

**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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**APPELLANTS' REPLY IN SUPPORT OF REQUEST TO TAKE  
JUDICIAL NOTICE**

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

## I. INTRODUCTION

After seven years of litigation, and in “Response” to Appellants’ Request to Take Judicial Notice, Respondent finally concedes the obvious—**Nevada has waived Sovereign Immunity from wage and hour liability**. Respondent denies a waiver of sovereign immunity under NRS 41.035 but concedes waiver under NRS 284.384. But NRS 284.384 says that the state administrative process is only required “for the adjustment of grievances for which a hearing is not provided by federal law,” which would include the FLSA where a hearing is provided under federal law. If the State had sovereign immunity from such claims under federal law, then NRS 284.384 would not have this carve-out from its grievance exhaustion requirement. Ultimately, the procedural propriety of Appellants’ claims is not before the Court at this time. This Court is faced with only the much more limited, threshold question—has Nevada waived sovereign immunity? On this question, Respondent has conceded, and Appellants have shown that the answer is yes.

Respondent advances only minimal argument regarding Appellants’ request for judicial notice, instead using its Response as an excuse to improperly advance new argument and attempt to clarify its legally and logically inconsistent position on sovereign immunity. As addressed in the following sections, (1) Respondent continues to ignore the state law portion of the certified question; (2) Respondent’s admission that the State has waived sovereign immunity exposes Respondent’s

flawed interpretation and strongly supports Appellants’ interpretation; and (3) Appellants’ Request for Judicial Notice should be granted.

## **II. ARGUMENT**

### **(1) Respondent Ignores the State Law Portion of the Certified Question.**

Respondent recognizes that the certified question accepted by this Court “asked whether Nevada has waived its sovereign immunity from claims based on ‘analogous provisions of state law.’” Response 3. Nonetheless, Respondent flatly refuses to analyze this issue in its briefing and instead requests that “this Court should not address” the state law portion of the certified question.<sup>1</sup> AB 28. Respondent now further argues in support of this request, falsely stating that Appellants’ “opening brief . . . do[es] not substantively address State-law claims” and protesting that Appellants’ analysis of the issue represents “an attempt to change the focus of this case after Nevada has filed its answering brief.”<sup>2</sup>

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<sup>1</sup> Respondent explains that it chose to ignore the state law portion of the certified question “[b]ecause no State-law claims are pending in the underlying action, [and thus] a decision about State-law claims would not be determinative here.” Appellants responded to this contention in their Reply Brief, which is incorporated by reference here. *See* Reply 16-17. Respondent now further observes that Appellants’ motion to reassert their state law claim was filed shortly before their reply brief and speculates that the motion “is likely to be denied because it was filed while the case was closed.” Response 5. As an initial matter, Appellants filed their motion promptly after receiving the EMC’s written decision on April 5, 2021. Respondent’s speculation (with which Appellants strongly disagree) as to how the district court may rule does not provide a basis for ignoring the motion.

<sup>2</sup> There is a distinct irony and arrogance in Respondent’s decision to unilaterally reformulate the certified question to exclude the state law issue while

Contrary to Respondent’s representations, and in line with the certified question accepted by this Court, Appellants thoroughly briefed this issue in their Opening Brief and again in their Reply. Specifically, Appellants argued that the legislature (and Respondent, through its litigation conduct) broadly waived sovereign immunity from *both* federal and state claims, and all arguments advanced by Appellants on this point supports finding a broad waiver of both types of claims.

**(2) Respondent Admits that the State has Waived Sovereign Immunity from Wage and Hour Claims.**

It is increasingly clear that Respondent strategically avoided answering the state law portion of the question because a claim of sovereign immunity from state law claims “would lead to absurd results that would radically alter the current state of the law with respect to governmental liability in Nevada.”<sup>3</sup> AOB, 15-16. Facing this reality, Respondent now admits, for the first time, that the State has waived Sovereign Immunity from state wage and hour claims against the State brought through the grievance process.<sup>4</sup> However, Respondent seeks to obscure the statutory basis for the

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simultaneously protesting that Appellants’ analysis of the same represents “an attempt to change the focus of this case.”

<sup>3</sup> Respondent admits as much in its Response: “Nevada has never argued or implied that grievants are barred by sovereign immunity from obtaining compensation through the grievance process. *That would defeat the point.*” Response, 7-8 (emphasis added).

<sup>4</sup> In Respondent’s view, the only limitation on this admitted waiver of immunity for wage and hour claims is procedural—*i.e.*, the grievant must first exhaust his/her administrative remedies, as set forth in NRS 284.384 *et. seq.*

waiver and minimize its impact by vaguely asserting that “the State maintains its sovereign immunity from statutory liability in general, but NRS 284.384 specifically waives its sovereign immunity from grievances.” Response at 8 and fn 3.

Respondent’s belated attempt to cure the legal and logical inconsistencies of its position only serves to further expose the untenability of its statutory interpretation. In a desperate attempt to avoid the broad, *express* waiver of sovereign immunity set forth in NRS 41.031, Respondent now contends the legislature *impliedly* waived immunity through NRS 284.384. There is nothing in the text of NRS 284.384 purporting to waive sovereign immunity, and Respondent does not cite to any legal authority or principle that might support implying such a waiver. Respondent’s last-ditch attempt to find another statutory source for what it believes to be a more limited waiver holds no basis in the law. But while the legal basis for Respondent’s admission may be misplaced, Respondent’s fundamental recognition that the State has waived sovereign immunity is telling and true.

### **(3) Appellants’ Request for Judicial Notice Should be Granted.**

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Respondent has never raised this perceived procedural requirement until now, more than seven (7) years after the filing of the complaint; therefore, even if this Court were to accept Respondent’s position that all wage and hour claims must first proceed via the grievance mechanism, it would be inapplicable in this case because it has been waived by Respondent’s litigation conduct. *See* AOB 32-36. It would also not be applicable to the federal claims since the FLSA provides a hearing and the state grievance process is available only “for the adjustment of grievances for which a hearing is not provided by federal law.” NRS 284.384

This Court may take judicial notice of facts that are “[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” NRS 47.130(2)(b). Respondent does not argue that the publicly filed documents presented by Appellants fail to meet this definition.<sup>5</sup> Because Appellants have “supplied [this Court] with the necessary information” to confirm the filing and authenticity of the documents, which “is not subject to reasonable dispute,” judicial notice is mandatory. NRS 47.150(2); *see also, Occhiuto v. Occhiuto*, 97 Nev. 143, 145 (1981) (“taking judicial notice of the prior proceedings” based on the “close relationship” of the cases). Accordingly, this Court should grant Appellants’ Request.

Dated: June 24, 2021

**THIERMAN BUCK LLP**

/s/ Joshua D. Buck

Mark R. Thierman, Bar No. 8285

Joshua D. Buck, Bar No. 12187

Leah L. Jones, Bar No. 13161

Joshua R. Hendrickson, Bar No. 12225

*Attorneys for Appellants*

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<sup>5</sup> Respondent argues only that the records are not “relevant to the merits of this certified question” because the district court previously dismissed Appellants’ state law claims. Again, Appellants have moved to reassert their state law claim in this litigation and fully expect the district court to allow them to do so. But regardless of whether Appellants ultimately pursue their state law claim by reasserting it through their pending motion, by appealing the earlier dismissal of the claim following trial on the other issues, by asserting the claim in the currently pending in the Haines Petition for Judicial Review via a trial *de novo* (which Appellants would seek to join with this litigation since Haines is a putative class member), or otherwise, this claim remains actively disputed by the parties (it was not fully resolved through the grievance process). Respondent cannot simply ignore it and hope it goes away, as Respondent did with the state law portion of the certified question.

### **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 June 24, 2021, the foregoing Appellants' Reply in Support of Request to Take Judicial Notice was served on the following by using the Supreme Court's eFlex System:

James T. Tucker  
Sheri M. Thome  
Wilson, Elser, Moskowitz, Edelman & Dicker LLP  
6689 Las Vegas Blvd. South  
Suite 200  
Las Vegas, NV 89119  
*Attorneys for Respondents*

By Electronic transmission to the following email accounts:

James.Tucker@wilsonelser.com  
Sheri.Thome@wilsonelser.com

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

Executed on June 24, 2021 at Reno, Nevada.

/s/ Jennifer Edison-Strekal  
An Employee of Thierman Buck, LLP