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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Elizabeth A. Brown
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RESPONSE TO APPELLANTS' REQUEST TO TAKE JUDICIAL NOTICE

Respondent Nevada *ex rel.* its Department of Corrections responds to Plaintiff-Appellants Donald Walden Jr., Nathan Echeverria, Aaron Dicus, Brent Everist, Travis Zufelt, Timothy Ridenour and Daniel Tracy's (collectively "Plaintiffs") request to take judicial notice.

I. INTRODUCTION

This Court should deny Plaintiffs' request to take judicial notice. Plaintiffs are requesting that this Court take judicial notice of petitions for judicial review filed in other cases, before other courts, by persons who are not parties to this case. The records do not support Plaintiffs' FLSA argument – on the contrary, they

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undermine that argument. Instead, the records signal an attempt to change the focus of this case after Nevada has filed its answering brief.

This Court should deny judicial notice because Plaintiffs' request violates its rule that it will not take judicial notice of filings in other cases. The records could have been presented to the district court[1] and made part of the record on appeal if they were so important. Plaintiffs chose not to do so, and they should not be allowed to smuggle the records in now as part of an appellate reply brief.

This Court should deny judicial notice for the separate reason that the records are unnecessary. The parties agree that the grievance procedure is an appropriate means for adjudicating overtime disputes. All that Plaintiffs' records show is that the grievance procedure is working - employees who believe they have been aggrieved are using the grievance procedure to obtain compensation. Indeed, the grievances cited by Plaintiffs are similar to their claims in this case, but Plaintiffs do not explain why they refused to use the grievance procedure.

II. RELEVANT BACKGROUND

A. No State-law claims are pending in this case

Plaintiffs are current and former Nevada correctional officers. 4 JA 849. They brought claims under the Fair Labor Standards Act (the "FLSA") and Nevada

[1] The term "district court" in this response refers to the U.S. District Court for the District of Nevada.

law. 3 JA 508. The Nevada-law claims have been dismissed. OB 8. Only the FLSA claims remain pending. *Id.*

Nevada moved for summary judgment based on its sovereign immunity. 4 JA 708-09. Neither Nevada's motion nor Plaintiffs' opposition discussed State-law claims because no such claims were pending. *See id.* at 708-09, 750-52. However, Nevada's motion did explain that the proper forum for overtime disputes like Plaintiffs' is Nevada's "comprehensive employee grievance process." *Id.* at 719-20.

The district court certified the instant question to this Court in response to Nevada's motion for summary judgment. 4 JA 849-50. The certified question's focus is whether Nevada waived its sovereign immunity from FLSA claims by way of NRS 41.031(1) "or otherwise." *Id.* at 855. The district court also asked whether Nevada has waived its sovereign immunity from claims based on "analogous provisions of state law," though no such claims were (or are) pending in this case. *Id.*

B. The opening brief and answering brief do not substantively address State-law claims

Plaintiffs' opening brief only mentions unnamed "analogous provisions of state law" in passing; it does not contain any separate, substantive arguments about them. *See* OB 16, 22, 36. Nevada's answering brief, in turn, explained that Nevada Rule of Appellate Procedure 5 barred assessing whether Nevada has

waived sovereign immunity from analogous provisions of State law. AB 28. The reason is that Rule 5 allows answering a question only if is "determinative" in a proceeding. Nev. R. App. P. 5(a). Because no State-law claims are pending in the underlying action, a decision about State-law claims would not be determinative here. AB 28.

The answering brief also detailed the comprehensive grievance system that Nevada has established to adjudicate overtime (and other wage and hour) disputes. AB 6. It explained that the grievance system would be made pointless if employees could go straight to court on more lucrative FLSA claims instead of grieving workplace disputes. *Id.* at 25-27.

C. Plaintiffs' reply brief attempts to have this Court rule on nonexistent State-law claims based on evidence that was not before the district court.

1. Plaintiffs filed a motion in the district court to try to manufacture a legal issue here.

One day before Plaintiffs' reply brief in this Court was due, Plaintiffs moved in the district court to "reassert" one of their State law claims. Appellants' Supplemental Appendix 35. Their motion was made more than a month after Nevada had filed its answering brief in this Court. *See id.* They filed their motion even though the district-court case was stayed and administratively closed while this Court considers the certified question. 4 JA 855-56.

Plaintiffs filed their reply brief in this Court the next day. It uses their district-court motion to reassert the State law claims as a purported basis for this Court to assess whether Nevada has waived its immunity from State-law claims. RB 16. Plaintiffs' motion has not been granted and is likely to be denied because it was filed while the case was closed.

2. Plaintiffs request judicial notice of filings in unrelated cases involving claims not pending here.

Plaintiffs' other purported basis for this Court to rule on the nonexistent State-law claims is the request for judicial notice at issue here. RB 16. In the request, Plaintiffs ask this Court take judicial notice of three petitions for judicial review. RJN 2.[2] Two of them predate the district-court briefing on sovereign immunity, yet they were not presented to the district court. *See id.* Ex. A, at 1; *id.* Ex. B, at 1.

All three petitions for judicial review involve grievances for allegedly uncompensated work time. RJN Ex. A, Ex. 1, at 12-13; *id.* Ex B., Ex. 1, at 12-13; *id.* Ex. C, Ex. 1, at 33-36. In all three, the Employee-Management Committee (the "Committee") granted the grievance at least in part. RJN Ex. A, Ex. 1, at 13; *id.* Ex B., Ex. 1, at 13; *id.* Ex. C, Ex. 1, at 36. Meaning that the grievants in those cases were able to obtain compensation through the grievance process that Nevada has established for that purpose.

[2] "RJN" citations refer to the request for judicial notice.

Plaintiffs do not point to any evidence that the grievants in those cases are plaintiffs in this case. Although the Committee cites federal law as guidance in its decisions, the claims in those cases were brought under State law. *See, e.g.*, RJN Ex. A, Ex. 1, at 1, 13. Thus, there is no overlap between the claims in those decisions and the claims pending in this case.

Plaintiffs urge this Court to rule in this case on the claims pending in those other cases. RB 16-17. In other words, they ask this Court to issue a holding on legal issues presented in other cases, pending in other courts, involving employees who are not parties to this case. *See id.*

III. ARGUMENT

A. Judicial notice is improper because the records are filings from unrelated cases

"As a general rule, [this Court] will not take judicial notice of records in another and different case, even though the cases are connected." *Mack v. Est. of Mack*, 125 Nev. 80, 91 (2009). That rule applies with even greater force here because the cases in Plaintiffs' request are not connected to this case. They involve different parties, claims and courts.

It is true that the *Mack* Court took judicial notice of the judicial records at issue there. 125 Nev. at 92. But that case involved special circumstances not present here. The judicial records concerned events that postdated the appealed

order, so they could not have been part of the appellate record. *Id.* The records were also outcome determinative. *Id.* at 92, 99.

Here, by contrast, two of the petitions for judicial review predated the district-court briefing. RJN Ex. A, at 2; *id.* Ex. B, at 2. Plaintiffs could have made them part of the record but chose not to. Also, Plaintiffs do not even attempt to argue that the petitions are relevant to the merits of this certified question, let alone outcome determinative. *See* RB 16-17. Under *Mack* this Court should decline to take judicial notice.

B. Judicial notice is unnecessary because the parties agree that Nevada employees can resolve overtime disputes through the grievance procedure

Appellate courts regularly deny requests for judicial notice that are unnecessary. *See, e.g.*, *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010); *De Tie v. Orange County*, 152 F.3d 1109, 1112 n.7 (9th Cir. 1998). Plaintiffs' records are unnecessary because they go to an issue that is not in dispute between the parties.

Nevada has explained that the grievance procedure is the appropriate and exclusive means for resolving overtime disputes between State employees and their employer. AB 6, 26; 4 JA 719-20. Nevada has never argued or implied that

grievants are barred by sovereign immunity from obtaining compensation through the grievance process.[3] That would defeat the point.

Plaintiffs' judicial records do nothing more than show that the grievance process is working as intended. Employees who believe they are aggrieved have obtained compensation from the Committee, subject to judicial review.

Plaintiffs' newfound interest in the grievance process is puzzling. Plaintiffs' records show that employees with similar disputes have obtained relief through the grievance process. Yet Plaintiffs do not explain why they refuse to take advantage of that process.

Also, Plaintiffs' sudden focus on the grievance process actively undermines their FLSA argument. As Nevada explained in its answering brief, it would make little sense for the State to establish and administer the grievance procedure if employees can pursue more lucrative FLSA claims directly in court. AB 26; *see also* 4 JA 719-20. Nevada's reading of the statutes gives force to the Nevada Legislature's choices: the State maintains its sovereign immunity from statutory liability in general, but NRS 284.384 specifically waives its sovereign immunity

[3] The reason Nevada does not have sovereign immunity from grievances is that the Nevada Legislature specifically authorizes grievances at NRS 284.384. That effected a waiver of sovereign immunity. *See* Nev. Const. art. 4, § 22 (providing that the Legislature may waive sovereign immunity via general laws). A holding on the scope of NRS 41.031(1) would have no effect on grievances.

from grievances. The result is that Nevada resolves overtime disputes exclusively through the quicker, less expensive, and less formal grievance process. AB 26.

IV. CONCLUSION

Judicial notice should not be a method for trying to rehabilitate your case after the respondent has filed its answering brief. This Court should deny the request for judicial notice.

DATED this 17th day of June, 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 June 17, 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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