCA to mean "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." Ironically, Oregon courts have held that FLSA claims for unpaid wages are "tort" claims under Oregon law and thus state of Oregon is not immune from such claims. *See Byrd v. Oregon State Police*, 238 P.3d 404, 405, 236 Or.App. 555, 558 (Or. App. 2010) (We held in *Butterfield v. State of Oregon,* 163 Or.App. 227, 987 P.2d 569 (1999), *rev. den.,* 330 Or. 252, 6 P.3d 1099 (2000), that a claim under the FLSA is a tort claim under the OTCA."); AOB at p. 30, n. 12.

As a result of Respondent's insistence that this Court follow Oregon's lead on determining whether Nevada limited its immunity waiver to torts, this Court is now presented with yet another basis to answer the certified question in the affirmative because the Oregon courts have held that a FLSA claim is a tort claim and thus held that Oregon is not immune to such a claim. Therefore, even assuming that NRS 41.031's general waiver of immunity is limited to torts, Appellants submit that their wage claims under both the FLSA and Nevada public employment wage-hour law would survive based on the same analysis set forth by the Oregon courts.

In Nevada "[a] tort, as generally defined, is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." *K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1368–69, 103 Nev. 39, 46 (Nev. 1987), *abrogated on other grounds by Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990); *Sadler v. PacifiCare of Nev.*,

130 Nev. 990, 998, 340 P.3d 1264, 1269 (2014) (holding that physical injury is not required to assert a tort claim and that "the Restatement (Second) of Torts § 7(1) (1965), broadly defines an injury for the purpose of tort law as "the invasion of any legally protected interest of another.""). Nevada also recognizes the doctrine of negligence per se. *See Sagebrush Ltd. v. Carson City*, 660 P.2d 1013, 1015, 99 Nev. 204, 207 (Nev. 1983); *See Barnes v. Delta Lines, Inc.*, 669 P.2d 709, 710, 99 Nev. 688, 690 (Nev. 1983) ("When a defendant violates a statute which was designed to protect a class of persons to which the plaintiff belongs, and thereby proximately causes injury to the plaintiff, such a violation constitutes negligence *per se,* unless the defendant can show that the violation was excused.").

It cannot be seriously disputed that the FLSA and Nevada's public sector wage-hour laws were enacted to protect the Appellants and all other prison guards from being deprived their rightful wages due and owing to them and that Respondent owed Appellants a duty of care to compensate them correctly according to state and federal law. *Id.* at 1015 (citation omitted) ("Whether a legislative enactment provides a standard of conduct in the particular situation presented by the plaintiff is a question of statutory interpretation and construction for the court."). Therefore, even if this Court were to limit the general waiver found at NRS 41.031 to claims sounding in tort, the certified question must still be answered in the

affirmative because claims under the FLSA and Nevada's public sector wage-hour laws could be considered tort claims.

VII. RESPONDENT'S ATTEMPT TO MANIPULATE THIS COURT'S DECISION BY HIGHLIGHTING ITS POTENTIAL DAMAGE LIABILIY MUST BE REJECTED

Respondent repeatedly highlights that its potential exposure in this case could exceed $100 million in an apparent attempt to manipulate by sympathy this Court's decision. *See* RAB at pp. 7, 11, 27 ("Plaintiffs seek to divert up to $100 million from other parts of Nevada's budget."). This emotional plea by Respondent must be rejected. The fact that Respondent could be liable for any amount of money must not factor into this Court's decision making process. Moreover, while Respondent highlights that it could be liable for over $100 million, it intentionally omits the fact that it maintained insurance coverage for all the years at issue in this action. As mentioned in Appellants' opening brief (*see* AOB at pp. 28-29), NRS 41.038(1) authorizes the State to "(a) insure itself against ***any liability*** arising under NRS 41.031." Emphasis added. Respondent has secured insurance from American International Group, Inc. ("AIG") in the amount of $10-$15 million per policy year for the duration of this action for "Employee Benefit Liability." Therefore, even

assuming liability, there is a real possibility that the full amount of damages would be contributed by AIG and not Respondent.[7]

VIII. CONCLUSION

For all the reasons set forth in Appellants' opening brief and in this reply brief, the certified question presented in this case should be answered in the affirmative.

Dated: May 28, 2021

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[7] The relevant time period involved in this case is 3-years from the date of filing the initial complaint, or May 12, 2011, to the present date. App. at vol. 1, pp. 10 - 15 (initial complaint). Assuming $15 million for each policy year in contribution, AIG could contribute up to $150 million to compensate Nevada correctional officers for the work they performed without compensation.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5)(A) and the type-volume limitation requirements of NRAP 32(a)(7)(A)(ii) because:

X This brief has been prepared in a proportionally spaced typeface using Microsoft Office in 14-point font size and Times New Roman.

X This brief contains less than 7,000 words (6,964) as measured by Microsoft's Office 365 (word count) program, including footnotes, but excluding the case caption page, table of contents, table of authorities, required certificate of service, and certificate of compliance with these Rules.

I hereby certify that I have read the 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 EOR 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.

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CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 7287 Lakeside Drive, Reno, Nevada 89511. On May 28, 2021, the Appellants' Reply Brief was served on the following by using the Supreme Court's eFlex System:

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

Executed on May 28, 2021 at Reno, Nevada.

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