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 APPENDIX OF RECORD ON APPEAL

Respectfully Submitted By:

/s/ Nathan E. Lawrence

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List of exhibits

	Description	Pages
1	9/2/20 - Ps Complaint	0001-0010
2	10/23/20 - D's Motion to Dismiss	0011-0026
3	11/5/20 - Ps Opposition to Motion to Dismiss	0027-0042
4	11/12/20 - Ds Reply in Support of M2D	0043-0053
5	1/2/21 - Transcript of Hearing	0054-0077
6	2/24/21 - Order Dismissing Case	0078-0084

Exhibit Appellant 1

9/2/20 - Ps Complaint

COMP
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CASE NO: A-20-820596-C
Department 14

DISTRICT COURT
CLARK COUNTY, NEVADA

DAVID A. GONZALEZ, an individual,

Plaintiff,

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,

Defendants

Case No.:

Dept. No.:

COMPLAINT

EXEMPT FROM ARBITRATION pursuant to NAR 3(A) and NAR 5:

- Action seeking judicial review of administrative decisions;
- Action for declaratory relief;
- Action presenting significant issues of public policy.

Plaintiff DAVID A. GONZALEZ, by and through his attorneys of the law firm of GALLIAN WELKER & BECKSTROM, L.C, and in support of his claims against the Defendants, hereby avers and alleges as follows:

JURISDICTION AND VENUE

1. At all times relevant hereto, Plaintiff DAVID A. GONZALEZ ("Mr. Gonzalez" or "Plaintiff") is and was an individual domiciled in Clark County, Nevada; specifically, from December 9, 2018, to present, Mr. Gonzalez is and was an inmate in the Nevada Department of Corrections ("NDOC"), housed at Three Lakes Valley Conservation Camp ("TLVCC"), P.O. Box 208, Indian Springs, Nevada 89070.

2. Defendant NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES ("NDCNR") is and was at all times relevant hereto a legal entity and, pursuant to NRS 232.010 to 232.162, inclusive, a duly authorized Department of the State of Nevada.

3. Defendant NEVADA DIVISION OF FORESTRY ("NDF") is and was at all times relevant hereto, a legal entity and, pursuant to NRS 232.090, a duly authorized Division of the NDCNR.

4. Defendant STEPHEN F. SISOLAK ("Governor Sisolak") is the Governor of the State of Nevada and, pursuant to NRS 232.050(1), is responsible for appointment and oversight of the Director of the NDCNR.

5. Defendant BRADLEY CROWELL ("Director Crowell") is the Director of the NDCNR and, pursuant to NRS 232.120(1), is responsible for appointment and oversight of the State Forester Firewarden of the NDF.

6. Defendant KACEY KC ("State Forester Firewarden KC") is the State Forester Firewarden of the NDF, and, pursuant to NRS 232.120(2), exercises such powers and performs such duties as are conferred upon her pursuant to NRS 472, 528 and other applicable provisions of the NRS and the Nevada Administrative Code ("NAC").

7. The acts or omissions of the Defendants giving rise to Plaintiff's injuries and claims occurred in Clark County, Nevada.

8. Jurisdiction over Plaintiff's claims in this Court is proper and is predicated upon Nev. Const. Art. 6, Sec. 6, and Nev. Const. Art. 15, Sec. 16(B).

9. Venue over Plaintiff's claims in this Court is proper and is predicated upon Nev. Rev. Stat. § 13.020.

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10. The amount in controversy exceeds $15,000.00.

GENERAL FACTUAL ALLEGATIONS

11. Plaintiff reasserts and realleges allegations 1 through 10 of this Complaint and incorporates them herein as if set forth in full.

12. From December 18, 2018, to present, Mr. Gonzalez was and is a member of a TLVCC "project crew" and has been employed by the NDF "to perform work related to firefighting... and other work projects" in accordance with NRS 209.457(2)(a). Specifically, Mr. Gonzalez, is employed primarily in the performance of project work for vegetation management and beautification of highways, pursuant, upon information and belief, to contracts for such services between the NDF and Lake Mead National Recreational Area, Nevada Department of Transportation, various water districts, and such other contracts as authorized under NRS 209.457(3)(a).

13. As a project crew member regularly employed to perform such work and having received additional training for the utilization of a chainsaw, Mr. Gonzalez is paid by the NDF at a rate of approximately $3 per workday when engaged on project work. Prior to the supplemental chainsaw training, Mr. Gonzalez (as are most other inmates) was paid $2 per workday, which amount was an increase from his initial ninety (90) days of employment at $1 per workday. As circumstances may otherwise warrant, for emergency incident response assignments (including firefighting), Mr. Gonzalez may be paid $1 per hour, from the time of dispatch until returned to TLVCC.

14. Although Mr. Gonzalez is an inmate at TLVCC, under the control and custodial authority of the NDOC, Mr. Gonzalez' salary for the work performed, in accord with the language of NRS 209.457, is 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.[1]

[1] *See generally* NRS 209.231(1). Any money received from the operation of any conservation camp established under this chapter or from the assignment of any crew of a conservation camp to the extent that the money is not used for salaries, overhead or operating expenses of any camp or crew must be placed in the Division of Forestry Account.

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15. Pursuant to NRS 209.231(3), the "State Forester Firewarden shall determine the amount of wages that must be paid to offenders who participate in conservation camps as provided in NRS 472.040."

16. Again, pursuant to NRS 472.040(1)(h), the "State Forester Firewarden shall… [d]etermine the amount of wages that must be paid to offenders who participate in conservation camps and who perform work relating to fire fighting and other work projects of conservation camps."

17. Pursuant to NRS 472.040(3), the "State Forester Firewarden, in carrying out the [determination of the amount of wages that must be paid to offenders who participate in conservation camps], is subject to administrative supervision by the Director of the State Department of Conservation and Natural Resources," said Director, under NRS 232.050(1), being "responsible to the Governor and… in the unclassified service of the State [of Nevada]."

18. Article 15, Section 16 of the Constitution of the State of Nevada provides that "[e]ach employer shall pay a wage to each employee of not less than the hourly rates set forth in this section," such hourly rates being no less than $8.00 per hour, effective as of July 1, 2020.[2] As used in Art. 15, Sec. 16(C), an "employee" means "any person who is employed by an employer… 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." For purposes of this Section, these are the only enumerated exclusions from the definition of "employee," with "inmate," "offender," or any synonymous variant notably not being excluded. An "employer" under this Section 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."

19. As referenced and described above, NDF is an entity which employs and pays wages to inmates for work relating to fire fighting and other conservation camp work projects. Additionally, the NDF enters into contracts of employment with state agencies and other third

[2] *See* State of Nevada Minimum Wage 2020 Annual Bulleting, posted April 1, 2020, by the State of Nevada Department of Business and Industry, Office of the Labor Commissioner. The "Lower Tier" minimum wage, applicable to employers providing or making available qualifying health benefits, is $8.00; the "Higher Tier" is $9.00 per hour. Prior to July 1, 2020, the minimally allowable "Lower Tier" wage is $7.25 per hour.

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parties for utilization of the labor of such inmates in their employ, by dint of which contracts NDF receives remuneration and profit.

20. For purposes of and in accordance with Art. 15., Sec. 16 of the Constitution of the State of Nevada, the NDF is an employer, and Mr. Gonzalez is an NDF employee, not subject to any definitional exclusion. Accordingly, Mr. Gonzalez is legally and constitutionally entitled to receive a wage not less than the applicable hourly wage, to wit, $8.00 per hour.

21. Mr. Gonzalez is presently paid, generally, $3 per workday, which is significantly less than the applicable minimum wage, and, therefore, such a rate of pay to him and similarly situated inmates constitutes a violation of Art. 15, Sec. 16 of the Constitution of the State of Nevada.

22. In an effort to remedy the injury to himself, on April 29, 2020, Mr. Gonzalez submitted an informal grievance to the NDOC which was denied and returned to Mr. Gonzalez on June 10, 2020. The basis for the denial was that Mr. Gonzalez' informal grievance was improper and non-grievable with the NDOC for lack of standing, since the "NDF is not an NDOC entity." Mr. Gonzalez was advised by NDOC personnel that he "must address [his] issue directly with NDF."

23. 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 amendment of the regulation whereby and under which the State Forester Firewarden has determined a wage for participants in conservation camps which is not in compliance with Art. 15, Sec. 16 of the Constitution of the State of Nevada, or, in the alternative, a declaratory order and/or advisory opinion from the State Forester Firewarden... holding that such regulation is superseded by the Constitutionally mandated minimum wage and, therefore, no longer applicable to Mr. Gonzalez."

24. On August 6, 2020, State Forester Firewarden KC denied Mr. Gonzalez' petition, concluding that the "State Forester Firewarden is... free to set any wage for offenders participating in conservation camp programs." This conclusion was predicated on the NDF's interpretation of NRS 209.461(8), which narrowly states that "[t]he 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 cause of action against the State or its

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officers or employees for employment of an offender or for payment of the federal or state minimum wage to an offender," as well as on a federal district court ruling which held that "neither Nevada statutory law, nor prison administrative regulations create a protected liberty or property interest [in prison employment]." *Collins v. Palczewski*, 841 F. Supp. 333, 339 (D. Nev. 1993).

25. More significantly, State Forester Firewarden KC confirmed that the "State Forester Firewarden has no authority to declare any provisions … unconstitutional or amend any such provisions that deny offenders the right to minimum wage."

26. As fully detailed above, the relevant chain of authority leads from NDF (State Forester Firewarden KC) to NDCNR (Director Crowell) to the State of Nevada (Governor Sisolak), each entity and individual having given their imprimatur to the denial of Mr. Gonzalez' constitutionally guaranteed right and wage.

27. Predicated on the above denial and the bases therefor, Mr. Gonzalez maintains that his rights and remedies pursuant to Article 15, Section 16 of the Constitution of the State of Nevada have neither been addressed nor resolved, and, accordingly, brings the instant complaint and asserts causes of action, as follows.

FIRST CAUSE OF ACTION

Substantive and Procedural Due Process Violation

28. Plaintiff reasserts and realleges allegations 1 through 27 of this Complaint and incorporates them herein as if set forth in full.

29. Article 1, Section 8, Subsection 2 of the Constitution of the State of Nevada provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law."

30. Article 15, Section 16 of the Constitution of the State of Nevada provides that every covered employee in the State is entitled to receipt of a minimum hourly wage, pursuant to which the right to receive such minimum wage and the monetary value thereof are properly established as individual property interests.

31. Pursuant to the applicable and relevant definitions of Article 15, Section 16 of the Constitution of the State of Nevada, Mr. Gonzalez is a covered, non-excluded employee of the

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NDF who possesses the personal right to compensation for his employment at the applicable minimum wage.

32. The actions of the Defendants, individually and concertedly, have deprived and continue to deprive Mr. Gonzalez of both his right to receive the minimum wage and the actual monetary value thereof.

33. As illustrated in State Forester Firewarden KC's denial of Mr. Gonzalez' petition, Mr. Gonzalez has no meaningful posture or procedure, absent intervention by this Court, for challenging the deprivation of his property and property right.

34. The actions of the Defendants, individually and concertedly, have deprived and continue to deprive Mr. Gonzalez of his constitutionally afforded rights, for which Mr. Gonzalez has suffered and continues to suffer economic injury, namely lost wages and attorneys' fees and costs, incurred and accruing.

SECOND CAUSE OF ACTION
Equal Protection Violation

35. Plaintiff reasserts and realleges allegations 1 through 34 of this Complaint and incorporates them herein as if set forth in full.

36. Article 15, Section 16 of the Constitution of the State of Nevada provides that every covered employee in the State is entitled to receipt of a minimum hourly wage, the enforcement of which provision is generally effected and enforced equally for all covered employees by and through the authority of the State of Nevada.

37. Pursuant to the applicable and relevant definitions of Article 15, Section 16 of the Constitution of the State of Nevada, Mr. Gonzalez is a covered, non-excluded employee of the NDF who is entitled to receive minimum wage.

38. As the covered employer or the agents thereof, the Defendants do not confer payment of the minimum wage to Mr. Gonzalez as is guaranteed to all other individuals directly employed by or in the State of Nevada.

39. Further, in contrast to the general enforcement of the minimum wage constitutional amendment, as is normally effected by the State of Nevada, the Defendants, each being an agent

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of the State of Nevada, not only do not enforce the minimum wage requirement with respect to Mr. Gonzalez, they are, individually and concertedly, actually denying such enforcement.

40. The actions of the Defendants, individually and concertedly, constitute unequal and disparate treatment of Mr. Gonzalez with respect to both payment of the minimum wage and the enforcement of the constitutional amendment assuring the same, as the result of which, Mr. Gonzalez has suffered and continues to suffer economic injury, namely lost wages and attorneys' fees and costs, incurred and accruing.

THIRD CAUSE OF ACTION
Declaratory Relief

41. Plaintiff reasserts and realleges allegations 1 through 40 of this Complaint and incorporates them herein as if set forth in full.

42. NRS 30.030 provides that "Courts of record … shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed."

43. NRS 30.040 allows that "any person… whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

44. Mr. Gonzalez' rights here, as previously detailed, are affected by relevant statutes and the Defendants' interpretation and application thereof.

45. Accordingly, Mr. Gonzalez is entitled to, and hereby requests, a judgment declaring that Article 15, Section 16 of the Constitution of the State of Nevada is applicable to Mr. Gonzalez and similarly situated inmates, such that he is entitled to receive payment for his employment at the applicable wage.

46. Further, Mr. Gonzalez hereby requests, a judgment declaring, to the extent that it is deemed to be controlling and relevant,[3] NRS 209.461(8) is unconstitutional in light of Article 15, Section 16 of the Constitution of the State of Nevada.

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[3] Mr. Gonzalez maintains that NRS 209.461(8) is not actually relevant, and its statement that it and the applicable chapter do not create a right or cause of action does not preclude the Constitution of the State of Nevada from doing so, and it is under the Constitution that Mr. Gonzalez' right and cause of action properly arise.

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FOURTH CAUSE OF ACTION
Injunctive Relief

47. Plaintiff reasserts and realleges allegations 1 through 46 of this Complaint and incorporates them herein as if set forth in full.

48. As detailed above, it is evident that the actions of the Defendants have caused and continue to cause injury to Mr. Gonzalez.

49. With respect to Article 15, Section 16 of the Constitution of the State of Nevada, the definitions of "employee," "employer," the requirements of each under the Section, and the applicability to the instant circumstance, is sufficiently clear to illustrate that Mr. Gonzalez is likely to succeed at a trial on the merits.

50. Public policy and public interest speak in favor of the relief requested by Mr. Gonzalez insomuch as granting the relief will fulfill the purpose of Article 15, Section 16 of the Constitution of the State of Nevada as drafted by the State Legislature and twice approved by popular vote of the entire citizenry. Additionally, ancillary effects of granting the relief potentially redound to lower rates of recidivism by inmates, increased availability of funds for restitutions to victims, and proper financial remuneration and workers' compensation benefits for active participants in the dangerous process of firefighting and wildfire deterrence.

51. Accordingly, permanent injunctive relief to effect compliance with the Constitution of the State of Nevada is warranted and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against the Defendants and relief as follows:

A. As to the first and second causes of action, for the economic damages that Mr. Gonzalez has suffered, in amounts to be proven at trial;

B. As to the third cause of action, a declaratory judgment finding that Article 15, Section 16 of the Constitution of the State of Nevada is applicable to Mr. Gonzalez and similarly situated inmates, such that he is (and they are) entitled to

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receive payment for employment at the then-current minimum wage;

C. As to the third cause of action, as necessary, a declaratory judgment stating NRS 209.461(8) is unconstitutional in light of Article 15, Section 16 of the Constitution of the State of Nevada;

D. Permanent injunctive relief, as the Court deems appropriate, to effect compliance with Article 15, Section 16 of the Constitution of the State of Nevada;

E. For punitive damages as the Court deems appropriate;

F. For pre-judgment interest from the date of Plaintiff's injuries and for post-judgment interest at the legal rate on the damages assessed by verdict until paid;

G. For Mr. Gonzalez' attorneys' fees and costs incurred and accruing pursuant to Article 15, Section 16(B) of the Constitution of the State of Nevada; and

H. For such other and further relief as this Court deems just under the circumstances.

DATED this 2nd day of September 2020.

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Exhibit Appellant 2

10/23/20 - D's Motion to Dismiss

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DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID A. GONZALEZ, an individual, Plaintiff, vs. 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, Defendants.	Case No.: A-20-820596-C Dept. No.: 14 Hearing Not Requested

MOTION TO DISMISS COMPLAINT

COME NOW, Defendants 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, by and through their counsel, Anthony J. Walsh, Esq. of the Nevada Attorney General's office, and move this Court for an order dismissing Plaintiff's Complaint,

pursuant to the provisions of NRCP 12(b)(5) for failure to state a claim upon which relief may be granted.

MEMORADUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

1. At all times relevant hereto, Plaintiff David A. Gonzalez ("Mr. Gonzalez" or "Plaintiff") is an individual domiciled in Clark County, Nevada. From December 9, 2018, to present, Mr. Gonzalez is and was an inmate in the Nevada Department of Corrections ("NDOC"), housed at Three Lakes Valley Conservation Camp ("TLVCC"), P.O. Box 208, Indian Springs, Nevada 89070.

2. Defendant Nevada Department of Conservation and Natural Resources ("NDCNR") is and was at all times relevant hereto a political subdivision of the State of Nevada and, pursuant to NRS 232.010 to 232.162, inclusive, a duly authorized Department of the State of Nevada.[1]

3. Defendant Nevada Division of Forestry ("NDF") is and was at all times relevant hereto a political subdivision of the State of Nevada and, pursuant to NRS 232.090, inclusive, a duly authorized Division of NDCNR.

4. Defendant Stephen F. Sisolak ("Governor Sisolak") is the Governor of the State of Nevada and, pursuant to NRS 232.050(1), is responsible for appointment and oversight of the director of NDCNR.

5. Defendant Bradley Crowell ("Director Crowell") is the Director of the NDCNR and, pursuant to NRS 232.120(1), is responsible for the appointment and oversight of the State Forester Firewarden of the NDF.

6. Defendant Kacey KC ("State Forester Firewarden") is the State Forester Firewarden of the NDF and, pursuant to NRS 232.120(2), exercises such powers and

[1] Pursuant to NRS 41.031(2), "an action may be brought under this section against the State of Nevada or any political subdivision of the State. In any action against the State of Nevada, the action must be brought in the name of the State of Nevada on relation of the particular department, commission, board or other agency of the State whose actions are the basis for the suit."

performs such duties as are conferred upon her pursuant to NRS 472, 527,528 and other applicable provisions of the NRS and Nevada Administrative Code ("NAC").

7. From December 18, 2018, to September 1, 2020, Mr. Gonzalez was a member of the TLVCC "project crew" and has been contracted by NDF " to perform work relating to firefighting, forestry conservation programs, public safety and other work projects, including, without limitation, day labor projects, emergency response and work projects that promote conservation of natural resources and human resources" in accordance with NRS 209.457(2)(a). Specifically, Mr. Gonzalez has been contracted to perform vegetation management and beautification of highways, pursuant to contracts between NDF and Lake Mead National Recreation Area, Nevada Department of Transportation, various water districts, and such other contracts as authorized under NRS 209.457(3)(a).Pursuant to NRS 209.231(3), the "State Forester Firewarden shall determine the amount of wages that must be paid to offenders who participate in conservation camps as provided in NRS 472.040."

8. Pursuant to NRS 472.040(1)(h), the State Forester Firewarden shall "[d]etermine the amount of wages that must be paid to offenders who participate in conservation camps and who perform work relating to fire fighting and other work projects of conservation camps.

9. Pursuant to NRS 472.040(3), "The State Forester Firewarden, in carrying out the powers and duties granted in this section, is subject to administrative supervision by the Director of the State Department of Conservation and Natural Resources."

10. Pursuant to NRS 209.231(3), the "State Forester Firewarden shall determine the amount of wages that must be paid to offenders who participate in conservation camps as provided in NRS 472.040."

11. Pursuant to NRS 209.461(8), "[t]he provisions of this chapter 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.

12. The Nevada State Constitution, Article 15, Section 16(A) provides, in pertinent part, "[e]ach employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits."

13. The Nevada State Constitution, Article 15, Section 16(C) provides, in pertinent part, "'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, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment."

STANDARD FOR DISMISSAL

When a court considers a motion to dismiss under NRCP 12(b)(5), all alleged facts in the complaint are presumed true and all inferences are drawn in favor of the complaint. *Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008). Thus, dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672.

LEGAL ARGUMENTS

I. INTRODUCTION

The complaint, filed on September 2, 2020, and served upon Defendants on September 8, 2020, alleges that Mr. Gonzalez, a current inmate within the Nevada Department of Corrections, performed vegetation management work for the NDF pursuant to NRS 209.457. Plaintiff's complaint alleges that Mr. Gonzalez is entitled to minimum wage benefits, pursuant to Article 15, Section 16 of the Nevada State Constitution ("Minimum Wage Act" or "MWA"). The complaint further alleges that Section 209.461(8) of the Nevada Revised Statutes ("NRS") is unconstitutional because it

prohibits any cause of action for minimum wage compensation regarding Nevada prison inmates.

The initial question before this Court is whether Nevada inmates assigned to work for the NDF are employees for purposes of the Minimum Wage Act. As such, Plaintiff's case may properly be dismissed under NRS 12(b)(5) if Plaintiff alleges no set of facts which, if true, entitle Plaintiff to relief.

Here, Plaintiff cannot establish any set of facts entitling him to relief because inmates have never been considered by any Nevada court to meet the definition of "employee" for minimum wage purposes. This position is supported by Nevada case law, Federal case law under the Fair Labor Standards Act and several other states. Because Mr. Gonzalez is not an employee of NDF or any of the named Defendants, his constitutional claims, declaratory relief and injunctive relief claims must fail. Further, because inmates are not state or private employees, NRS 209.461(8) is constitutional.

II. THERE IS NO EMPLOYMENT RELATIONSHIP BETWEEN PLAINTIFF AND ANY NAMED DEFENDANT

There is no employment relationship between any of the parties represented in this case. Subpart A of the above cited Minimum Wage Act provides that "[e]ach employer shall pay a wage to each employee of not less than the hourly rate set forth in this section." Subpart C defines "employee" as "any person who is employed by an employer as defined herein" subject to several limitations which do not apply to this case. Subpart C defines "employer" as "any individual, proprietorship, joint venture, corporation, limited liability company, trust, association or other entity that may employ individuals or enter into contracts of employment." However, there is no definition for what it means to be employed. This issue has been litigated in courts across the country as the Federal Labor Standards Act ("FLSA") 29 U.S.C §§ 201, et. seq., provides for a federal minimum wage and utilizes a similar linguistic structure.

The Nevada Supreme Court has had the occasion to interpret this language in the FLSA in conjunction with the language used by the Nevada Wage and Hour Law (which

was in force prior to the adoption of article 15, Section 16 of the Nevada Constitution in 2006). In *Prieur v. D.C.I. Plasma Ctr.,* 2 Nev. 472, 726 P.2d 1372 (1986), the Court was presented with a situation that is similar to the case at bar. There, two prisoners who had been selected to perform services for a blood plasma facility filed complaints against the blood plasma facility, contending that they were not being paid a minimum wage under either the Nevada Wage and Hour Law or the FLSA. The *Prieur* Court analyzed both the Nevada Wage and Hour Law and the FLSA and concluded that both required an "employer" to pay a minimum wage to an "employee" under specific circumstances. However, neither the Nevada Wage and Hour Law nor the FLSA defined when an employment relationship existed sufficient to bring the arrangement under the purview of either legislation.

The Court concluded that "an entitlement to minimum wage must be predicated on the existence of an employment relationship." *Id* at 1373. The Court then applied the "economic reality" test[2] and noted the ability of the Department of Prisons (now the Department of Corrections) to create a work program was granted by the legislature and that it was the purview of the Director of the Department of Corrections to enter into contracts with private employers for the use of inmate services. Further, if prisoners desired to participate in the work program, they were required to apply to the Department of Corrections and, if selected, were required to fill out a form which acknowledged that the inmate "requests to be employed in one of the private industry programs of the Nevada Department of Prisons." *Id*.

Based on the above, the *Prieur* court concluded that:

> the Department of Prisons is the sole party to the contract with respondent, and that the Department of Prisons, not respondent, actually determines the rate and method of appellants' compensation. Therefore, under the circumstances of this case, we conclude that no employment relationship existed between appellants and respondent.

[2] "The 'economic reality' test has since been refined and now is understood to include inquiries into: whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984).

Prieur, 102 Nev. at 474, 726 P.2d at 1373.

This holding was echoed in a similar case decided by the Ninth Circuit. In *Morgan v. MacDonald*, 41 F.3d 1291 (9th Cir. 1994), where an inmate was employed as a computer troubleshooter for the Education Center which was located on the grounds of the Ely State Prison. "The prison contracted with the White Pine County School Board to operate the Education Center; the two entities then agreed to let inmates perform various jobs there. The inmates are paid a nominal salary each week, at a rate below the minimum wage established by the FLSA." *Morgan*, 41 F.3d. at 1292. The District Court dismissed the complaint alleging a violation of the FLSA's minimum wage requirement.

On appeal, the Court of Appeals held the minimum wage provisions of the FLSA did not apply to the inmate because he was not an "employee" as defined by the FLSA. The Court reaffirmed the holding of *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993), explaining that:

> [I]nmates cannot be deemed employees under the FLSA when they work for prison-run industries and are statutorily required to work as a term of their confinement. Under these circumstances, we concluded, "the economic reality is that [the prisoners'] labor belongs to the institution." Moreover, we noted that the primary policy concern of the FLSA – ensuring a minimum standard of living for all workers – is simply inapplicable to prisoners "for whom clothing, shelter, and food are provided by the prison."
>
> . . .
>
> Under Nev. Rev. Stat. § 209.461, all inmates are required to work or receive training for 40 hours each week. Thus, Morgan was in no sense free to bargain with would-be employers for the sale of his labor; his work at the prison was merely an incident of his incarceration. *See Vanskike*, 974 F.2d at 809 (prisoner's employment with prison didn't "stem from any remunerative relationship or bargained-for exchange of labor for consideration, but from incarceration itself"). Morgan and the prison didn't contract with one another for mutual economic gain, as would be the case in a true employment relationship; their affiliation was "penological, not pecuniary." *Hale*, 993 F.2d at 1395. Because the economic reality of Morgan's work at the prison clearly indicates that his labor "belonged to the institution," *id.* at 1395, he cannot be deemed an employee under the FLSA.

Id. at 1292–93.

/ / /

As indicated in the citation above, the *Morgan* court relied on another federal decision which has provided the framework for most courts in analyzing the issue of prison labor under the auspices of the FLSA. In *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992), the Court explained that "[t]he Thirteenth Amendment [of the United States Constitution] excludes convicted criminals from the prohibition of involuntary servitude, so prisoners may be required to work. Further, there is no Constitutional right to compensation for such work; compensation for prison labor is 'by grace of the state.'" *Vanskike*, 974 F.2d at 809. The *Vanskike* court recognized that although the United States Constitution provides that prisoners are not guaranteed a wage at all, let alone a minimum wage, "[t]hat there is no Constitutional right does not, however, foreclose the possibility of a statutory right to compensation." *Id.* The Court then went on to address the FLSA to determine whether its minimum wage provisions applied to prisoners.

On the outset, the *Vanskike* Court recognized that "courts have generally declined to extend the FLSA's minimum wage provision to prisoners who work in prison." *Id.* at 807–08, citing *Miller v. Dukakis*, 961 F.2d 7, 8 (1st Cir. 1992); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1230, 1328 (9th Cir. 1991); *Alexander v. Sara, Inc.*, 721 F.2d 149, 150 (5th Cir. 1983); *Wentworth v. Solem*, 548 F.2d 773, 775 (8th Cir. 1977); *Emory v. U.S.*, 2Cl. Ct. 579, 580 (1983, *affd*, 727 F.2d 1119 (Fed. Cir. 1983); *Worsley v. Lash*, 421 F. Supp. 556, 556 (N.D. Ind. 1976); *Sims v. Parke Davis & Co.*, 334 F. Supp. 774, 787 (E.D. Mich. 1971), *affd*, 453 F.2d 1259 (6th Cir. 1971); *Hudgins v. Hart,* 323 F. Supp. 898, 899 (E.D. La. 1971); *Huntley v. Gunn Furniture Co.,* 79 F. Supp. 110, 116 (W.D. Mich. 1948).

However, to determine whether the FLSA applied, the Court reiterated that "[b]ecause status as an 'employee' for purposes of the FLSA depends on the totality of circumstances rather than on any technical label, courts must examine the 'economic reality' of the working relationship." *Id.* In applying that test, the Court concluded the minimum wage provisions of the FLSA did not apply to inmates work assignments. In addition to several other reasons, the Court "emphasize[d] that Vanskike was not in a true economic employer-employee relationship with the DOC, so the statutory language does

not cover him." *Id.* at 812. The Court recognized 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 for essentially they presuppose a free labor situation. Put simply, the DOC's 'control' over Vanskike does not stem from any remunerative relationship or bargained-for exchange of labor for consideration, but from incarceration itself. The control that the DOC exercises over a prisoner is nearly total, and control over his work is merely incidental to that general control." *Id.* at 809.

The *Vanskike* Court further reasoned that the FLSA was inapplicable because:

> The first purpose of the FLSA has little or no application in the context presented here. Prisoners' basic needs are met in prison, irrespective of their ability to pay. Requiring the payment of minimum wage for a prisoner's work in prison would not further the policy of ensuring a "minimum standard of living," because a prisoner's minimum standard of living is established by state policy; it is not substantially affected by wages received by the prisoner. It is true, as Vanskike points out, that some cases have characterized the FLSA's primary purpose more specifically, as aimed at "substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S.728, 739, 101 S. Ct. 1437, 1444, 67 L. Ed. 2d 641 (1981). The evil of substandard wages, however, as just noted, does not apply where worker welfare is not a function of wages. As for oppressive working hours, Vanskike alleges only that he was underpaid, not that he was overworked, so only the minimum wage provision of 29 U.S.C. § 206, and not the separate working-hours provision of § 207, is directly at issue here. A prisoner may, of course, challenge his conditions of incarceration under applicable statutory and Constitutional provisions such as the Eighth Amendment. But the fundamental goal of ensuring workers' welfare and standard of living does not call for the application of the minimum wage in these circumstances.

(Emphasis added). *Id.* at 810–11.

While not referenced in *Vanskike*, another important consideration is the inmate receives other valuable consideration for performing a work assignment such as the one presented by NDF: time off their sentence. Pursuant to NRS 209.449, inmates receive work credits for performing these assignments. The ability to obtain these work credits in order to reduce a sentence is certainly a valuable commodity that is not easily quantified in monetary terms.

/ / /

Based on the foregoing, it is respectfully requested that this Court adopt the reasoning in *Vanskike*, *Morgan, Hale* and *Prieur*.

III. *PRIEUR* CAN BE READ CONSISTENTLY WITH THE ECONOMIC REALITY TEST OF FEDERAL CASES

Prieur is still good law. Its analysis as to what defines an employment relationship should be applied to the present situation. This is true even though the *Prieur* court was analyzing the Nevada Wage and Hour Law which was supplanted by Article 15, Section 16 of the Nevada Constitution in 2006,[3] the analysis in *Prieur* regarding whether the employment relationship exists is applicable to the subject provisions of the Nevada Constitution.

One of the base findings in *Prieur* was that "[b]oth the Fair Labor Standards Act and the Nevada Wage and Hour Law require an 'employer' to pay minimum wage to an 'employee' under specific circumstances." *Prieur*, 102 Nev. at 474, 726 P.2d at 1373. That finding holds true for the subject provisions of the Nevada Constitution. Just as the FLSA and the Nevada Wage and Hour Law defined "employer" and "employee" in a rather broad way, so too does Article 15, Section 16 of the Nevada Constitution. Indeed, as noted above, Article 15, Section 16 states that an "employer shall pay a [minimum] wage to each employee" and then defines an employee "as any person who is employed by an employer" and an employer is an entity that "employs individuals or enter[s] into contracts of employment." Just as with the FLSA and the prior Nevada Wage and Hour Law, there is no definition as to what it means to be employed. As such, because the terminology and construction of Article 15, Section 16 tracks so closely with the FLSA and the prior Nevada Wage and Hour Law, this Court should continue to apply the "economic reality" test adopted by *Prieur* as a viable way to interpret what it means to be employed under Article 15, Section 16, *while also acknowledging the circumstances of incarceration forwarded in Vanskike*.

[3] *See generally Thomas v. Nev. Yellow Cab Corp.*, 327 P.3d 518 (Nev. 2014).

When applying the economic reality test, this Court should also reach same outcome that was reached in *Prieur* as the parties are similarly situated. Therefore, just as the appellants in *Prieur* actually performed work for a blood plasma facility, Mr. Gonzalez performed work for the Division of Forestry but, to borrow a quote from *Morgan*, the parties "didn't contract with one another for mutual economic gain, as would be the case in a true employment relationship; their affiliation was 'penological, not pecuniary.'" *Morgan*, 41 F.3d. at 1292.

Just as in *Prieur*, the parties are not free to bargain with each other and no true employment relationship exists. Here, the economic realities of incarceration differ greatly from those in a free economy and should be considered under the totality of the circumstances. *Hale,* (993 F.2d at 1394); *Vanskike,* 974 F.2d at 808. As noted in *Hale* (citing *Vanskike*), the purpose of a minimum wage under the FLSA was to provide protection from substandard living conditions in a free economy:

> Our conclusion that prisoners in these cases are not "employees" of the prison entitled to a minimum wage is consistent with the purpose of the FLSA. It was enacted because Congress found that the existence "in industries engaged in commerce or in the production of goods for commerce"[4] of labor conditions detrimental to maintaining minimum standards of living necessary for health, efficiency and general well-being of workers perpetuates substandard conditions among workers, burdens commerce, constitutes an unfair method of competition in commerce, leads to labor disputes, and interferes with the orderly and fair marketing of goods. 29 U.S.C. § 202(a). We agree with Arizona that the problem of substandard living conditions, which is the primary concern of the FLSA, does not apply to prisoners,

[4] 29 U.S.C. § 202(a) declares in full:

> (a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce....

> for whom clothing, shelter, and food are provided by the prison. *See Vanskike,* 974 F.2d at 810 ("the payment of minimum wage for a prisoner's work in prison would not further the policy of ensuring a `minimum standard of living'")….

(Emphasis added). *Hale*, 993 F.2d at 1396. (Internal citations omitted).

Mr. Gonzalez, while incarcerated, receives meals, shelter and medical care. As well, Mr. Gonzalez is entitled to time off his sentence for participation in work programs pursuant to NRS 209.449. As such, minimum wage is a solution for a problem that does not exist in the prison setting. Under the analysis in *Vanskike, Hale* and *Morgan*, Mr. Gonzalez would not be considered an employee for purposes of minimum wage. Therefore, there is no employment relationship with any party involved in this case.

Further, if there was no employment relationship between the blood plasma facility and the appellants in *Prieur*, then there certainly would be no employment relationship between Defendants and Mr. Gonzalez.

Because there is no employment relationship, the minimum wage provisions of the Nevada Constitution's Minimum Wage Act are not applicable to the parties herein.

IV. PLAINTIFF'S FIRST CAUSE OF ACTION – SUBSTANTIVE AND PROCEDURAL DUE PROCESS

The Due Process Clauses of the United States and Nevada Constitutions prohibit the State from depriving any person "of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; Nev. Const. art. 1, § 8(5). There are two steps to analyzing a procedural due process claim: first, it must be determined "whether there exists a liberty or property interest which has been interfered with by the State, ... [and second] whether the procedures attendant upon that deprivation were constitutionally sufficient" *Malfitano v. Cty. of Storey*, 396 P.3d 815, 133 Nev. Adv. Op. 40 (2017); *Ky. Dep't of Corr. v. Thompson,* 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989).

> Because we have "always been reluctant to expand the concept of substantive due process," *Collins* v. *Harker Heights, supra,* at 125, we held in *Graham* v. *Connor,* 490 U.S. 386 (1989), that "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing

> these claims." *Albright* v. *Oliver,* 510 U.S. 266, 273 (1994) (plurality opinion of Rehnquist, C. J.) (quoting *Graham* v. *Connor, supra,* at 395) (internal quotation marks omitted).

Cty. of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

To maintain a procedural or substantive due process claim, Mr. Gonzalez must establish, in this case, a deprivation of a protected property interest and procedural deficiency related to such a deprivation. Here, Mr. Gonzalez may have a statutorily protected interest in some amount of wages under NRS 209.231(2), in which compensation is set by the Forester Firewarden. However, for claim for deprivation of minimum wage payments under Article 15, Subsection 16 of the Nevada Constitution, Mr. Gonzalez must demonstrate a contextual source of constitutional protection. In this case, the issue is solely whether Mr. Gonzalez meets the definition of "employee" under Article 15, Subsection 16. Mr. Gonzalez alleges not facts of procedural deficiency. Based on arguments presented in Sections I–IV of this Motion, Mr. Gonzalez's claim is based only on an assumed employee-employer relationship. Mr. Gonzalez can prove no set of facts in which he is an employee of NDF or the named Defendants. As such, Plaintiff's due process claims must fail as a matter of law.

V. PLAINTIFF'S SECOND CAUSE OF ACTION – EQUAL PROTECTION VIOLATION

> The threshold question in equal protection analysis is whether a statute effectuates dissimilar treatment of similarly situated persons. In analyzing alleged equal protection violations, the level of scrutiny that applies varies according to the type of classification created. Where a case presents no judicially recognized suspect class or fundamental right that would warrant intervention under a standard of strict scrutiny or where it presents no quasi-suspect class such as sex, illegitimates or the poor that would warrant application of intermediate level scrutiny, we analyze the challenged law under the rational basis test. A statute meets rational basis review so long as it is reasonably related to a legitimate government interest.
>
> But where a law contains no classification or a neutral classification and is applied evenhandedly, it may nevertheless be challenged as in reality constituting a device designed to impose different burdens on different classes of persons.

Rico v. Rodriguez, 120 P.3d 812, 121 Nev. 695 (2005). (Internal citations omitted).

Here, the second cause of action challenges no specific statute. Additionally, to maintain an equal protection cause of action, Mr. Gonzalez must allege facts showing that he has been treated differently under the law. Mr. Gonzalez's second cause of action simply alleges he is an employee for purposes of Article 15, Section 16 of the Nevada Constitution, and that he has not been given minimum wage benefits. Prisoners are not considered a protected class. *Cairns v. Sheriff, Clark Cty.*, 508 P.2d 1015, 89 Nev. 113 (1973). Rather, Mr. Gonzalez has alleged no facts to show that he has not been treated the same as any other inmate, in that every inmate receives the same amount of money for a work assignment. Nevertheless, Mr. Gonzalez must establish that he meets the definition of employee under Article 15, Section 16 of the Nevada Constitution. Based on the arguments presented in Sections I–V of this Motion, Mr. Gonzalez can prove no set of facts to show that he meets the constitutional definition of "employee."

Plaintiff's Equal Protection claim is based on an assumed employee-employer relationship that simply does not exist. Such relationship is necessary to maintain Plaintiff's equal protection claim.

VI. PLAINTIFF'S THIRD CAUSE OF ACTION – DECLARATORY RELIEF

Plaintiff's third cause of action seeks a declaration of his rights under NRS 30.030 and 30.040. Because no employee-employer relationship exists in this case, Plaintiff has no cognizable or relevant rights to be enumerated and declaratory relief is improper. Plaintiff Further requests declaratory relief to the extent that NRS 209.461(8) is unconstitutional.

As stated above, NRS 209.461(8) specifically prohibits any cause of action for inmates in relation to minimum wage. On its face, a plain reading of NRS 209.461(8) does not speak to whether inmates are considered employees for purposes of minimum wage, but rather that no cause of action exists even if inmates were to be considered employees. This alone does not conflict with Nevada's Minimum Wage act and has signaled legislative intent that the Minimum Wage Act does not apply to inmates. Here no justiciable controversy exists because, as a matter of law, Mr. Gonzalez is not an employee. *See Kress v. Corey,* 65 Nev. 1, 26, 189 P.2d 352, 364 (1948) (providing that, to obtain declaratory

relief, a plaintiff must show (1) a justiciable controversy, (2) between persons with adverse interests, (3) where the party seeking declaratory relief has a legal interest in the controversy, and (4) the issue is ripe for judicial determination). As such, Plaintiff's declaratory relief claim must fail.

VII. PLAINTIFF'S FOURTH CAUSE OF ACTION – INJUNCTIVE RELIEF

Plaintiff's final cause of action requests that the named Defendants comply with the Nevada Constitution so as to prevent ongoing harm to Plaintiff and all similarly situated inmates based on policy grounds.

It should be noted that no class has been alleged or plead except informally in the final claim. As well, the policy grounds cited by Plaintiff are sufficiently mitigated by the reasoning cited above in *Prieur, Vanskike, Morgan*, and *Hale.*

CONCLUSION

Based on the foregoing, it is respectfully requested that this Court grant Defendants' Motion to Dismiss all of Plaintiff's claims.

AFFIRMATION

The undersigned does hereby affirm that the foregoing Motion to Dismiss Complaint does not contain the social security number of any person.

DATED this 23rd day of October, 2020.

AARON D. FORD
Attorney General

By: */s/ Anthony J. Walsh*
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 23rd day of October, 2020, I electronically filed the foregoing document, **DEFENDANTS' MOTION TO DISMISS COMPLAINT**, with the Clerk of the Court by using the Court's e-filing system.

/s/ Kristalei Wolfe
Kristalei Wolfe, an employee of the
Office of the Attorney General

Back to List of exhibits

Exhibit Appellant 3

11/5/20 - Ps Opposition to Motion to Dismiss

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DISTRICT COURT
CLARK COUNTY, NEVADA

DAVID A. GONZALEZ, an individual,

Plaintiff,

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,

Defendants.

Case No.: A-20-820596-C

Dept. No.: 14

OPPOSITION TO MOTION TO DISMISS COMPLAINT

HEARING REQUESTED

Plaintiff DAVID A. GONZALEZ, by and through his attorneys of the law firm of GALLIAN WELKER & BECKSTROM, L.C, hereby submits his Opposition to Defendants' Motion to Dismiss Complaint (the "Motion").

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This Opposition is based on the papers and pleadings on file in this matter, the following Memorandum of Points and Authorities, and any arguments from counsel the Court may choose to hear on this matter.

DATED this 5th day of November 2020.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The collective Defendants' Motion to Dismiss the complaint filed by Plaintiff DAVID A. GONZALEZ ("Plaintiff" or "Mr. Gonzalez") seeks to find purchase in reliance on the prior interpretation by various state and federal courts of various Nevada statutes, the federal Fair Labor Standards Act ("FLSA," the federal minimum wage act), and the statutory schemes of other states, not a single one of which has any bearing on or supremacy over the Nevada Constitution, as applied to the citizens of Nevada. In fact, both the attempt to summarily dismiss Mr. Gonzalez' review by this Court and the general position held by the Defendants places them firmly in opposition to the opinion of the Nevada Supreme Court on this issue, which noted, in a unanimous ruling, as penned by Justice Hardisty on December 26, 2019, that "[w]hether inmates are entitled to the minimum wage under our constitution is an open question in Nevada." *White v. State*, 454 P.3d 736, 739 (Nev. 2019).

To the extent that the arguments presented in the Defendants' Motion, as relates to the definition of "employer" and "employee" and the applicability of both to inmates employed by the State of Nevada, are the arguments on which this Court should, ultimately, opine, the Plaintiff maintains that inmates are included within the definitional language of Article 15, Section 16 of the Constitution of the State of Nevada (the "Minimum Wage Amendment" or "MWA"[1]). Defendants' further reliance on the "economic reality" test, as enumerated in *Prieur v. D.C.I. Plasma Ctr.*, 102 Nev. 472, 726 P.2d 1372, (1986) and elsewhere is grossly misplaced due to notable factual distinctions and, more importantly, to the fact that the "economic reality" test is not governing law even with respect to Nevada statutory wage claims, and certainly not with respect to the text of the MWA.

Defendants' references to prior caselaw notwithstanding, the subject matter of Mr. Gonzalez' complaint actually appears to be a matter of first impression before a District Court in Nevada. Accordingly, for the reasons noted above and as further explicated below, Defendants' Motion to Dismiss Complaint should be DENIED, and this matter should proceed to be heard before the Court on the merits.

II. BACKGROUND AND RELEVANT FACTS

1) On September 9, 2020, Mr. Gonzalez filed his complaint against the State of Nevada; the Nevada Department of Conservation and Natural Resources ("NDCNR"), the Nevada Division of Forestry ("NDF"), Stephen F. Sisolak, in his official capacity as Governor of Nevada (the "Governor"); Bradley Crowell, in his official capacity as Director of Nevada Department of Conservation and Natural Resources (the "Director"); and Kacey KC, in her official capacity as Nevada State Forester Firewarden (the "Firewarden").

2) On October 23, 2020, Defendants timely filed their Motion to Dismiss Complaint,

[1] Although the use of the shorthand, "MWA," is adopted from Defendants' Motion, it should be well noted that Plaintiff's use of the acronym is for "Minimum Wage Amendment," not "Minimum Wage Act." Defendants' reference to the Article 15, Section 16 of the Constitution of the State of Nevada significantly diminishes, by analogy to an "act" or statute, the import of the amendment, which, in addition to the imprimatur of the legislature, was twice voted on and ratified by the citizens of Nevada in 2006 and is not subject to alteration by legislative action.

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the hearing for which is presently set before this Court on December 8, 2020, at 9:30 a.m.

3) The MWA provides that "[e]ach employer shall pay a wage to each employee of not less than the hourly rates set forth in this section," such hourly rates being no less than $8.00 per hour, effective as of July 1, 2020.[2] As used in the MWA, an "employee" means "any person who is employed by an employer... 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." 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."

4) 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).

5) The Nevada Department of Corrections (the "NDOC," not a named party to the complaint) is a political subdivision of the State of Nevada and, pursuant to Nevada Revised Statute ("NRS") 209.101, is a duly authorized Department of the State of Nevada, headed by the Board of State Prison Commissioners, of which Board the Governor is the President.

6) Pursuant to NRS 209.121(2)(a), the Governor appoints the Director of the NDOC, who administers the NDOC pursuant to NRS 209.131 *et seq.*

III. LEGAL STANDARD

With respect to a motion to dismiss, brought under Nev. R. Civ. P. 12(b)(5) for failure to state a claim on which relief may be granted, the court must recognize all factual allegations in the complaint as true and draw all inferences in favor of the plaintiff. *Buzz Stew, LLC v. City of*

[2] *See* State of Nevada Minimum Wage 2020 Annual Bulleting, posted April 1, 2020, by the State of Nevada Department of Business and Industry, Office of the Labor Commissioner. The "Lower Tier" minimum wage, applicable to employers providing or making available qualifying health benefits, is $8.00; the "Higher Tier" is $9.00 per hour. Prior to July 1, 2020, the minimally allowable "Lower Tier" wage is $7.25 per hour.

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N. Las Vegas, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). A "complaint should be dismissed only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [him] to relief." *Id.*

IV. ARGUMENT

a. The Constitution of the State of Nevada is the supreme law of the State of Nevada and controls over any conflicting statutory provisions or interpretations thereof; the State of Nevada is not subject to the FLSA or interpretations thereof.

"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, 5201 (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. The presumption is against implied repeal unless the enactment conflicts with existing law to the extent that both cannot logically coexist." *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 ought to be not what the legislature, or ... the voting public, meant to say, but what it succeeded in saying.**" *Id.* at 490 (internal citations omitted, 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

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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 it hardly needs explication beyond the above referenced quotes from *Thomas v. Nev. Yellow Cab Corp.*, it is manifest that the MWA supplants and/or supersedes the Nevada Wage and Hour Law which was in force prior to the passing and adoption of the MWA. Even if the MWA had not been adopted as a direct constitutional replacement to the prior statutory Nevada Wage and Hour Law, the subsequently enacted MWA would render any extant contrary provision of the that law unconstitutional and impliedly repealed. Since the Nevada Wage and Hour Law is both supplanted and/or superseded, the excised language of that particular statute is excised from Nevada governance as is the caselaw interpretive of such statute. In short, the Nevada Wage and Hour Law and the court's prior interpretations of such, on any matter, including, as here, applicability to inmates, are entirely mooted and not relevant to understanding the effect of the MWA. As such, they provide no grounds to dismiss the complaint.

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 Nevada courts. Absent any prior or precedential caselaw addressing the MWA in the specific context of the issue now before the Court, there is no basis by which unrelated interpretation of irrelevant statutes can be dispositive or allow dismissal of the instant action.

Nevada presently mandates a minimum wage of, at least $8.00, with a higher requirement of $9.00 for employers who do not provide minimal healthcare. The current federal minimum

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wage is $7.25 per hour. Since the state provision, afforded by the MWA, exceeds the federal minimum, pursuant to 29 U.S.C. § 218(a) and 29 CFR § 778.5, the MWA is controlling law in Nevada with respect to payment of minimum wage, to the complete exclusion of the minimum wage provision of the FLSA. Succinctly, the FLSA does not factor into Nevada minimum wage considerations, but, even if it somehow did, it and any associated caselaw could not be analogized to the MWA as an interpretive guide, since the FLSA language varies so dramatically from the MWA and also because interpretation of the FLSA is freighted with its own unique definitions (*see* 29 U.S.C. § 203) and particular purpose and Congressional intent, which, in no wise, relate to the MWA or its drafting. *See Reich v. Circle C Invs.*, 998 F.2d 324 (5th Cir. 1993) ("The FLSA defines an 'employer' as 'any person acting directly or indirectly in the interest of an employer in relation to an employee.' The FLSA's definition of employer must be liberally construed to effectuate Congress' remedial intent.")

Nothing raised in the Defendants' Motion presents a precedential holding with respect to the MWA and its connection to employed inmates in the State of Nevada. Accordingly, Defendants' citation to inapposite holdings cannot control, and their Motion should be denied so that the Court may make the requisite analysis necessary to the proper evaluation of Mr. Gonzalez' complaint. While this alone should be sufficient basis for denial of the Motion, the Defendants' other arguments are addressed by turn below.

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, the relevant definitions for employee and employer, wherein an "employee" means "any person who is employed by an employer." 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 this employer / employee relationship provided for under the MWA are "an employee who is under eighteen

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(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 not excluded.

As already cited above,"[t]he goal of constitutional interpretation is to determine the public understanding of a legal text. ... 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... contrary to the intent expressed by the provision's clear textual meaning, is not the proper way to perform constitutional interpretation. The issue ought to be not what the legislature, or ... the voting public, meant to say, but what it succeeded in saying." *Thomas*, 130 Nev. at 490.

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." *Id.* at 488 (internal citations omitted).

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.*, NDCNR) 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." No citation is even necessary to demonstrate this obvious conclusion.

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 MWA for the inmate "employee" is whether or not inmates are "employed by the State, the NDCNR, and/or the NDF." 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

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word "hire," which Black's defines as "to stipulate for the labor or services of another." Mr. Gonzalez 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.[3]

NRS 209.461(1)(b) does require 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. 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. The work being done by Mr. Gonzalez and similarly situated inmates is entirely voluntary and is distinguishable from work conducted inside a facility and is even more distinct from vocational training or other education. Mr. Gonzalez volunteers his labor in exchange for pay, and in so doing, he maintains his status as a State employee.

While this analysis does seem to answer the question of employment, 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

[3] As addressed in subsequent sections, Defendants opine that prior courts were substantially unable to decide on the meaning of the word "employ," but this simply reflects those courts efforts to avoid the obvious definition. The FLSA indicates that "'Employ' includes to suffer or permit to work." 29 U.S.C. § 203(g).

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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."

Given that the plain language illustrates that inmates are employees for purposes of 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 clearly recognizes that it employs inmates because it seeks to exclude their stated employment 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 only excludes a right to a minimum wage or a cause of action **created** by NRS 209.[4] 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 irrelevant, but, should the Court view it

[4] 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.

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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 actually quite clear, 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. As such, they are rightfully entitled to received compensation for the labor commensurate with the minimum wage, and, in recognition of this, Defendants' Motion should be denied.

The remainder of the Defendants' Motion attempts to assert that inmates are still not actually employees (despite the affront to the English language that such an argument poses) under any applicable definition, and their basis for support of this argument is found in prior interpretation of irrelevant statutes, which interpretations included convoluted machinations surrounding "economic realities," Congressional intent, and seeming abuse of the English language to achieve a predetermined outcome. Such prior findings, whether or not rightly held, as addressed below in more detail, are neither binding on nor compatible with the plain language of the MWA.

c. The economic reality test is not applicable in the instant context, but, assuming, *arguendo*, that it may be, inmates still satisfy the definition of employees.

The Nevada Supreme Court has previously utilized the economic reality test to interpret the FLSA and to clarify the definition of employment thereunder. In *Prieur v. D.C.I. Plasma Ctr.*, 102 Nev. 472, 726 P.2d 1372 (1986), as cited by Defendants, the Court held that "an entitlement to minimum wage must be predicated on the existence of an employment relationship. To determine whether an employment relationship exists, the 'economic reality' of the relationship must be considered." *Id.* at 473. The economic reality test initially arose solely in the context of the FLSA, and as addressed below, that is still only where Nevada applies that test. "[I]n determining whether an employment relationship exists for purposes of the FLSA, [courts] must evaluate the 'economic reality' of the relationship. Such an evaluation was first applied in the FLSA context in *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, ...

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(1961)." *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984).

The economic reality test, as applied in Nevada, includes inquiries into "(1) Whether the alleged employer hires and fires the inmates; (2) Whether the alleged employer supervises and controls employee work schedules and conditions of employment; (3) Whether the alleged employer determines the rate and method of payment; (4) Whether the alleged employer maintains employment records; (5) Whether allowing the inmates to work for less than minimum wage will give the alleged employer an unfair competitive advantage since its competitors will have to pay their workers the minimum wage; (6) Whether the alleged employer exercises discretion in choosing workers; (7) Whether the alleged employer receives labor in exchange for wages." *Morgan v. MacDonald*, CV-N-91-408-ECR, 1992 U.S. Dist. LEXIS 14463, at *10-11 (D. Nev. Sep. 14, 1992).

There is little question or dispute that, with respect to the FLSA (despite the fact that its own definitional language is well short of confusing) the economic reality test holds primacy. It is crucial to note, however, that interpretation of the FLSA under this test incorporates many FLSA specific considerations, much of which are determined by the clear Congressional intent behind the FLSA, such as a ruling that "it is highly implausible that Congress intended the FLSA's minimum wage protection be extended to felons serving time in prison." *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1324 (9th Cir. 1991). No such intent or limitation is implicated here, with respect to the MWA.

Though it does not generally give rise to an inmate minimum wage, the FLSA has not been held to be so strongly a complete obstacle as Defendants imply. In *Morgan*, cited above, a Nevada federal district court concluded "that we are bound to follow the conclusion that inmates are not always precluded from suing as employees under the FLSA." *Morgan v. MacDonald* at *10. In *Carter*, the 2nd Circuit held "that an inmate may be entitled under the law to receive the federal minimum wage from an outside employer, depending on how many typical employer prerogatives are exercised over the inmate by the outside employer, and to what extent." *Carter*, 735 F.2d at 14. Application of the economic reality test is not, necessarily, a barrier to concluding that an inmate is an employee under the FLSA, and "the existence of an employment

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relationship must be determined on a case-by-case basis." *Hale v. Arizona*, 967 F.2d 1356, 1365 (9th Cir. 1992). Even so, it is **not** the applicable standard for a Nevada constitutional claim.

The Nevada Supreme Court recently clarified *Prieur*, holding that "the economic realities test is not an appropriate reflection of Nevada law ... and, despite mentioning this test to resolve federal FLSA claims in *Prieur v. D.C.I. Plasma Center*, ... we did not adopt that test in relation to the state law claims raised in that case and did not incorporate that test into Nevada's wage and hour law." *Boucher v. Shaw*, 124 Nev. 1164, 1170 n.27, 196 P.3d 959, 963 (2008). A claim under the MWA is inherently a state law claim, not subject to the economic reality test. Absent the imposed burden of that test, the Court should properly engage the plain language analysis utilized above in *Thomas*, which Mr. Gonzalez urges will lead the Court to the same conclusion already presented. If so, the question is entirely resolved in favor of the Plaintiff, and Defendants' Motion must be denied.

Assuming, *arguendo*, that the Court believes the economic reality test applies here, on the specific facts for Mr. Gonzalez, it is still demonstrable that he is an employee of the State of Nevada for whom the MWA applies. Mr. Gonzalez is incarcerated by the NDOC. He provides labor to the NDF (and by legal extension, as detailed in the facts of the Complaint, referring to the relevant statutes which define the chain of command and control) directly to the NDCNR and, further, to the State of Nevada. The faculty by which Mr. Gonzalez effects the labor for which he is compensated is a contract or other "cooperation" (*see* NRS 209.457(1)) between the NDOC and the NDF. In contrast to *Prieur* and *Hale* above, there is no involvement of a private third-party employer whose exercise of control over employee inmates may be limited to such a degree that neither the private employer nor the prison can fully meet the definition of an employer. Mr. Gonzalez is incarcerated by the State of Nevada. Mr. Gonzalez provides work which inures to the benefit of the State of Nevada, from whom he receives his wages. The distinctions between Departments and Divisions, in this context, are not meaningful, functioning as they do, as the right and left hands of the same body, controlled by the same head (the State of Nevada and the office of the Governor).

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Addressing each element of the economic reality test corroborates Mr. Gonzalez' claims:

(1) The employer hires and fires the inmates: The State of Nevada, via the NDOC and the local wardens, makes the determination as to which inmates are eligible for work through the conservation camps. NDF also has the ability to dismiss inmates from the work crews.

(2) The employer supervises and controls employee work schedules and conditions of employment: The State of Nevada, via the NDF completely controls the work performed by inmates. *See* NRS 209.231(1) and (3), NRS 209.457, and NRS 472.040(1)(h).

(3) The employer determines the rate and method of payment: The State of Nevada, via the NDF determines the rate and method of pay. *See* NRS 209.231(3) and NRS 472.040(1)(h).

(4) The employer maintains employment records: Upon information and belief, the State of Nevada, via the NDF and NDOC maintains records of inmate employment.

(5) Allowing the inmates to work for less than minimum wage gives the employer an unfair competitive advantage: Upon information and belief, Mr. Gonzalez is employed to effect vegetation management and beautification of highways, pursuant to contracts for such services between the NDF and Lake Mead National Recreational Area, Nevada Department of Transportation ("NDOT"), and various water districts, which work is then not economically available to private enterprise.

(6) The employer exercises discretion in choosing workers: The State of Nevada, via the NDOC and the local wardens, makes the determination as to which inmates are eligible for work through the conservation camps.

(7) The employer receives labor in exchange for wages: Certainly, the State of Nevada, via the NDF, NDCNR, and even NDOT receive the benefit of Mr. Gonzalez' labor and provide him (under)payment accordingly.

Although Mr. Gonzalez maintains that the economic reality test does not apply, and the proper interpretation of the MWA is expressed by the provision's clear textual meaning, as shown here, with respect to the itself and its various Departments and Divisions, the State of

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Nevada is also an employer, and Mr. Gonzalez is an employee under the economic reality test. Accordingly, by this measure, and all those detailed fully above, Mr. Gonzalez has presented sufficient facts and claims to survive Defendants' Motion to Dismiss Complaint and to have his claims heard, in full, before this Court.

V. CONCLUSION

For the foregoing reasons, Plaintiff David A. Gonzalez respectfully requests that the Court deny Defendants' Motion to Dismiss Complaint.

DATED this 5th day of November 2020.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 5th day of November 2020, I served a true and correct copy of the foregoing **OPPOSITION TO MOTION TO DISMISS COMPLAINT**, as filed, by way of the District Court's electronic Odyssey File and Serve system to the following:

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Exhibit Appellant 4

11/12/20 - Ds Reply in Support of M2D

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DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID A. GONZALEZ, an individual, Plaintiff, vs. 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, Defendants.	Case No.: A-20-820596-C Dept. No.: 14

REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT

COMES NOW, Defendants, 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, by and through their counsel, Anthony J. Walsh, Esq. of the Nevada Attorney General's office, and files this Reply in Support of Motion to Dismiss Complaint.

This Reply is based on the papers and pleadings on file in this matter, the following Memorandum of Points and Authorities, and any arguments from counsel the Court may choose to hear on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

LEGAL ARGUMENT

I. INTRODUCTION

Plaintiff's Opposition to Defendant's Motion to Dismiss Complaint was timely filed on November 5, 2020. The Opposition argues two primary points: 1) that Section 209.461(8) of the Nevada Revised Statutes ("NRS"), prohibiting any cause of action for minimum wage compensation for Nevada prison inmates, has been impliedly repealed by the subsequent enactment of Nevada's Minimum Wage Amendment in 2006, and that such repeal is supported by the Nevada Supreme Court's decision in *Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518, 130 Nev. 484 (2014); and 2) that the "economic reality" test for employment does not apply to this case because *Prieur v. D.C.I. Plasma Ctr.,* 102 Nev. 472, 726 P2d 1372 (1986) did not adopt such a test and was decided under both the prior Fair Labor Standards Act and the Nevada Wage and Hour Law. The Opposition further argues that even if this Court adopts an economic reality test, any factors analyzed militate in favor of Mr. Gonzalez's status as an employee of the State of Nevada.

The constitutionality of NRS 209.461(8) notwithstanding, the Opposition overlooks crucial and controlling law on this Court. Specifically, the Nevada Supreme Court's Decision in *Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 130 Nev. 879 (2014) explicitly adopts the economic reality test in deciding whether a person is an employee under both Nevada Law and the FLSA. As such, the Opposition mischaracterizes the status of Nevada Law. Even if NRS 209.461(8) is ruled unconstitutional, Plaintiff's claims fail because Mr. Gonzalez does not meet the definition of employee for minimum wage purposes

under the Minimum Wage Amendment ("MWA") and therefore does not have to fall within the ambit of the MWA.

II. THE ECONOMIC REALITY TEST ADOPTED BY *TERRY* CONSIDERS THE TOTALITY OF THE CIRCUMSTANCES.

The Opposition argues that the *Prieur* court never adopted an economic reality test to identify whether inmates were employees under FLSA or Nevada Wage and Hour Law. See Opposition to Motion to Dismiss, Pg. 13, ll. 3-12; *Boucher v. Shaw*, 196 P.3d 959, 124 Nev. 1164, FN 27 (2008). While the *Prieur* court did not explicitly adopt the economic reality test, the Court recognized the importance of assessing the economic reality of the relationship and concluded the Department of Prisons (now the Department of Corrections) determined inmate wage rates and not the private, third party respondents. *Prieur*, 102 Nev. at 474, 726 P.2d at 1373. *Prieuer* is entirely consistent with the economic reality test adopted by *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), specifically because those Federal cases are exactly on point in this case. See Defendant's Motion to Dismiss Complaint, Sec. 3.

The Opposition crucially fails to address the legal reality that the economic reality test considered in *Prieur*, as applied to inmates, has been adopted by the Nevada Supreme Court in *Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 130 Nev. 879 (2014). There, the Court found that exotic dancers met the statutory definition of "employee" under NRS 608.250, while also recognizing that NRS 608 was superseded by the MWA under *Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518, 130 Nev. 484 (2014). In *Terry,* the original complaint was brought under NRS 608.250 and not the MWA. Nevertheless, the Court reasoned that both definitions of employee and employer under NRS 608.010, 608.011 and the MWA required a more instructive aid – the FLSA – to determine the exact relationship between appellant and respondent in harmony with Nevada legislative intent for minimum wage laws to "run parallel" to federal law and case law. *Terry*, 336 P.3d at 955.

/ / /

The Court held:

> Thus, the Legislature has not clearly signaled its intent that Nevada's minimum wage scheme should deviate from the federally set course, and for the practical reasons examined above, our state's and federal minimum wage laws should be harmonious in terms of which workers qualify as employees under them. **We therefore adopt the FLSA's "economic realities" test for employment in the context of Nevada's minimum wage laws.**

Id at 958. (emphasis added).

In doing so, the Nevada courts may follow federal case law in applying the economic reality test, including an examination of the totality of the circumstances:

> **Thus, the economic realities test examines the totality of the circumstances and determines whether, as a matter of economic reality, workers depend upon the business to which they render service for the opportunity to work**. See *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32-33, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961); *Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 434 (5th Cir.2013). Given this backdrop, this court has difficulty fathoming a test that would encompass more workers than the economic realities test, short of deciding that all who render service to an industry would qualify, a result that NRS Chapter 608 and our case law specifically negate. See NRS 608.255; *Prieur*, 102 Nev. at 474, 726 P.2d at 1373.
>
> Thus, to the extent that our test could only, from a pragmatic standpoint, seek to be equally as protective as the economic realities test, and having no substantive reason to break with the federal courts on this issue, **"judicial efficiency implores us to use the same test as the federal courts"** under the FLSA. See *Moore v. Labor & Indus. Review Comm'n*, 175 Wis.2d 561, 499 N.W.2d 288, 292 (Wis.Ct.App.1993) (adopting, for analogous state law purposes, the test used by federal courts to determine whether someone is an employee for the purpose of a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012)).

Id. at 956-957.

As such, *Terry* formally opens the door for Nevada courts to employ an economic reality test under the MWA. The *Terry* Court examined six non-exhaustive factors to determine that indeed the appellant-performers qualified as employees under NRS 608.010 and 608.011, as follows:

> 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.

Id at 958-961.

Here, the above factors are similar in substance to those argued and applied in the Opposition. Nevertheless, when properly examined, they militate in favor of the argument that inmates performing work for NDF do not meet the definition of employee under the MWA:

1) Degree of employee control in manner of work performed: NDF and NDOC exert near total control over inmate labor, including supervision, scheduling hours and training. However, this level of control arises from the reality of incarceration, so that control over an inmate as an employee is merely incidental to the general control exerted over an inmate. See *Vanskike v. Peters*, 974 F.2d at 809.

2) The alleged employee's opportunity for profit or loss depending on his or her managerial skill: It is not established that inmates display managerial skill in terms of performing vegetation management for NDF. Rather, inmates possess little opportunity for profit, as NRS 209.246 allows for wages to be deducted for certain costs accrued during incarceration. Applicable restitution orders may also impact an inmate's ability to accrue profits under NRS 209.4827-4843. As stated in *Morgan*, the relationship between inmates and the state is "penological, not pecuniary." *Morgan v. MacDonald*, 41 F.3d 1291, 1292 (9th Cir. 1994)

3) The alleged employee's investment in equipment or materials required for their task, or their employment of helpers: Here, inmates are provided with all equipment and materials for their tasks, under NRS 209.461(d). As argued above, this is incidental to any employment relationship and purely a function of the reality of incarceration.

4) Whether the service rendered requires special skill: As analyzed in *Terry*, "[a]ll work requires some skill, so in the economic realities context, courts look specifically

for workers' "special" skills; namely, whether their work requires the initiative demonstrated by one in business for himself or herself." *Terry, 336 P.3d at 959,* citing *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 328 (5th Cir.1993). Here, inmates are provided with training and equipment to perform vegetation management under NRS 209.457(2)(b) in exchange for some financial compensation as well as a reduced sentence under NRS 209.449. As such, inmates cannot demonstrate that the work performed requires their own business initiative, as the labor exchange in a free market would not involve the reduction of penological or rehabilitative sentence.

5) The degree of permanence in the working relationship: Here, inmates performing work under NRS 209.457, as argued above, perform work in exchange for a reduced sentence. As such, the work relationship is inherently impermanent and non-pecuniary.

6) Whether the work performed is an integral part of the alleged employer's business: Because Mr. Gonzalez alleges that his employer is Nevada Department of Corrections, the State of Nevada, or NDF, none of which are businesses, but are capable of hiring employees, the issue is whether Mr. Gonzalez's services are integral to the statutory scheme under which he provides services. Here, that is rather circular concept because Mr. Gonzalez has performed services specifically for a program designed to make use of inmate services in the context of vegetation management. Mr. Gonzalez's services are necessary to fulfill individual work projects for NDF, but not for the continued operation of the program. Such work does not have an inherently pecuniary component and is incidental to Mr. Gonzalez's incarceration.

The above factors, because they are not exhaustive, serve as guideposts for the totality of the economic realities considered by the Court. While the above factors weigh in favor of Defendants' argument that Mr. Gonzalez does not qualify as an employee under the FLSA or MWA, it is also crucial that federal courts have found that inmates do not meet the definition of employee under the FLSA based on policy reasons inherent to minimum wage laws. Because the above economic reality test was adopted in *Terry*, the

Nevada Supreme Court has signaled that it will look to federal case law in applying employment tests, which suggests that this Court should root its analysis and base its decision on *Morgan* and *Vanskike*.

III. THE PUBLIC POLICY CONCERNS THAT SERVE AS THE BEDROCK OF NATIONAL AND STATE MINIMUM WAGE LAWS DO NOT APPLY TO INCARCERATED PERSONS.

Inmates are not subject to the same free-market pressures that minimum wage laws are designed to ameliorate. Specifically, the *Morgan* court recognized that factors closely resembling those cited above are not the best guideposts for determining whether an employment relationship exists for inmates. Specifically, "the primary policy concern of the FLSA—ensuring a minimum standard of living for all workers—is simply inapplicable to prisoners 'for whom clothing, shelter, and food are provided by the prison." *Morgan*, 41 F.3d. at 1292. In doing so, the *Morgan* court declined to employ a four-part test and instead focused on the broader policy concerns addressed in *Hale*. *Id.*

It is clear from the holdings in *Hale*, *Morgan* and *Vanskike*, that minimum wage laws are designed to help people adequately pay rent, put gas into their cars, purchase food, receive medical treatment, and pay tuition among other life-related expenses. None of those expenses apply to Mr. Gonzalez. Instead, it would lead to an absurd result if non-incarcerated individuals who may struggle, even while receiving minimum wage, are not guaranteed housing, medical treatment and food, while those who are incarcerated are given minimum wage without the same burdens as those in the free-market. Incarceration is a punishment and Mr. Gonzalez is serving a punitive sentence. The state has well recognized that it would be cruel and inhumane to allow prisoners to fall into separate substandard living conditions endemic to a more cruel past; that is why prisoners in Nevada are required to receive adequately nutritional meals, shelter and medical treatment, under NRS 209. As a rehabilitative opportunity, inmates are allowed, as a reward, to volunteer for outdoor work and training that may instill valuable experience for improved post-release outcomes. The disconnect between living situations of incarcerated

/ / /

and non-incarcerated individuals favor a finding that Mr. Gonzalez and similarly situated inmates do not meet the MWA's definition of "employee."

Additionally, Nevada's ballot measures leading to the MWA in 2004 and 2006 are couched solely in poverty reduction language, unrelated to the context of incarceration. Arguments for the MWA cited that increasing the minimum wage would benefit "[l]ow-income workers who do not currently earn enough to cover the basic costs of living for their families – housing, health care, food and child care."[1] Arguments against the MWA described financial burdens to business, leading to decreased tax revenue and economic downturn.[2] These policies arguments, for and against the MWA, soundly match those considered in *Morgan*, *Hale* and *Vanskike* and do not match the economic realities of incarceration.

Based on the foregoing, Nevada courts are required to consider the economic reality of alleged employees under *Terry*. In this context, the 9th Circuit's decisions in *Morgan* and *Hale* and 7th Circuit's decision in *Vanskike* are factually on point and may be relied on by this Court to determine the economic reality of the alleged employee-employer relationship at hand.

IV. THE MWA DID NOT IMPLIEDLY REPEAL NRS 209.461(8).

The Opposition argues that the MWA impliedly repealed NRS 209.461(8). Plaintiff relies on *Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518, 130 Nev. 484 (2014), in which a taxi-driver exception to Nevada's Wage and Hour Law was held to be subsequently repealed by the enactment of the MWA, precisely because taxi-drivers were not explicitly exempted under the MWA.

NRS 209.461(8) is not an exception to the MWA or any other prior minimum wage law. In fact, NRS 209 does envision some circumstances in which minimum wage may be

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[1] See State of Nevada Statewide Ballot Questions 2004, Pp. 41-44; https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf (last accessed 11/11/2020); State of Nevada Statewide Ballot Questions 2006, Pp. 31-34.; https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2006.pdf (last accessed 11/11/2020)

[2] Id.

applicable to inmates. NRS 299.463(1) provides for certain deductions "if inmates earn more than the federal minimum wage." However, such wage determinations are solely within the discretion of the director, and in this case the Forester Firewarden, under NRS 209.231(3) and NRS 472.040(1)(h). There remains no requirement under NRS 209 that inmates are entitled to minimum wage. It should be noted that NRS 209.231(3),NRS 472.040(1)(h) and NRS 209.457 explicitly do not refer to inmates as "employees" Rather, each statute refers simply to "offenders" whose wage are set by the Forester Firewarden or are used for work projects by the Forester Firewarden.

In this case, NRS 209.461(8), which precludes inmates from maintaining a minimum wage cause of action can be read in harmony with the MWA under *Thomas*. In *Thomas*, NRS 608.250(2), which was enacted prior to the MWA, excluded six **classes of employees** from its minimum wage mandate, including taxicab drivers. *Thomas* 327 P.3d at 520. As such, NRS 608.250(2) excluded types of workers from the MWA that were already types of employees.

NRS 209.461(8) does not create an exception for inmates in the same way that NRS 608.250(2) did for taxi drivers. Instead, the preclusion of inmate minimum wage claims fits squarely with the above argument that inmates do not meet the definition of employee under the MWA. NRS 209.461(8) states 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." Based on the plain meaning of the statute, inmates are not an excluded class of employee as was the case in NRS 608.251(2); inmates are simply not employees. This position is further evidenced by the requirement in NRS 209.461(1)(a) that the Director shall "to the greatest extent possible approximate the normal conditions of training and employment in the community." Under this reading, inmate labor is an approximation of employment, which is why inmate labor may seem to match many economic reality factors described in *Terry* and federal case law. This

approximation underscores the importance of the *Vanskike* and *Morgan* holdings that economic reality tests are more accurate when they consider the totality of public policy reasons for minimum wage rather an exhaustive list of factors in the context of incarceration.

Even if NRS 209.461(8) is unconstitutional to the extent that it is repealed by the MWA, Mr. Gonzales must still prove that he is an employee to maintain a state law cause of action under the MWA. Based on the above elaborated policy reasons and controlling economic reality test, Mr. Gonzalez can prove no set of facts in which he is an employee for minimum wage purposes.

V. CONCLUSION

Based on the foregoing, it is respectfully requested that this Court grant Defendants' Motion to Dismiss all of Plaintiff's claims.

AFFIRMATION

The undersigned does hereby affirm that the foregoing Reply in Support of Motion to Dismiss for Defendants does not contain the social security number of any person.

DATED this 12th day of November 2020.

AARON D. FORD
Attorney General

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 12th day of November, 2020, I electronically filed the foregoing document, **REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT**, with the Clerk of the Court by using the Court's e-filing system.

/s/ Caitie Collins
Caitie Collins, an employee of the
Office of the Attorney General

Back to List of exhibits

Exhibit Appellant 5

1/2/21 - Transcript of Hearing

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DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID GONZALEZ, Plaintiff, vs. STATE OF NEVADA, Defendant.	CASE NO: A-20-820596-C DEPT. XIV

BEFORE THE HONORABLE ADRIANA ESCOBAR, DISTRICT COURT JUDGE
TUESDAY, JANUARY 12, 2021

RECORDER'S TRANSCRIPT OF HEARING RE:
DEFENDANT'S MOTION TO DISMISS COMPLAINT

APPEARANCES:

For the Plaintiff(s): NATHAN E. LAWRENCE, ESQ.

For the Defendant(s): ANTHONY J.A. WALSH, ESQ.,
GREGORY D. OTT, ESQ.

RECORDED BY: JILL JACOBY, COURT RECORDER

Las Vegas, Nevada; Tuesday, January 12, 2021

[Proceeding commenced at 9:54 a.m.]

THE COURT: We have David Gonzalez versus State of Nevada. Your appearances for the record, please.

MR. WALSH: Good morning, Your Honor. My name is Anthony Walsh, representing State of Nevada Department of Conservation and National Resources, as well as Governor Sisolak, Bradley Crowell, and Kacey KC in their official capacities.

THE COURT: Okay, very good.

MR. WALSH: And it's --

THE COURT: Thank you.

MR. OTT: Good morning, Your Honor, Greg Ott also for the same matter -- same entities as Mr. Walsh.

THE COURT: Okay, very good. Good morning, counsel. And --

MR. LAWRENCE: And -- this is Nathan Lawrence on behalf of Plaintiff David Gonzalez.

THE COURT: Okay, good morning, counsel. This is a -- this is Defendant's motion to dismiss the complaint. I have reviewed all of the pleadings, and I'd like you to go ahead and make your record, either Mr. Walsh or Mr. Ott, or both, you know. Go on.

MR. WALSH: Thank you, Your Honor. To begin with, I -- bear with me. Is my reception okay?

THE COURT: Yes, I can hear you.

MR. WALSH: Okay, thank you.

THE COURT: Can everyone else hear Mr. Walsh?

THE COURT RECORDER: Yes.

MR. LAWRENCE: It did cut out a little bit, but yes, for the most part.

THE COURT: Okay, let -- please let me know if you cannot because we've had IT problems for the last couple of days. Thank you. Please go on, Mr. Walsh.

MR. WALSH: I understand.

So, yeah, Your Honor, the only issue of law in this case is simply whether or not inmates participating in Nevada Division of Forestry work programs meet the constitutional definition of employee. And the case law that we've been able to develop throughout the briefing indicates that inmates working in NDF camps do not meet the definition of employee and are excluded from the requirements of both the Minimum Wage Act and the Fair Labor Standards Acts based on the Nevada Courts -- Nevada Supreme Court's interpretation under *Terry versus Sapphire Gentlemen's Club*, in which the Nevada Supreme Court specifically adopted the economic realities test employed by federal courts in terms of deciding whether or not a putative employee is actually an employee.

And in this case, we believe that the economic realities indicate that NDF inmates -- or inmates working for NDF camps are not employees, specifically because the economic realities of incarceration are not the same as the economic realities faced by the general public in

terms of the policy reasons behind the minimum wage amendment in Nevada or the Fair Labor Standards Act in federal law.

There, the minimum wage amendment and Fair Labor Standards Act are designed to prevent members of the general public from falling into substandard living conditions, in which case people would be paid a minimum wage so that they can pay their rents, purchase food, pay for gas for their car, perhaps save up a little bit. And none of those realities impacts prisoners or inmates in the same way, whereas inmates have food, clothing, shelter, their medical expenses are covered. And additionally, if an inmate is essentially -- I would want to say -- like laid off from an NDF program if the program were to end, inmates would not be covered by any statutory framework for unemployment benefits.

So, Your Honor, if you have any specific questions, that's the general thrust of the arguments forwarded. And this would fit squarely into a 12(b)(5) -- NRCP 12(b)(5) motion to dismiss simply because of NRS 209.461(8) in which the provisions of NRS 209 specifically state that inmates in the Nevada prison system do not have a cause of action against the State or its officers for federal or state minimum wage.

THE COURT: Okay. Thank you.

MR. WALSH: Thank you.

THE COURT: All right. Counsel?

MR. LAWRENCE: Yes, sorry. I muted there for a moment. Thank you, Your Honor.

THE COURT: Go on.

MR. LAWRENCE: [Indiscernible] proposition. So, I'll try not to step on people's toes or over-speak on somebody else. So, thank you.

So, in respect to that -- Mr. Walsh is correct in the statement of the question that is before the Court and that is whether or not an inmate can meet the definition of an employee under the Minimum Wage Act. As you already referenced, this has been well-briefed and you've already indicated you read that, so I'm not going to belabor the points that I've already addressed in the briefs.

The most relevant thing for our side today is obviously to respond to *Terry*, which was not addressed in our initial opposition. So, *Terry* raises two questions, one, whether or not the economic realities test is what is actually applicable to the current circumstance. And then it also goes on then to speak to the various elements of the economic reality test and whether or not those would preclude an inmate from receiving the minimum wage under the various articulated standards.

While there is definitely some -- well, they're definitely just generally correct that the Supreme Court has extended the economic reality test for its applicability to the Court -- with respect to Nevada's minimum wage laws and/or statutes. It's not necessarily so clear that it's entirely applicable here. *Terry's* distinct from the current circumstance for a couple reasons, not the least of which, which I think is probably one of the most crucial factors here, is that *Terry* was brought under the NRS 608, the statute that incorporates the various definitions of employer and employee.

So, that's distinct here because our particular claim is not brought under NRS 608, it's brought under the Minimum Wage Act. And so, we're largely relying on the definition -- the particular definitions that are incorporated into the Minimum Wage Act, which are distinct from those that are in NRS 608.

To the degree that as the Supreme Court said the definitions in the Minimum Wage Act are somewhat [indiscernible], and don't necessarily provide a whole lot of elucidation, it may be necessary for the Court to resort to something else, including something like definitions that are in NRS 608 or possibly the economic reality test. But that's not actually a question of civil law yet. There is no indication at this point that the economic reality test would govern in the current context.

As I referenced in my prior opposition, a year or so ago in the *White v. State* matter, Justice Hardesty, Stiglich, and Silver in a unanimous opinion, part of the dicta not necessarily part of the primary holding pointed out that whether or not inmates are entitled to the minimum wage in the State of Nevada is still an open question. And that was obviously made after the *Terry* decision, and Hardesty concurred in the *Terry* decision, so it's not like he made that statement without an acknowledgement of what *Terry* holds.

So, it is an open question. It's obviously up to us as the Plaintiff here to address what aspects of that are open and how it's answered one way or another. But it is an open question, it is correct then and it's still correct now because nothing has changed in the law since the 2019 decision in which that opinion was made.

Again, if we're turning back to *Terry*, I've provided points of distinction, the first [indiscernible] like I said, the *Terry* case was not brought under the Minimum Wage Act, it was brought under NRS 608. That's a very crucial point, I think. And the other language that's in *Terry* that seeks to reconcile the Minimum Wage Act with NRS 608 talks about what the distinction is because there's no uncertainty with respect to the fact the minimum wage amendment modified the statute. And it supplanted some of the statutory definitions, and it supplanted some of the requirements that were predicated on the minimum wage statute.

And to the extent the report can be measured in a -- an amendment or an act of the Constitution, which Justice Cherry opined in the *Yellow Cab* case that we really don't get into questions of intent if we focus on the strict language, but to the intent that something can be inferred from the passage of the minimum wage amendment, it's largely that the whole point of the amendment was to expand on the scope, and that's actually referenced in *Terry* very specifically.

It says, thus apart from signaling this state's voters' wish that more, not fewer, persons would receive minimum wage protection. So, there is something to be argued that the minimum wage amendment was designed to expand the scope of employer and employee, and therefore, to allow additional people to receive the benefit. So, the question whether or not the economic -- reality test is actually applicable to inmates is there questions as to whether or not the expansion was designed to include inmates is still an open question.

With respect to that, if we assume arguendo that the

economic reality test would apply, the analogy to the federal -- the FLSA, the Federal Minimum Wage Act is inapplicable here for a variety of reasons. District Courts have opined on it, certain Federal District Courts have opined on it, but just because there's some association or incorporation economic realities test, ours is not the federal standard. We don't necessarily follow the federal standard.

We incorporate some of the tests, but we are not completely analogous to the federal standard for a variety of reasons, not the least of which is that FLSA has a certain complexity of language, and it's framed with a lot of prior case law interpretation that had addressed these questions. And under the FLSA there's no argument that inmates are not entitled to receive the minimum wage, and that's not what we're trying to analogize to, but also there's no bearing that's going to be -- or no indication that that's going to bear on this matter.

Speaking to the economic reality test more generally, with respect to the question that Mr. Walsh raised with respect to the realities of how minimum wage impacts someone's life, those are certainly factors in consideration of why we have a minimum wage, the necessity for somebody to be able to afford to bear costs of living. And certainly, there's an argument to be made that those don't apply to an inmate in a given context because obviously a lot of those expenses are covered. But that's not really what the economic reality test speaks to.

What the economic reality test actually speaks to is whether or not that is an economic reality that there -- the employer is employing the employee. It's irrelevant whether or not that person needs a job or

whether he has expenses to cover or any of those exigencies that go along with that. The question is, does the economic reality test define the word employee in the context of the employer and employee such that somebody can be properly entitled employee? That's what the economic realities test speaks to.

This also is pointed out in *Terry*. The Supreme Court indicated they fashioned the economic realities test to be wide-reaching, to not be a narrow scope. And other case law, and I don't have it in front of me, I think it's referenced in the opposition, indicates the economic realities test is not a complete bar from an inmate ever being deemed an employee. There's specific federal cases, District Court cases, which say that there's not such a bar, that under the proper circumstances the economic realities test will allow for an inmate to be defined as an employee for which the minimum wage would be applicable. And that's even with respect to the federal minimum wage, not even addressing what we're dealing with here, which is again, a different standard than what's contemplated under the FLSA.

Again, as Mr. Walsh pointed out in the -- in their motion, the economic realities test does examine the totality of the circumstances, and again, I'm reading from *Terry* here, and determines whether as a matter of economic reality, workers depend on the business to which they render service for the opportunity to work. That is the broad economic reality that we're asking to look at, whether or not the worker depends on the business to which they render service for the opportunity to work.

There's no question here about that the inmates depend entirely on the State for their opportunity to work. I mean, clearly they can't commute. So, obviously, that's the question. Now, there's a list of various factors that go into it, they're not an exhaustive list, and they're referenced in *Terry*, they're referenced in prior cases, and they vary even in Nevada from one case to another. And I've addressed seven of those in my opposition, so I'm not going to reiterate those specifically as they're framed from the *Prieur* case.

As they are incorporated from *Terry*, I would like to address those very quickly, and I don't know if I've already talked [indiscernible] maybe out of the question.

THE COURT: [Inaudible] That's okay, go ahead.

MR. LAWRENCE: Real quickly, [indiscernible] in each of the six aspects of the economic realities test that the State raised. First, with respect to the degree of employee control, they can see that there is undoubtedly control. Now, they argue that it's no reflective of incarceration versus actual employment, but -- and clearly they exercise control through the incarcerated process, there's no doubt about that.

But the question is still the control about the employment. There are plenty of people that are incarcerated who are not employed, who don't fall into these programs. And again, it is important to keep this in mind the context that we're dealing with with the Plaintiff Mr. Gonzalez who works with the NDF, and he works in the conservation camps. There are other prison industries, there are other things that our -- our complaint hasn't spoken to those. We're speaking of a very

narrow subset, whether the Court would see fit to expand it more broadly is a different question.

But our specific subset relates to people that are working in conservation camps whose employment is selected by NDOC, whose employees are paid by the NDF, who basically have that linear line from their employment straight to the governor's office. So, functionally all the aspects of their employment lie within State control. That is distinct from private enterprise and other things of that sort where there may be arguments made about who can qualify as an employer in that circumstance because not all the aspects are controlled by a single entity. Here we do have that. The single entity is the State.

And again, the point of this is not due to incarceration, it's due to employment. These people have to meet certain requirements to get the job and then they are selected. They can be excluded from this sort of work by the director of the NDOC. So, this is not like they're obligated to work. This isn't slave labor under the 13th -- allowable slave labor under the Thirteenth Amendment. This is distinct -- a distinct aspect of employment where the control of their employment is exercised by the State and that is independent of incarceration because not every incarcerated person is controlled in this same manner.

So, with respect to item one that the State raises, bearing down to the benefit of the inmate as an employee. The second one's a really crucial one actually, the alleged employee's opportunity for profit or loss depending on his or her managerial skill. The managerial skill obviously in this context means functionally managing themselves. It

obviously cannot speak more broadly than that because if you think just a door greeter at Walmart is certainly an employee, he's not managing anything more than his own employment. And so, that's what we're speaking to here. And so the question of profit or loss is quite significant.

State argues that under NRS 209.246 wages can be deducted, and that's certainly true, no objection to the applicability of that which would allow for deduction of wages to compensate for some of the costs that are accrued to the State or incurred by the State for incarcerating an inmate. More relevant than that though is actually NRS 209.463, which talks about deductions that are made with respect to an inmate when they are making money above minimum wage. 209.463, number 1, it says if the hourly wage of the offender is equal to or greater than the federal minimum wage. So, that's certainly contemplated.

There are deductions that are allowed by the directors, discretionary deductions allowed by the director. The first one is for victim compensation. That's the first thing. So, if there's enough money coming into a particular inmate, it goes to victim compensation. That's arguably not a profit generator for the inmate.

The second one though is the amount the director considers reasonable to meeting existing obligations of the offender for the support of his or her family. That is a direct profit motive for that particular inmate to work.

Part C is not relevant to our complaint of that statute. Part D is in the next deduction available in that list of priorities, and it's amount

determined by the director for deposit in an individual account of the offender. So, there's three things that come into play here with respect to deductions that have to be made regarding the profit motive of that particular inmate to go out and work. First is victim compensation, second is to support his family, third is to his own bank account. So, those are definitely profit motives that cause the inmate to go out and actually seek work.

Another really, really relevant aspect, and it's the whole reason this case exists or the reason that we brought it, is related to the quote by Judge Hardesty in the *White v. State* case that I referenced a while back. In that particular case, Darrell White was working in prison industries and was injured. He expired his sentence, that injury followed him from prison out into the real world.

When he'd gotten out to the real world, he was entitled to worker's compensation because he couldn't work due to the injury he incurred while working in prison. He was paid 20-some dollars a month because even though he was a completely expired sentence -- a completely free individual, he was still being paid predicated on the amount that he had earned while he was an inmate. That struck us as justly unfair, so we sought to correct that when we had the case, and we actually -- we didn't win the case, but part of what was raised was that there was a -- underlying fundamental right to that individual inmate to receive the minimum wage. That's what prompted the quote that's in the *White* case.

So, again, that's a proper motive that plays into this. Even if

we said all these deductions are actually going to reduce the amount that a particular inmate may receive while he's incarcerated, well that particular inmate did not wind up with an injury for which the injury carries forward into his real life following his release from incarceration. There's a direct economic impact on what he receives at that point, as well. So again, that speaks to the profit motive.

So, as a point too, I think that redounds the alleged employee's opportunity for profit or loss completely redounds to the benefit of the inmate. There's no doubt that they benefit directly from the fruit of their labor.

The investment, materials equipment rights part three as raised by the State. They concede that they again reference for some argument that it's related to incarceration or an employment relationship. I'm not going to belabor that, I'm just going to refer back to the same argument I made as to why this is distinct from the incarcerated element on point one.

Whether the services rendered require special skills, point 4 that they raise under economic realities test, there is specific training that goes with this. Mr. Gonzalez specifically is actually trained to use a chainsaw. I don't know the scope of that training. I can't really speak to that at this point directly, but there is special training that goes into this. This is not, you know, some aspect of functional mindless labor or anything that does not [indiscernible]. There is skill that is brought to this work and there is skill [inaudible].

THE COURT: Mr. Lawrence?

MR. LAWRENCE: Yes?

THE COURT: Mr. Lawrence?

MR. LAWRENCE: Yes.

THE COURT: Let me ask you this. Is it correct that when he trained to use the electric saw or whatever it was there was a -- he received a higher pay?

MR. LAWRENCE: Largely yes, he gets $3 per day as opposed to 2.

THE COURT: Okay.

MR. LAWRENCE: So, yes, there is some direct [indiscernible] compensation for the increased training, but it's marginal.

The degree of permanence in the working relationship, obviously there is a termination of employment with respect to this. Most of these inmates that are in these programs are on minimum security. They're more likely than not to be -- that would be released back into society. So, there is a termination point, but again, that's true of all employment. There's no such thing as permanent employment, particularly in a state like Nevada where it's at-will.

So, I mean, the permanence of it is a marginal factor at best. And the net question that really it speak to the permanence is if the inmate does his job well and actually performs in accordance with the requirements of the job, he can maintain the job for the entirety of his incarceration. So, the employee functionally -- well, the inmate, the employee, functionally controls the permanency of employment in that context.

The last one is a really interesting one too with respect to whether the work performed is an integral part of the alleged employer's business. So, here we're speaking to the State. And the State in their defense argues several things about it being a circular concept and speaks to it in the concept of this being something strictly as a [indiscernible] work project for inmates. It's far from that.

The NDF, the Nevada Division of Forestry, has a mandate to maintain fire prevention efforts, as well as the vegetation clearing efforts. This isn't something that they simply do because it's a way to get the prisoners out and have them do something. They have a mandate by the State to get this done. So, they have a financial interest, and they have an obligation with respect to having the work that's being done be done.

And again, this is actually a profit generator for the State. The NDF in all the relevant statutes is actually allowed to make contracts with the federal government, with municipalities, with private enterprise, and they do so. So, they actually take the prisoner employee's labor, they shop it out, and they reap a profit on it. This is -- it's completely a functional business model, and it is not something that is strictly done for the purposes of creating the -- a productive serving incarceration. This isn't about that.

They utilize prison labor in order to accomplish -- objectives for which they are imposed to do by the state government and by the mandate, the statute that establishes the NDF. And the government said they actually make money doing so.

The contrary part of that is, is whether or not it's an integral part as well -- and it's not contrary, it's just an ancillary part whether or not it's integral to the NDF and the State's function is whether or not they could not use the prisoners to go do this. And absolutely they could. The NDF is not obligated to use prisoners even though a lot of the stuff with respect to conservation camps is incorporated in the relevant statutes related to the NDF because it was designed to use prison labor.

But even if you set that aside and say the prisoners are not integral as employees to it, they can go get somebody else to do this job. Absolutely, they could. They could reach out to the private market, they could hire people off the street to do these jobs, but if they did, they'd be paying them at least minimum wage, and probably a heck of a lot more given the work that's demanded, especially in firefighting.

So, that's -- in all those things, whether or not the economic reality test is actually applicable here and it's -- we still maintain that it's not. It's a close call. It's probably a little closer call than what we had indicated in our opposition. It is a tight question. I still don't believe it's necessarily follows from *Terry*, and it's not necessarily the default either.

Because if you look at the -- all the implementation of the economic reality test over the course of time, Supreme Court had to make an actual overt decision to say, yes, the economic reality test applies here. They had to do so with respect to the FLSA even though it was already being used elsewhere. They finally adopted that.

They then specifically said no, it doesn't apply to Nevada minimum wage laws. They later reversed that and said, okay, well,

we're going to apply it. But even then it was only narrowly applied with respect to claims arising under NRS 608, which this one does not.

So, just kind of recapping that, don't necessarily believe that the economic reality test is what's applicable here. But if in the event that it is, in this particular context for Mr. Gonzalez and for inmates situated as he is for which all the direct aspects of their employment are controlled by the State, we believe he satisfies the economic realities test such that on balance put -- he could win this matter and of course he should obviously be able to avoid dismissal.

Thank you for the time, I know I talked a lot.

THE COURT: All right, thank you, Mr. Lawrence. Mr. Walsh or Mr. Ott?

MR. WALSH: Yes, Your Honor.

I'd like to address specifically, I guess in order, the first of Mr. Lawrence's point regarding whether or not the economic realities test applies to the Minimum Wage Acts where it clearly applies to the FLSA under Nevada Supreme Court interpretation. And I think the most instructive language from *Terry* is the conclusion of section two, stating that the Legislature has not clearly signaled its intent that Nevada minimum wage schemes should deviate from federally set course and that for the practical reasons examined above, our state and federal minimum wage laws should be harmonious in terms of which workers qualify as employees under them. Therefore, under -- adopt the FLSA's economic realities test for the employment in the context of Nevada's minimum wage laws.

And that's not specifically limited to NRS 608 but indicates a broader application of the economic realities test to Nevada's minimum wage schemes either in statute or in its constitutional context. And in that case, that leads us to looking at federal law as applied to Nevada's definition of employee --

THE COURT: Mr. Walsh, will you speak a little bit slower? I'd appreciate it, please. If you --

MR. WALSH: I apologize.

THE COURT: -- speak a little bit -- yes, thank you.

MR. WALSH: Thank you.

Yeah, the Nevada Supreme Court's conclusion at the end of section two in *Terry versus Sapphire* indicates that the Nevada Supreme Court would be applying the economic realities test, not just to NRS 608, but Nevada's minimum wage scheme in its broader constitutional context.

In doing so, that opens up the door for the Nevada Supreme Court and courts in the state to look to the federal law and federal case law in terms of deciding whether or not inmates should be granted or be given status as an employee. And that opens the door for this Court to use *Hale, Morgan,* and *Vanskike* to come to the similar conclusion that the Ninth Circuit and Seventh Circuit come to that inmates do not meet the definition of employee, both under the economic realities test and the FLSA.

And to Mr. Lawrence's second point regarding the type of labor that a inmate may [inaudible] as determinative of their status as an

employee, *Morgan v. MacDonald*, the Ninth Circuit 1994 decision, did not make much of a distinction between the type of labor an inmate may engage in in order to qualify as an employee. Specifically, at the second end of section two in *Morgan versus Hale* states that our holding in *Hale* did not turn on the fact that prisoners that were engaged in hard labor or purely menial tasks.

In fact, we noted that one of the Plaintiffs worked as a bookkeeper and office manager, hardly the sort of work normally thought of as hard labor. Determinative in *Hale* was the fact that inmates work in prison-run programs stemmed primarily from their status as incarcerated criminals.

And Mr. Lawrence's third points, I guess kind of revolves around the concept the State either running their labor as a business or profit-generating enterprise, that concern was addressed in *Hale*, in both cases, where the purpose of the -- of minimum wage is to also kind of prevent an anti-competitive scenario from playing out. In this case, in *Hale*, in both cases, the Court was not -- did not find that determinative of whether or not inmates met the definition though of employee and found in both cases that inmates were not employees for purposes of the Fair Labor Standards Act.

And I believe every -- that I would further along those lines is covered in briefing. Thank you.

THE COURT: Okay, thank you. All right. Well, in this Court's view, with respect to the motion to dismiss, I've taken a look at the cases, *Hale, Morgan, Vanskike,* and also I think there's a decision that's

very important that you're making and -- in the law and really this article 15, section 16 of the Nevada Constitution known as the Minimum Wage Act. It was added in 2006 and does not guarantee payment of a specific -- that guarantees payment of specific minimum wage for employees.

So, are the inmates employees within this definition? And I do not believe that they are. And the reason for that, with discussing your brief thoroughly, but with respect to NRS 209.57, 457 34, the Nevada Division of Forestry, a -- they're able to enter into contracts with other entities. So, that's an important issue in this Court's view.

And NRS 209.457(a) provides that the NDF may use offenders who are [indiscernible] to the custody of the department and eligible for assignment to an institution or facility of minimum security pursuant to the provisions of NRS 209.481 to perform work relating -- related to firefighting, forestry, conservation programs, and so forth. And that -- there's no direct employee relationship between an inmate and the NDF. Instead, it's the Department of Corrections is the -- the director shall require each offender to spend 40 hours a week in vocational training or employment.

So, that's -- and in some cases, the inmates also have a reduction in the time that they have to serve, it's my understanding. But the NDOC makes the determination as to which inmates are eligible for the work to these conservation camps. Also, NRS 209.4618 does not create a right on behalf of the offender to employment or to receive the federal or state minimum wage for any employment and does not establish a basis for any cause of action against the state or its officers

or employers for employment of an offender or payment of the federal or state minimum wage to an offender.

And with respect to the *Prieur* case, this is the one about the plasma and the two inmates that were working there, this was prior to the amendment. However, they did take a look at the economic realities test, and that actually is consistent with the State's view here. And let's see, it seems that the economic realities test is not applicable here.

I think that the *Morgan* case is correct, the rationale there, that the Court held the prisoners cannot be considered employees under FLSA when they work for prison-run industries and are statutorily required to work. The policy behind the minimum wage does not apply. They are housed, they are given medical treatment, they are given food, they are given clothing, and you know, shelter.

I believe the *Thomas* case is distinguished. It does not apply here. This had to do with the taxi driver exemption. I was on that board for five years. This is -- in my mind, as a member for five years of the board approximately, this is not the type of case that's analogous to this situation.

The Court held that the Legislature cannot provide for more or different exemptions than the Constitution and thus conflicts with the Constitution such that the statute was preempted. Here, NRS 209.461 does not create any exceptions for employees that can receive minimum wage like the taxi driver exception in NRS 608.250 and specifically excludes inmates from minimum wage.

So, I -- this Court does not see the Plaintiff -- this Court finds

that Plaintiff is not an employee within the meaning of the NWA and NRS 209.61. They don't conflict here. There are no claims, in my view, for which relief can be granted. And actually, I'm going to look at my other note. Again, NRS 209.4618 does not create an exception for inmates in the same way that NRS 608.2502 did for the taxicab drivers. Instead, it precludes inmates' wage claims and it fits squarely within the above argument that the Nevada Supreme Court -- inmates do not meet the definition of the employment under the NWA.

And I do agree with the State with respect to it opening up to the federal cases which are, I think, very -- while they're in different circuits, they're very instructive in this case. So, I would like the State to please prepare -- so, finding that the Plaintiff does not claim -- has no claims for which relief can be granted for the reasons that were very eloquently placed forward in the pleadings.

I'm going to dismiss Plaintiff's motion -- excuse me, dismiss -- I'm granting Defendant's motion to dismiss with prejudice. I don't believe that there's any area where this would be applicable to inmates. Whether you look at the cases cited by the State or the NRS 209.46 -- point 4 -- and also, looking at NRS 608.250, I don't believe that it fits within that; it's distinguished.

So, I'd like the State to please prepare a detailed, organized order please. I'd like you to please make sure that Mr. Lawrence has a chance to take a look at it as to form and substance. I'd like you to please make sure that that's sent to the Department XIV inbox, and I'd like it in PDF and Word format, please. Okay?

Thank you, counsel. Have a great day. Be safe out there.

MR. WALSH: Thank you, Your Honor.

MR. LAWRENCE: Thank you, Your Honor.

THE COURT: Have a good day.

MR. WALSH: You, too.

[Proceeding concluded at 10:34 a.m.]

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Kaihla Berndt

Kaihla Berndt
Court Recorder/Transcriber

Exhibit Appellant 6

2/24/21 - Order Dismissing Case

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DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID A. GONZALEZ, an individual, Plaintiff, vs. 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, Defendants.	Case No.: A-20-820596-C Dept. No.: 14

ORDER OF DISMISSAL

This matter having come on regularly for hearing before this court on January 12, 2021, at the hour of 9:30 a.m. on Defendants' Motion to Dismiss.

The Court having read and reviewed the papers and pleadings on file herein and considered the arguments of counsel, and finds the following:

The instant Complaint alleges that Plaintiff, David A. Gonzalez, who at all relevant times has been an inmate of the Nevada Department of Corrections ("NDOC"), has participated in a Nevada Division of Forestry ("NDF") work program pursuant to Nevada

Case Number: A-20-820596-C

Revised Statute ("NRS") 209.457(2)(a). The Complaint seeks relief declaring Plaintiff is entitled to minimum wage compensation under Article 15, Section 16 of the Nevada State Constitution. Defendant's Motion to Dismiss argues the Plaintiff is not entitled to such relief as he was an inmate and not defined as an employee under Nevada law. As such, the sole issue before this Court is whether inmates in the NDOC and performing work for the NDF pursuant to NRS 209.457(2)(a), are employees as defined by Article 15, Section 16 of the Nevada State Constitution and are thus entitled to minimum wage compensation under Article 15, Section 16 of the Nevada State Constitution.

A. Plaintiff is Not an Employee Under Article 15, Section 16 of The Nevada State Constitution

The Nevada Supreme Court in *Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 130 Nev. 879 (2014) has adopted an "economic realities" test to determine whether an employment relationship exists between purported employees and employers for claims arising under NRS 608.010. There, the Court found that certain adult performers met the statutory definition of "employee" under NRS 608.250, while also recognizing that NRS 608 was superseded by Article 15, Section 16 of the Nevada State Constitution ("Minimum Wage Amendment" or "MWA"), under *Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518, 130 Nev. 484 (2014). In *Terry,* the original complaint was brought under NRS 608.250 and not the MWA. Nevertheless, the Court reasoned that both definitions of employee and employer under NRS 608.010, 608.011 and the MWA required a more instructive aid – the federal Fair Labor Standards Act "economic realities" test – to determine the exact relationship between appellant and respondent in harmony with Nevada legislative intent for Nevada minimum wage laws to "run parallel" to federal law, at least in many significant respects. *Terry*, 336 P.3d at 955

The Court held:

> Thus, the Legislature has not clearly signaled its intent that Nevada's minimum wage scheme should deviate from the federally set course, and for the practical reasons examined above, our state's and federal minimum wage laws should be harmonious in terms of which workers qualify as employees under them. We therefore adopt the FLSA's "economic realities"

> test for employment in the context of Nevada's minimum wage laws.

Id at 958.

Nevada courts may, therefore, follow federal case law in applying the economic reality test, including an examination of the totality of the circumstances:

> Thus, the economic realities test examines the totality of the circumstances and determines whether, as a matter of economic reality, workers depend upon the business to which they render service for the opportunity to work. See *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32-33, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961); *Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 434 (5th Cir.2013). Given this backdrop, this court has difficulty fathoming a test that would encompass more workers than the economic realities test, short of deciding that all who render service to an industry would qualify, a result that NRS Chapter 608 and our case law specifically negate. See NRS 608.255; *Prieur*, 102 Nev. at 474, 726 P.2d at 1373.
>
> Thus, to the extent that our test could only, from a pragmatic standpoint, seek to be equally as protective as the economic realities test, and having no substantive reason to break with the federal courts on this issue, "judicial efficiency implores us to use the same test as the federal courts" under the FLSA. See *Moore v. Labor & Indus. Review Comm'n*, 175 Wis.2d 561, 499 N.W.2d 288, 292 (Wis.Ct.App.1993) (adopting, for analogous state law purposes, the test used by federal courts to determine whether someone is an employee for the purpose of a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012))

Id. at 956-957.

Defendants argued that the holdings in *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) were determinative. Specifically, "the primary policy concern of the FLSA—ensuring a minimum standard of living for all workers—is simply inapplicable to prisoners 'for whom clothing, shelter, and food are provided by the prison." *Morgan*, 41 F.3d. at 1292. Federal Appellate Courts have consistently found that inmates do not meet the definition of employee under the FLSA. This court agrees and may apply the same test to the MWA under *Terry*.

As here, under *Morgan* and *Hale*, inmates were held to be required to perform work as a condition of their incarceration. See *Morgan*, 41 F.3d. at *Id.* (citing NRS 209.461(1)(b)

as applied to Nevada inmates under the FLSA); *Hale*, 993 F.2d 1387 at 1398. Because *Morgan* examined the economic realities of Nevada inmates, *Morgan* is factually and analytically on point for this court's determination: NRS 209.461(1)(b) still requires, to the extent practicable, Nevada inmates to either receive vocational training or work 40 hours per week as a condition of incarceration, subject to behavioral, medical, or educational exclusions. Further, the NDOC may provide inmates to the NDF under NRS 209.457(3) which allows the NDF to utilize inmates to perform work as specified in the statute, provided that an inmate volunteering for a work program meets certain eligibility requirements under NRS 209.457(2)(a) and NRS 209.4615.

The only Nevada Supreme Court decisions to consider inmate eligibility for minimum wage compensation are *Prieur v. D.C.I. Plasma Ctr.*, 102 Nev. 472, 726 P2d 1372 (1986) and *White v. State*, 454 P.3d 736, 135 Nev. Adv. Op. 67 (2019). However, the Court in *Prieur*, sitting prior to the enactment of the MWA, recognized but did not employ the economic reality test; instead, ultimately finding that no employment relationship existed between Nevada inmates and a private company because the State and the company were the sole contracting parties. See *Prieur*, 726 P2d 1372 at 1373. Similarly, *White* was decided on other workers' compensation grounds. See *White,* 454 P.3d at 739-40. Nevertheless, the Court in *Prieur* signaled that it was open to examining the economic realities of incarceration in terms of employment. See *Prieur*, 726 P2d 1372 at *Id. Prieur* can therefore be read consistently with *Terry*, which was decided after the enactment of the MWA and which specifically applied the economic realities test to both Nevada law and the FLSA. See *Terry*, 336 P.3d at 955-957. As such, this court may examine the economic realities of Nevada inmates to determine whether an employment relationship exists.

Under the totality of the circumstances, factors and policies analyzed in *Terry*, *Hale*, *Morgan* and *Vanskike*, it is this court's finding, parallel to and consistent with federal law, that the purpose of any minimum wage law is to prevent members of the general public from falling into substandard living conditions. The economic realities of incarceration are distinct and separate from those faced by the general public because inmates are

guaranteed housing, meals, medical attention and are able to participate in work programs under NRS 209.457(2)(a) and in exchange for sentence reduction credits under NRS 209.449. The reality of incarceration is further not based on a pecuniary relationship between inmates and the state. Therefore, there is no employment relationship between inmates and the state.

Based on the foregoing, this court finds that inmates in Nevada do not meet the definition of employee under Nevada's Minimum Wage Amendment.

B. Article 15, Section 16 of the Nevada State Constitution Does Not Impliedly Repeal NRS 209.461(8)

Defendants assert that NRS 209.461(8) establishes that there is no right to minimum wage compensation for inmates. Plaintiff has argued that the MWA impliedly repealed NRS 209.461(8). Plaintiff relies on *Thomas v. Nevada Yellow Cab Corp* (citation supra), in which a taxi-driver exception to Nevada's Wage and Hour Law was held to be impliedly repealed by the later enactment of the MWA, precisely because taxi-drivers were not explicitly exempted under the MWA.

This court finds that *Thomas* is distinguishable from the case at hand and therefore inapplicable. NRS 209.461(8) does not create a constitutionally conflicting exemption from the MWA in the same way as the taxi driver exemption examined in *Thomas*. Here, NRS 209.461(8) simply bars a minimum wage cause of action for inmates arising pursuant to the provisions of NRS Chapter 209 and does not expressly create an exemption for those who would otherwise be classified as employees under the MWA. Based on the totality of the circumstances and policies examined in *Terry, Hale, Morgan*, and *Vanskike*, inmates do not have the same employee-employer relationship characteristics as taxi drivers and their employers.

Based on the foregoing, this court finds that NRS 209.461(8) is not in conflict with, nor impliedly repealed by the MWA.

/ / /

/ / /

C. Plaintiff's Complaint Fails to State a Claim Upon Which Relief Can Be Granted

Pursuant to Nevada Rule of Civil Procedure ("NRCP") 12(b)(5), Plaintiff's Complaint fails to state a claim upon which relief can be granted because Plaintiff's claim for minimum wage compensation is explicitly barred by NRS 209.461(8). NRS 209.461(8) states: "The provisions of this chapter 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." As such, Plaintiffs is not an employee, and has no claims for which relief can be granted.

Based thereon, IT IS HEREBY ORDERED that Plaintiff's Complaint be and is hereby dismissed with prejudice.

DATED: _____

Dated this 24th day of February, 2021

_____

DISTRICT COURT JUDGE

AA8 9E3 90C8 907F
Adriana Escobar
District Court Judge

Respectfully submitted by:

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

David Gonzalez, Plaintiff(s)	CASE NO: A-20-820596-C
vs.	DEPT. NO. Department 14
State of Nevada, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 2/24/2021

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August 2021, I mailed a true and correct copy of the foregoing **APPELLANT'S APPENDIX ON RECORD ON APPEAL** to the counsel listed below:

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