IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID A. GONZALEZ, an individual,

Appellant,

v.

STATE OF NEVADA; NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES; NEVADA DIVISION OF FORESTRY; STEPHEN F. SISOLAK, in his official capacity as Governor of Nevada; BRADLEY CROWELL, in his official capacity as Director of Nevada Department of Conservation and Natural Resources; and KACEY KC, in her official capacity as Nevada State Forester Firewarden; collectively,

Respondents.

Supreme Court No.: 82762

District Court No.: A-20-820596-C

APPELLANT'S OPENING BRIEF

Oral Argument Requested

GALLIAN WELKER & BECKSTROM, L.C.
Nathan E. Lawrence, SBN 15060
Travis N. Barrick, SBN 9257
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Telephone: (702) 892-3500
Facsimile: (702) 386-1946
nlawrence@vegascase.com
Attorneys for Appellant David A. Gonzalez

AARON D. FORD, Attorney General
Mr. Anthony J. Walsh, Esq.
Deputy Attorney General, Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
Tel: 775-684-1213
Fax: 775-684-1108
Attorney for Respondents

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

NEVADA RULES OF APPELLATE PROCEDURE
RULE 26.1 ("NRAP 26.1") DISCLOSURE

The undersigned counsel of record certifies the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. The Appellant, DAVID A. GONZALEZ ("Mr. Gonzalez"), is an individual to whom the corporate ownership disclosures under NRAP 26.1(a) are inapplicable. Mr. Gonzalez is appearing under his proper name and is not using any pseudonym.
2. The undersigned counsel of record has appeared in this matter before the District Court and in the prior administrative inquiries to Kacey KC and the Nevada Division of Forestry.

DATED this 30th day of August 2021.

GALLIAN WELKER & BECKSTROM, L.C.

Nathan E. Lawrence, SBN 15060
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Telephone: (702) 892-3500
nlawrence@vegascase.com
Attorneys for Appellant David A. Gonzalez

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

TABLE OF CONTENTS.

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

TABLE OF AUTHORITIES.

CASES.

STATUTES, RULES, AND REGULATIONS.

OTHER.

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

I. STATEMENT OF JURISDICTION.

Jurisdiction is proper in the instant matter pursuant to NRAP 3A(a) and NRAP 3A(b)(1), which provide, respectively, that "[a] party who is aggrieved by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial," and "[a]n appeal may be taken from the following judgments and orders of a district court in a civil action: (1) A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered." This matter is before the Court pursuant to an Order of Dismissal, entered by the Eighth Judicial District Court on February 24, 2021, satisfying both NRAP 3A(a) and NRAP 3A(b)(1).

II. ROUTING STATEMENT.

This matter is presumptively and properly retained by the Supreme Court under the authority of NRAP 17(a)(11) and/or NRAP 17(a)(12), which, respectively and in relevant part, provide that "[t]he Supreme Court shall hear and decide… "[m]atters raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law; and [m]atters raising as a principal issue a question of statewide public importance…." Broadly, the principal issue before the Court is the applicability of Article 15, Section 16 of the Constitution of the State of Nevada (the "Minimum Wage Amendment") to prison

inmates and/or individuals incarcerated in the State of Nevada, such that the Minimum Wage Amendment entitles them to receipt of the state minimum wage.

Unequivocally, discernment and application of the will of the people of the State of Nevada, as expressed in the twice-passed[1] Minimum Wage Amendment and in regard to inmates who are citizens and residents of the State of Nevada, raises a question of statewide public importance. Additionally, as was noted by this Court on December 26, 2019, in *White v. State*, 454 P.3d 736, 739 (Nev. 2019), "whether inmates are entitled to the minimum wage under our constitution is an open question in Nevada." Since *White* and in the intervening two years, that question remains unreviewed and unanswered, so the instant matter is one of first impression before the Court. Retention by the Supreme Court is, therefore, proper.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW.

As noted above and in the Docketing Statement filed on April 13, 2021, the principal issue before the Court is whether or not the plain language of the Minimum Wage Amendment, which incorporates its own uniquely drafted definitions for "Employee" and "Employer,"[2] such definitions being distinct from

---

[1] Added in 2006. Proposed by initiative petition and approved and ratified by the people at the 2004 and 2006 General Elections.

[2] "Employee" means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days. "Employer" means any individual, proprietorship, partnership, joint venture,

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

any prior-enacted statute or state administrative or regulatory code, requires payment of the state minimum wage to all non-excluded employees in the State of Nevada, to include inmates employed in Nevada, and, more specifically, as is the case with the Appellant, those working out of Nevada Department of Corrections ("NDOC") conservation camps for the Nevada Division of Forestry ("NDF"). Additionally, as raised below, the issues before the Court also include consideration of the applicability to the Minimum Wage Amendment of the "economic realities" test, presently only adopted for certain statutory regimes in the State of Nevada, and, if applicable, whether or not Appellant and similarly situated inmates are "employees" under the noted test for purposes of the Minimum Wage Amendment.

IV. STANDARD OF REVIEW.

The standard of review for the instant matter is de novo. "This court reviews issues of law de novo." *Hawley v. Kaufman*, Nos. 46634, 46705, 46706, 2008 Nev. Unpub. LEXIS 1, at *2 (May 8, 2008). "Constitutional issues... present questions of law that we review de novo." *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 618, 173 P.3d 707, 711 (2007); *see also Lewis v. Lewis*, 132 Nev. 453, 455, 373 P.3d 878, 879 (2016) ("However, the court reviews constitutional issues de novo.")

---

corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

I. STATEMENT OF THE CASE.

On September 2, 2020, Appellant DAVID A. GONZALEZ ("Appellant" or "Mr. Gonzalez"), at the time[1] an inmate in the Nevada Department of Corrections ("NDOC") Three Lakes Valley Conservation Camp ("TLVCC") working for the Nevada Division of Forestry ("NDF"), filed his Complaint in the Eighth Judicial District Court for various causes of action, seeking economic damages, *inter alia*, based on entitlement to receive the minimum wage under Article 15, Section 16 of the Nevada Constitution (the "Minimum Wage Amendment" or "MWA").

Following Respondents' Motion to Dismiss, this matter is before the Court on appeal from the District Court's February 24, 2021, Order of Dismissal, in which it found that claims for violation of the MWA are subject to the "economic realities" test, Appellant is not a defined and eligible employee under such test or the MWA, and Appellant's claims under the MWA are precluded by NRS 209.461(8), which the District Court found not in conflict with nor impliedly repealed by the MWA. Appellant urges that all such findings and conclusion of law are in error.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.

The procedural history of the case is brief and as follows:

1. On September 2, 2020, Appellant filed his Complaint.

[1] Mr. Gonzalez is no longer incarcerated, having been recently paroled.

2. On October 23, 2020, Respondents filed their Motion to Dismiss.

3. On November 5, 2020, Appellant filed his Opposition.

4. On November 12, 2020, Respondents filed their Reply in Support of Motion.

5. On January 12, 2021, the hearing on Respondents' Motion to Dismiss was held before Judge Adriana Escobar, at which time the Motion was granted.

6. On February 24, 2021, the District Court entered its Order of Dismissal, and, on March 11, 2021, Respondents filed the Notice of Entry of Order of Dismissal.

7. On April 8, 2021, Appellant timely filed his Notice of Appeal.

Given the brief procedural history of the case and the early dismissal of the matter below solely on questions of law, there were no new facts adduced or following from prosecution of the matter thus far. Relevant facts are fully detailed in Appellant's Complaint with exhibits, somewhat succinctly reproduced here.

1. From December 18, 2018, until early 2021, Mr. Gonzalez was a member of a TLVCC "project crew," employed by the NDF "to perform work related to firefighting… and other work projects" in accordance with NRS 209.457(2)(a).

2. Mr. Gonzalez, was employed primarily in the performance of project work for vegetation management, pursuant, upon information and belief, to contracts under NRS 209.457(3)(a) between the NDF and Lake Mead National Recreational Area, Nevada Department of Transportation, various water districts, and others.

3. Mr. Gonzalez was paid approximately $3 per day when engaged on project

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

work. Prior to his supplemental chainsaw training, Mr. Gonzalez was paid $2 per day, reflecting an increase from the initial ninety (90) days at $1 per day.

4. Although under the control and custodial authority of the NDOC, Mr. Gonzalez' salary, in accord with the language of NRS 209.457, was paid directly by the NDF (listed as "OA - Outside Agency Payroll" on the NDOC account statements to Mr. Gonzalez), subject to deductions by the NDOC, as applicable.

5. Pursuant to NRS 209.231(3) and NRS 472.040(1)(h), the State Forester Firewarden determined the amount of wages paid to Mr. Gonzalez.

6. On April 29, 2020, Mr. Gonzalez submitted an informal grievance to the NDOC which was denied on June 10, 2020. The grievance was held improper and non-grievable with the NDOC for lack of standing, as the "NDF is not an NDOC entity." Mr. Gonzalez was advised he "must address [his] issue directly with NDF."

7. On June 29, 2020, pursuant to NAC 527.550(1) or, in the alternative, NAC 527.560(1), Mr. Gonzalez submitted a verified petition to the NDF and State Forester Firewarden KC requesting relief in accord with the MWA.[2]

8. On August 6, 2020, State Forester Firewarden KC denied Mr. Gonzalez' petition, concluding that she "is… free to set any wage for offenders participating in conservation camp programs."

[2] To the extent that it was even necessary to do so (Appellant does not believe it is required here), the efforts described in this Section in Paragraphs 6 and 7 sufficiently exhaust any required administrative remedies.

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

III. SUMMARY OF ARGUMENT.

Are working inmates in Nevada slaves or employees? With no intent to engage in hyperbole or be unduly melodramatic, that is ultimately the substance if not the exact text of the questions to be answered by this Court. It is fully understood that slavery and involuntary servitude may lawfully be imposed under the Thirteenth Amendment to the United States Constitution, "as a punishment for crime whereof the party [is] duly convicted," but, for obvious and easily understood reasons, this allowance is not relied upon by the State of Nevada to compel completely unremunerated labor from Nevada inmates. Neither slavery nor involuntary servitude are actually imposed as a specific element of criminal sentencing in Nevada, and inmates are generally paid for most labor they perform, though, realistically, the nominal "wage" inmates receive offers more value to the State, insomuch as it may, equally nominally, avoid the specter of slave ownership. The current system, as formulated here in Nevada and throughout much of the United States, largely avoids the disapprobation of inmate slavery and the budgetary implications associated with a fair wage by the facile manipulation of language, redefining "employer" and "employee" in such ways as to almost inevitably and unavoidably assure that inmates cannot and will not be entitled to the minimum wage. With respect to the federal Fair Labor Standards Act ("FLSA") and most state statutory schemes, including Nevada statutes, the matter is well settled law, with

inmates only rarely being allowed access to a minimum wage.

The State of Nevada has an opportunity here to strike a different course, and, in Appellant's view of the MWA, it has already done so, pending the Court's affirmation. The MWA, as passed by the legislature and Nevada voters presents newly formulated definitions for "employee" and "employer," applicable only to the consideration of who is eligible to receive a minimum wage in Nevada. Since the Nevada Constitution is the supreme law of the State, controlling over conflicting statutory provisions,[3] prior statutory and regulatory definitions for "employer" and "employee," are inapposite for evaluation under the MWA, as is any caselaw related to interpretation of any such preexisting definitions. It is inarguable that the MWA creates a broad definition of "employer" and "employee," conferring the benefit of a minimum wage on the vast majority of employed individuals with minimal exclusions from the definition of "employee." Inmates in Nevada are not in those exclusions, and they and the State easily satisfy the relevant definitions of "employee" and "employer." A constitutional amendment is not subject to interpretation for intent, standing on its plain language and what it says,[4] and the MWA plainly says inmates are properly employees under the State Constitution.

Respondents argue that the plain language of the MWA is facially

[3] *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 488, 327 P.3d 518, 5201 (2014).
[4] Id. at 490.

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

insufficient for adjudication, asserting the "economic realities" test governs interpretation of the MWA. As a matter of law, this is simply not the case. Adoption of the "economic realities" test in the State of Nevada has historically been incremental and strictly pursuant to the imprimatur of the Nevada Supreme Court, most recently adopted in *Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 130 Nev. 879 (2014) to apply to claims brought under NRS 608.250 (and other minimum wage laws… not constitutional amendments). The Court has at no time, explicitly, held that the "economic realities" test would be applicable to claims brought exclusively under the MWA, so, as a matter of law, the "economic realities" test does not, at least not yet, govern Appellant's claim.

To the extent the Court may be inclined to adopt the "economic realities" test for claims brought under the MWA and, more specifically, to inmates seeking relief thereunder, Appellant urges this would be in error. The Court has opined that it finds the MWA's "employer" and "employee" definitions more tautological than those in statute,[5] but, in doing so, it recognized the broadness of those definitions was intentional and for the purpose of assuring that even more persons in Nevada would be entitled to the minimum wage.[6] In the clear light of this intention, without which the MWA would have been entirely unnecessary (as sufficient minimum

[5] *Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 955, 130 Nev. 879, 884 (2014).
[6] *Id.*

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

wage statutes existed prior to the amendment's enactment), strict reversion to a reliance on the prior and statutorily based "economic realities" test risks rendering the entire MWA even more tautological than any definitions contained therein. In applying the "economic realities" test, the Court would inadvertently supplant the MWA and the concomitant wishes of the state legislature and the State's voters.

In *Terry*, the Court resorted to the "economic realities" test, relying on the general premise that such test has been identified by the United States Supreme Court as both "broad" and "comprehensive."[7] In analyzing a more conventional "employee" versus an "independent contractor"[8] (a more apropos application), as in *Terry*, this may generally be true, but, in the context of inmate employment, the opposite is much more prevalent, such that classifying any inmate as an "employee" is a task best characterized as Herculean or Sisyphean or in some manner likely to require the aid of some ancient deity. While paying lip service to the idea that some circumstances may arise in which an inmate could be classified as an "employee" under the "economic realities" test, caselaw never yields such a broad and comprehensive outcome, primarily because courts narrowly find that an inmate's

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

[7] *See Id.*

[8] Interestingly, given this functional purpose for the test, it is quite telling that no Court has ever found inmates to be "independent contractors," which is arguably the conclusion of the test for those deemed not to be "employees." Under prior caselaw, inmates are, generally, neither employees nor independent contractors, so it beggars belief to assert that this particular test is somehow an accurate means to define the legal status of an employed inmate.

labor belongs not to him/herself, but to the prison in which they are incarcerated. *See generally Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993); *Morgan v. MacDonald*, 41 F.3d 1291 (9th Cir. 1994); and *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992). To assert that an individual's labor belongs entirely to someone else is the very definition of slavery, and this is the status quo which the "economic realities" test, when applied to inmates, seeks to perpetuate indefinitely.

The conventional use of the "economic realities" test is simply entirely inapposite here for the Appellant, and the State's endeavors to avoid the definition of an inmate as an "employee," make a mockery of the State's own statutory use of the word. EMPLOYMENT OF OFFENDERS is the title of the relevant statutory chapter (NRS 209.457 to 481) regarding just that, and EMPLOY-formative words are used therein over sixty times, yet the State asserts that inmates are not employees.[9] It is an irreconcilable linguistic absurdity, but, if the Court should require that further guidance is required to evaluate the employment status of inmates, such that it adopts the "economic realities" test with respect to Appellant's claims, Appellant argues that, as someone incarcerated and controlled by the NDOC and trained, employed, and paid by the NDF, all the elements of the "economic realities" test are satisfied. Appellant engaged in voluntarily employment (such that

[9] To paraphrase "The Princess Bride," the State keeps using that word, but I don't think it means what they think it means. Inconceivable!!

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

his labor reasonably belonged to him, not to the State), and a singular entity controlled all such employment and all aspects thereof, namely, the State of Nevada.

Lastly, Respondents resort to NRS 209.461(8), which provides that the "provisions of [NRS 209] do not create a right on behalf of the offender to employment or to receive... minimum wage for any employment and do not establish a basis for any cause of action against the State... for employment of an offender or for payment of the federal or state minimum wage to an offender," and the District Court has held this to be applicable and not impliedly repealed. Appellant does not find it to be applicable, as the Appellant did not seek relief under NRS 209, so any lack of a cause of action thereunder is irrelevant. Appellant's claim is solely founded in the MWA, and NRS 209 holds no sway. To the extent that the two are in conflict, the MWA must prevail, and NRS 209.461(8) should be stricken.

In sum, the Minimum Wage Amendment stands alone without need for augmentation by inapposite statutory aids, and, in so doing, by not excluding inmates, it, perforce, includes them in the definition of an "employee" with an entitlement to the state minimum wage. Even if found to be germane, the "economic realities" test does not logically or reasonably apply to consideration of inmate employment, nor, in the instant circumstance, would it prevail over the Appellant's claims. Accordingly, Appellant's claims for relief should be granted, predicated on a proper finding that inmates are "employees," as defined in the MWA, laborers

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

worthy of their hire, and payable in accordance with the state minimum wage.

IV. ARGUMENT.

a. The Constitution of Nevada is the supreme law of the State and controls over any conflicting statutory provisions or interpretations thereof; the MWA is the primary source for defining entitlement to minimum wage in Nevada.

"The Nevada Constitution is the supreme law of the state, which control[s] over any conflicting statutory provisions." *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 488, 327 P.3d 518, 520 (2014) (internal citations omitted). The court "will construe statutes, if reasonably possible, so as to be in harmony with the constitution [, but] when a statute is irreconcilably repugnant to a constitutional amendment, the statute is deemed to have been impliedly repealed by the amendment." *Id.* "A constitutional amendment, adopted subsequent to the enactment of the statute… is controlling over the statute that addresses the same issue. **Statutes are construed to accord with constitutions, not vice versa**." *Id.* at 489 (internal citations omitted, emphasis added).

"The goal of constitutional interpretation is to determine the public understanding of a legal text leading up to and in the period after its enactment or ratification. To seek the intent of the provision's drafters or to attempt to aggregate the intentions of Nevada's voters into some abstract general purpose underlying the Amendment, contrary to the intent expressed by the provision's clear textual meaning, is not the proper way to perform constitutional interpretation. **The issue**

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

ought to be not what the legislature, or … the voting public, meant to say, but what it succeeded in saying." *Id.* at 490 (emphasis added).

It is axiomatic that employees (excluding federal employees) within a state are entitled to the greater employment benefit whenever a conflict exists between the FLSA and the state's minimum wage provision. This functional exception to the Supremacy Clause is codified in both federal statutes and regulations, specifically as noted below:

> 29 U.S.C. § 218(a): No provision of [the FLSA] shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act.
>
> 29 CFR § 778.5: Where a higher minimum wage than that set in the Fair Labor Standards Act is applicable to an employee by virtue of such other [state] legislation, the regular rate of the employee, as the term is used in the Fair Labor Standards Act, cannot be lower than such applicable minimum.

Though the citations above compel a largely self-evident conclusion, the net of it all is that the MWA is the unitary wellspring from which flows all employee entitlement to a minimum compensation in the State of Nevada. Subsequent and even prior Nevada statutes may be complementary or adjunctive to the MWA (*e.g.*, NRS 608.250), but, where they are not, they are supplanted and/or superseded, and any prior judicial interpretation thereof would also not be binding. Even informative federal statutes (*e.g.*, the oft-cited FLSA) cannot override the MWA, particularly,

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

as here, where the State of Nevada provides a minimum wage higher than required under the FLSA.[10] Since the state provision exceeds the federal minimum, pursuant to 29 U.S.C. § 218(a) and 29 CFR § 778.5, the MWA controls entirely, to the complete exclusion of the minimum wage provision of the FLSA, and, if the Court so chooses, to the complete exclusion of the FLSA's "economic realities" test, which would be the correct outcome, as detailed more fully below.

As *Thomas* further instructs, the language of the MWA should be interpreted by its clear textual meaning, not in accord with any functionally preceding statutes, nor should any legislative or perceived voter intent be relevant to its understanding. The language of the MWA stands on its own as written, and the plain language thereof controls, subject only to necessary interpretation by, primarily, this Court. Presently, there is no direction by this Court that disallows interpretation of the MWA and its definitions of "employee" and "employer" according to their plain, and understandably broad, language.

b. The plain language of the MWA is the only relevant definition of "employee;" inmates are employees under the MWA; if NRS 209.461(8) is incompatible with the Constitution, the statute must be stricken.

The MWA provides, within the text of the amendment itself to the exclusion of all other definitions for the same words, the relevant definitions for "employee"

[10] Nevada presently pays $8.75, with a higher requirement of $9.75 for employers who do not provide minimal healthcare. The current federal minimum wage is $7.25 per hour.

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

and "employer," wherein an "employee" means "any person who is employed by an employer."[11] An "employer" under the MWA is "any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment." The only exceptions to the "employee" definition under the MWA are "an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days." Inmates are notably not excluded. Though concededly broad, the Court need not look beyond these definitions for guidance.

A "reading of the Minimum Wage Amendment as allowing... additional exceptions to Nevada's constitutional minimum wage disregards the canon of construction '*expressio unius est exclusio alterius*,' the expression of one thing is the exclusion of another.... Following the *expressio unius* canon, the text necessarily implies that all employees not exempted by the Amendment... must be paid the minimum wage set out in the Amendment." *Thomas*, 327 P.3d at 488 (internal citations omitted). In other words, expansiveness may be utilized for additional inclusions, but such expansiveness to exclude other "employees" would be in error.

[11] Appellant is fully aware that the Court has, in *Terry*, found this definition to be more tautological than instructive, and Appellant addresses this more fully in the next section. The Appellant does, however, urge that the definitions here are sufficient to their purposes.

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

The first question to be answered in the instant context is whether or not the State of Nevada is an employer for purposes of the MWA. On its face, and by any conventional understanding, the answer is obvious. The State and each of its Departments (*e.g.*, NDOC) and Divisions (*e.g.*, NDF) collectively employ tens of thousands of individuals (not counting inmates), and, as an employer, the State is subject to payment of the minimum wage. Besides the obvious answer, the more relevant one is that the State and each of its Departments and Divisions are "entit[ies] that may employ individuals or enter into contracts of employment." Equally importantly, the State and each of its Departments and Divisions comprise a single employing entity which satisfies the "employer" definition as to inmates.

Despite the dim view in which many are, unfortunately, held by society at large, there is no doubt that inmates are persons, so the only element lacking analysis under the plain language of the MWA for the inmate "employee" is whether or not inmates are employed by the State. Black's Law Dictionary indicates the term "employ" "is equivalent to hiring, which implies a request and a contract for a compensation and has but this one meaning when used in the ordinary affairs and business of life." Further expansion is found in the definition of the word "hire," which Black's defines as "to stipulate for the labor or services of another." Appellant and similarly situated inmates are entirely voluntary laborers, who exchange their physical labor for remuneration (currently well less than the

minimum wage), so there is little controversy in saying that, under Black's Law Dictionary and the common understanding of the word, the inmates are employed by a demonstrable employer. It follows that they must, therefore, be employees.

NRS 209.461(1)(b) does require, as an aspect of incarceration, certain work or training to be completed by all inmates, stating, in relevant part, that the "Director [of the NDOC] shall: (b) … to the extent practicable, require each offender, except those whose behavior is found by the Director to preclude participation, to spend 40 hours each week in vocational training or employment, unless excused for a medical reason or to attend educational classes." This statute does not, however, read so broadly as to make all inmate labor involuntary or render it penological rather than pecuniary or otherwise generally deprive an inmate of ownership of his or her own labor.[12] As noted, NRS 209.461(1)(b) allows exceptions from labor entirely for those inmates who choose further criminality over productivity, those who only participate in training or education, and those exempted for medical reasons. Not all incarceration includes labor. The work being done by Appellant and similarly situated inmates is entirely voluntary and is distinguishable from other work conducted inside a facility and is even more distinct from vocational training

[12] *See generally Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993), which cites an inmate's lack of ownership of his/her own labor as a basis to eschew the employee appellation.

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

or other education. Appellant volunteers his labor in exchange for pay, and in so doing, he maintains his status as a State employee.

While this analysis would seem to answer the question of employment and the appropriate definition thereof, it may actually be overly analytical, since the State, by its own language (and apparent admission) acknowledges that it employs inmates. As previously referenced, NRS 209.461(8) provides that the "provisions of [NRS 209] do not create a right on behalf of the offender to **employment** or to receive the federal or state minimum wage for any **employment** and do not establish a basis for any cause of action against the State or its officers or employees for **employment** of an offender or for payment of the federal or state minimum wage to an offender" (emphasis added). NRS 209.457 to NRS 209.481 are collectively presented under the subchapter heading "EMPLOYMENT OF OFFENDERS," and EMPLOY formative words are used in that subchapter over sixty times, including such directives for the State to "employ the maximum number of offenders possible" and enter "into any contract with a private employer for the employment of offenders." For the State to employ complete reliance on the word "employ" in statute, then to later attempt to transmogrify the same word to another definition

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

entirely, solely to avoid just compensation for potentially life-threatening labor,[13] is an exercise in unadulterated linguistic jiggery-pokery.

Given that the plain language illustrates that inmates are employees under the MWA, the only remaining question centers on the enumerated exclusions, which are only "an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days." Inmates, prisoners, or offenders by any other name are not listed, and since "the text necessarily implies that all employees not exempted by the Amendment… must be paid the minimum wage set out in the Amendment," inmates are conclusively employees entitled to the minimum wage.

It is beyond doubt that the State actually recognizes that it employs inmates because it seeks to exclude their stated employment, as described above, from the mandatory minimum wage in NRS 209.461(8). Even so, the specific language of NRS 209.461(8) is unavailing in regard to the instant matter, insomuch as that it only excludes a right to a minimum wage or a cause of action **created** by NRS

[13] It is again noted here that Appellant and those similarly situated may be called on to fight wildfire in this and other states, where risk of significant injury, even death, is possible. A side effect of this low rate of pay, as raised in *White v. State*, 454 P.3d 736 (Nev. 2019), is that a severely injured inmate may be compensated for total permanent disability (under NRS 616B) at a rate of pay of only a few dollars per day. This particular possibility was deemed by Justice Stiglich, in the hearing on *White*, to be, in a sense, shocking to the conscience.

209.[14] It does not exclude the possibility of a right to a minimum wage or a cause of action arising pursuant to any other statute or, more importantly, a constitutional amendment. The MWA clearly establishes the right and further establishes the cause of action, stating that "[a]n employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs." With respect to the right and cause of action afforded to an inmate employee by the MWA, NRS 209.461(8) is frankly irrelevant, but, should the Court view it as conflicting with and irreconcilably repugnant to the MWA, the statute should be deemed to be impliedly repealed.

The plain language of the MWA is not just plain, it is quite clear, sufficiently precise, and exceedingly broad. Inmates satisfy all necessary elements of the requisite definitions and are properly understood to be non-excluded employees of the State of Nevada. Relying on this Court's "tautological" reference in *Terry* to

[14] It is also noted that NRS 209.461(8) does not establish a right to employment, generally, and this is not disputed. It is reasonable that the State cannot be compelled to employ inmates to conduct labor; however, once the State does so, the MWA requires that they pay them the minimum wage.

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

assert that the MWA is overly broad and underly instructive, Respondents insist the "economic realities" test must be applied. This assertion is in error.

c. The "economic realities" test does not govern the MWA nor should it.

Respondents have argued the "economic realities" test is already applicable in regard to interpreting the MWA, but this overstates the current the Court's prior rulings. Appellant acknowledges that the Court has recently accorded authority to the "economic realities" test for interpretation of minimum wage laws, specifically claims brought under NRS 608.250, with its attendant definitions of "employee" and "employer" in NRS 608.010 and 011. In regard to those statutory definitions, the Court "adopt[ed] the FLSA's 'economic realities' test for employment in the context of Nevada's minimum wage laws." *Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 958, 130 Nev. 879, 888 (2014). This adoption, in regard only to the noted statute, does not automatically extend to the MWA nor has the Court ever held so, rendering Respondents' reliance thereon presently misplaced.

As previously cited, the Court has expressed, in a sense, a dissatisfaction with the interpretative facilitation provided by the language of the MWA while simultaneously crediting the MWA with an effort to expand the availability of the minimum wage to Nevada employees. *See Id.* at 955. This same dissatisfaction with the definitional language of NRS 608.010 and 011 prompted the Court to adopt the "economic realities" test for ruling on NRS 608, supported by its understanding that

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

"the Legislature has not clearly signaled its intent that Nevada's minimum wage scheme should deviate from the federally set course." *Id.* at 958. This may well be true with respect to the statute, but it is inherently not true with respect to the MWA. As the Court has noted in both *Terry* and *Thomas v. Yellow Cab Corp.*, the MWA was drafted and enacted to expand the scope of access to the minimum wage in Nevada. If the MWA was, therefore, created to deviate from the prior state course, it was also, by extension, created to deviate from the federally set course. Accordingly, the "economic realities" test is neither relevant nor binding. Seeking to force the MWA into the scope of the "economic realities" test based on prior caselaw and application to "narrower" statutes can only result in an unduly narrower interpretation of the MWA. This is contrary to both the language of the MWA and the understood "state voters' wish[es]," *Id.* at 955, and risks mooting the MWA and effecting a return to the prior statutory scheme.

d. Even if applied generally to the MWA, the "economic realities" is inapposite for evaluating inmate employment, as it is designed to contemplate distinctions between "employees" and "independent contractors."

When the Court adopted the "economic realities" test for NRS 608.250 in *Terry*, it did so in the context of determining whether or not dancers at Sapphire Gentlemen's Club were employees or independent contractors. *Id.* at 958, referencing "Deborah T. Landis, Annotation, *Determination of "**Independent Contractor**" and "**Employee**" Status for Purposes of § 3(e)(1) of the Fair Labor*

Standards Act (29 U.S.C.S. § 203(e)(1)), 51 A.L.R. Fed. 702 § 2 (1981) (emphasis added). The Court also predicated its adoption of the test on the belief that the "economic realities" test is "broad" and "comprehensive." *Id.* at 956. The latter is likely true in the noted context, but none of the above is true as relates to inmates.

Appellant is not aware of any arguments asserting reliance on the "economic realities" test to assert inmates are "independent contractors." Reasonably, there are none, because the premise is facially absurd, yet multitudes of courts have used a balancing test to distinguish between an inmate "employee" and an inmate… well, nothing. In all the analyses, there is simply nothing on the other side of the balance. An inmate is adjudicated on a balance between an employee and a null set, though Appellant certainly finds other court's slavish adherence to the "economic realities" test to be telling as to what they may perceive on the opposite side of the fulcrum. If the purpose of the "economic realities" test is not to distinguish between "employee" and "independent contractor," the test is misapplied to inmates.

In *Terry*, the Court relied heavily on the idea that the "economic realities" test favors a broad and comprehensive definition of "employee," which is entirely reasonable given the federal government's and the State's desire to assure minimum wage standards to the largest reasonable populace. In discussing this aspect of the test, the Court cited to numerous cases… not one of which applied its "broad" interpretation to inmates. The reality is that such "broadness" is not evident in any

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

case where an inmate's employment is on the scales with slavery on the opposite side. As cited by Respondents in their initial Motion to Dismiss, each of *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993); *Morgan v. MacDonald*, 41 F.3d 1291 (9th Cir. 1994); and *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992) find unequivocally, under the "economic realities" test, that inmates are not employees. And, of course, they are also not independent contractors. The "economic realities" test is simply not designed to contemplate an inmate's employment, and while reliance thereon may imply a just and fair legal consideration, it is inherently (and likely by design) structured to doom an inmate's aspirations… except as in Appellant's circumstance.

e. Even though inapposite to inmate employment, Appellant still qualifies as an "employee" under the economic realities test.

In Nevada, as adopted in *Terry* for statutory analysis, the "economic realities" test incorporates the following elements: 1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; and 6) whether the service rendered is an integral part of the alleged employer's business. *Terry v. Sapphire Gentlemen's Club*, 336 P.3d at 958.

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

Further to consideration of this same "economic realities" test, as noted in the prior section, Respondents rely on three particular cases related to inmate employment, each of which is distinguishable. By distinction from those cases, and on a point-by-point analysis of the test, Appellant, based on the particular circumstances of his employment by the State of Nevada (via the NDOC and the NDF, in conjunction and under the collective control of the State's executive branch), regardless of its suitability, satisfies each element of the "economic realities," such that he is properly classified as an employee of the State of Nevada.

Without diving into excessive detail with respect to the cases on which Respondents first relied for their Motion to Dismiss, Appellant notes that each is distinguishable as follows:

- In *Morgan v. MacDonald*, 41 F.3d 1291 (9th Cir. 1994), the inmate in question was employed pursuant to a contract with the White Pine County School Board, a distinct and separate entity from the NDOC prison operated by the State of Nevada. The court in *Morgan* held that, *inter alia*, the inmate had not contracted for employment with the White Pine County School Board and was, therefore, not their employee. Since the prison had contracted with the School Board, the court, without any persuasive reasoning,[15] ruled the inmate's labor belonged to the prison.

[15] Analogize to a contract for services between two independent businesses, and no one would reasonably conclude that one businesses employees labor belonged so incontrovertibly to the business that such business was not obliged to pay the contracted or appropriate wage. Ascribing

With Appellant, there is no distinct third-party contractor. Despite its self-selected attempts to delineate, the "contract" for employment here is by and between the State of Nevada (NDOC) on the one hand and the State of Nevada (NDF) on the other. The state exercises complete control over Appellant's employment.

- In *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993), inmates were not deemed employees under the FLSA as the court found they were statutorily required to work as a term of their confinement. Again, the court concluded that the inmate's labor belongs to the institution, since, under NRS 209.461, all inmates are required to work or receive training for forty hours each week. Moreover, the court noted that the primary policy concern of the FLSA – ensuring a minimum standard of living for all workers – was simply inapplicable to prisoners for whom clothing, shelter, and food are provided by the prison. *Hale* is not only just wrongly decided, it is distinguishable from the instant matter. NRS 209.461(1)(b), *supra*, does ostensibly require, as an aspect of incarceration, certain work to be completed by all inmates, excluding those who spend time in vocational training, "those whose behavior is found by the Director to preclude participation," and those who are "excused for a medical reason or to attend educational classes." Clearly, not all inmates work as a result of incarceration, since many may be exempted for

---

the inmate's labor to the prison solely reflects the desired outcome, not a reasoned or explicated analysis.

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

behavioral, educational, or medical reasons. More notably, in Appellant's case, labor for the NDF is never required of all or any inmates, and the inmates are particularly selected, based on particular criteria, for participation in the conservation camps. Work by an inmate in a conservation camp, like TLVCC, reflects aspiration, not obligation, so *Hale*'s analysis as to penologically imposed work cannot govern here. Further, the court's assertion in *Hale* regarding the purpose of the FLSA is inapplicable for obvious reasons, as is the court's assertion that anyone, inmate or otherwise, is not entitled to receive a minimum wage simply because they might have some other source for clothing, shelter, or food. The latter point fails legally and logically.

- In *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992), the court therein, just like in *Hale*, unreasonably concludes that the mere premise of the FLSA (to provide a minimum standard of living)[16] precludes extension of the minimum wage to an inmate. This premise is again not reasonably accurate, but, even if true, the intended FLSA purpose does not inform interpretation of the MWA and is entirely inapplicable in that regard. *Vanskike* further seems to hold that a prison's control of the inmate precludes its definition of "employment," but that is fundamentally not so, just as a general consideration, and more particularly with respect to Appellant

[16] Consider, by analogy, an otherwise wealthy man who chooses to work at an entry level job. The court's theory would indicate that such a person is not entitled to receive the minimum wage because he has food, clothing, and housing. This is an absurdly untenable argument.

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

and similarly positioned inmates, who are, as noted, not compelled to labor under the NDF, but do so by applying for and meeting the criteria for such an employment opportunity. Interestingly, the court in *Vanskike* acknowledged that the economic reality test may not be the best measure for prison related labor because the "factors fail to capture the true nature of the relationship," *Id.* at 809, yet, as many courts are wont to do, they still held against the inmate's interest. *Vanskike* does not fit Appellant's circumstance and does not control.

Despite all the arguments above, which decry arrival at this particular destination, should the Court deem that the "economic realities" test in *Terry* does, apply to Appellant, the result still favors the Appellant's claim, as explicated below.

First, with respect to the degree of the alleged employer's right to control the manner in which work is to be performed, there is no question that the State, through the NDF and NDOC, singularly controls the work inmates perform. Work duties, locations, and assignments are selected by the NDF, pursuant to its statutory obligations or pursuant to a contract with a third party. Inmate employment is subject to selection criteria established by the Director of the NDOC, and many inmates are not eligible for employment in this fashion. Inmates employed thusly volunteer for this work and are "hired," after which the State will directs all output of their labor. This factor favors Appellant.

The second factor is the alleged employee's opportunity for profit or loss

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

depending upon his managerial skill. Reasonably here, the only managerial skill in question relates to the inmates' ability to functionally manage him/herself and continuing employment. By analogy, "managerial skill" cannot speak more broadly than that which would be burdened upon a basic employee in other minimum wage employment. In addressing this element, Respondents argued in their Reply in Support that, under NRS 209.246 wages can be deducted so as to functionally zero an inmate's net income, concluding that this indicates no profit motive for an inmate's chosen labor. This is fundamentally untrue and does not contemplate NRS 209.463(1), which speaks to deductions that may be made from an inmate's wages when in excess of the federal minimum wage. Specific deductions, as may be prioritized by the Director of the NDOC under NRS 209.463, indicate multiple profit motives for an employed inmate, to wit: (a) An amount the Director deems reasonable for deposit with the State Treasurer for credit to the Fund for the Compensation of Victims of Crime; (b) An amount the Director considers reasonable to meet an existing obligation of the offender for the support of his or her family; and (d) An amount determined by the Director for deposit in the individual account of the offender in the Prisoners' Personal Property Fund. Each and every one of these deductions – compensation of a victim, support of family, and direct financial enrichment – redounds to the personal interest and profit motive of an inmate, and, again, this factor favors the Appellant.

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

The third factor, accounting for the alleged employee's investment in equipment or materials required for his task or his employment of helpers speaks only to an inmate being an employee. Any and all materials relevant to inmate employment are provided by the State, and, of course, an inmate cannot hire or employ helpers. As discussed above, this particular element speaks well to the inapplicability of the "economic realities" test to an inmate, but, if it is ultimately determined to be governing, this element too would weigh in favor of Appellant.

The fourth element in the "economic realities" test considers whether services rendered require a special skill, which is again a bit unusual in the context of minimum wage employment, the vast majority of which requires minimal training, education, or experience. Even so, there is no argument, in the "real world," that minimum wage employees are not actually employees, nor should any such argument be foisted upon inmates as a means to consider them anything other than an employee. Further, in the current circumstance, Appellant actually received particular training for his job, in the use of a chainsaw, for which training he also received an increase (one more dollar per day!) in wage. On its face, the element is not sufficient to otherwise define basic employment, and the Appellant satisfies this aspect, even without due consideration of his training and special skills.

Fifthly, the courts consider the permanence of the working relationship. This element is seemingly neutral, as there is no doubt that most inmates will not retain

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

any NDF job indefinitely. Most qualified for such labor are generally closer to parole eligibility or sentence expiration; however, in the context of minimum wage employment, while this factor may not overwhelmingly benefit Appellant, it does not detract. Minimum wage employment, by definition, is not designed for permanence, nor is it be subject to long-term employment contracts.

Last in the analysis of the "economic realities" test is whether the service rendered is an integral part of the alleged employer's business. Interestingly and perhaps somewhat unexpectedly, this factor also weighs in favor of Appellant. Much is made in the cases cited above in regard to inmate labor simply being part of their incarceration, implying that inmate employment is penological, related to vocational improvement, or a means to avoid idle hands. In some contexts, that is possibly true, but it is quite untrue with respect to the work performed by Appellant and conservation camp inmates. The NDF has a statutory mandate to maintain fire prevention efforts as well as vegetation clearing efforts. The work is generally effected by inmates in coordination with the NDOC, but even absent that labor pool, the mandate would abide, and the NDF, reasonably, would be required to seek employees in the labor marketplace. The inmate labor employed is integral and crucial to the State's "business." Additionally, pursuant to contracts with other government agencies, municipalities, and private enterprise, the State (the NDF and the NDOC working jointly, as hands attached to the same body and controlled by

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

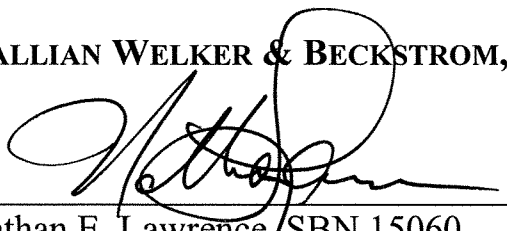
the same mind) relies on inmate labor to perform such contracts and generate income to the State. The inmates are an integral part of fulfilling the State's business. This factor substantially redounds to Appellant's benefit. On the strength of the above analysis, as to each element of the "economic realities" test, the balance favors Appellant, who is properly classified as an employee of the State of Nevada.

V. CONCLUSION.

For the reasons set forth above, Plaintiff and Appellant David A. Gonzalez respectfully requests that this Court find in his favor, reverse the decision of the District Court, and remand the matter for calculation and award of damages for unpaid wages for the period of his employment.

DATED this 30th day of August 2021.

GALLIAN WELKER & BECKSTROM, L.C.



Nathan E. Lawrence, SBN 15060
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Telephone: (702) 892-3500
nlawrence@vegascase.com
Attorneys for Appellant David A. Gonzalez

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

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 typestyle requirements of NRAP 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 font, Times New Roman type face.

2. I further certify that this brief complies with the page- or type-volume limitations in NRAP 32(a)(7) because, exclusive of those sections excluded under NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points, and contains approximately 7,500 words within 30 pages.

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 that every assertion in the brief regarding matters in the record be supported by reference to the page and volume number, if any, of the Appendix.

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

4. 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 30th day of August 2021.

GALLIAN WELKER & BECKSTROM, L.C.

Nathan E. Lawrence, SBN 15060
Travis N. Barrick, SBN 9257
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Telephone: (702) 892-3500
nlawrence@vegascase.com
Attorneys for Appellant David A. Gonzalez

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 30th day of August 2021, I served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** as filed, by way of the Supreme Court's electronic filing system to the following:

AARON D. FORD, Attorney General
Mr. Anthony J. Walsh, Esq.
Deputy Attorney General, Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
Tel: 775-684-1213
Fax: 775-684-1108
Attorney for Respondents

DATED this 30th day of August 2021.

GALLIAN WELKER & BECKSTROM, L.C.

Nathan E. Lawrence, SBN 15060
Travis N. Barrick, SBN 9257
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Telephone: (702) 892-3500
nlawrence@vegascase.com
Attorneys for Appellant David A. Gonzalez

GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Phone 702-892-3500