No. 82762

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,

Respondent.

On Appeal from the Eighth Judicial
District Court of the State of Nevada
Case No. A-20-820596-C

RESPONDENT'S ANSWERING BRIEF

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INTRODUCTION

Appellant, David A. Gonzalez, argues two primary points on appeal from the district court's Order of Dismissal: 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("NRS"), prohibiting any cause of action for minimum wage compensation for Nevada prison inmates, has been impliedly repealed by the subsequent enactment of Article 15, Section 16 of the Nevada State Constitution ("Minimum Wage Amendment" or "MWA") in 2006, and that such repeal is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. Mr. Gonzalez further argues that even if this Court adheres to an economic reality test, any factors analyzed militate in favor of Mr. Gonzalez's status as an employee of the State of Nevada.

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 Federal Fair Labor Standards Act (FLSA). 29 U.S.C. § 203. As such, Mr. Gonzalez mischaracterizes the status of Nevada Law; Nevada courts look to federal case law to determine a potential employee's status. Though this is a case of first impression in Nevada, a well-developed body of federal case law shows that inmates are not employees, as the economic realities of incarceration are not the same as those

encountered by members of the public, and therefore do not match the intended purpose of minimum wage laws.

Even if NRS 209.461(8) is ruled unconstitutional or impliedly repealed, Mr. Gonzalez's claims fail because Mr. Gonzalez does not meet the definition of employee for minimum wage purposes under the Minimum Wage Amendment.

ISSUES PRESENTED FOR REVIEW

The sole issue before the Court is whether Nevada inmates assigned to work in Nevada Division of Forestry work programs are employees for purposes of the MWA. Such a determination hinges on whether the MWA impliedly repealed the prohibition on inmate minimum wage claims embodied in NRS 209.461(8).

SUMMARY OF ARGUMENT

Nevada courts utilize an economic reality test to determine whether an employer-employee relationship exists between parties. Though this test focuses on several different, non-uniform, factors across various state and federal cases, Nevada case law recognizes that such a determination is truly based on the totality of the circumstances. Nevada courts further follow federal case law when interpreting minimum wage statutes, as this Court has recognized the legislature's intent for Nevada minimum wage laws to run parallel and be consistent with federal law.

Here, consistent with federal case law, Nevada inmates are not employees under totality of circumstances; minimum wage laws are designed to prevent

individuals from falling into substandard living conditions. Federal courts have recognized that this purpose does not apply to those who are incarcerated because life essentials are already provided – food, shelter, clothing, medical attention and educational opportunities.

As such, NRS 209.461(8) does not conflict with Nevada's Minimum Wage Amendment. Additionally, if this Court looks to traditional economic reality test factors, such as level of purported employer control, permanence of the relationship, skill required and investment in materials (among other factors), any similarities to traditional employee-employer relationships are more related to the nature of incarceration.

ARGUMENT

I. Mr. Gonzalez is Not an Employee Under Article 15, Section 16 of The Nevada State Constitution

A. Nevada Courts Utilize the Economic Reality Test Consistent with Federal Case Law

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, citing *Thomas v. Nevada Yellow Cab Corp*, 130 Nev. 484. *Terry*, 336 P.3d at 954. 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, NRS 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 and do so 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.**

(Emphasis added) *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))

(emphasis added) *Id.* at 956-957.

The State has 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) are determinative, each case having interpreted the FLSA in terms if inmate minimum wage claims. 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.

B. Federal Appellate Courts Have Consistently Found That Inmates Do Not Meet The Definition Of Employee Under The FLSA

In *Morgan*, where an inmate was employed as a computer troubleshooter for the Education Center which was located on the grounds of the Ely State Prison,

"[t]he 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 9th Circuit 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:

> "… [T]he 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 1292-1293.

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 807-808, citing *Miller v. Dukakis*, 961 F.2d 7,8 (1st Circuit. 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. United States*, 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 810-811.

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

As here, under *Morgan* and *Hale*, inmates are 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 the 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 Nevada Department of Corrections (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 P.2d 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*, parallel to and consistent with federal law, 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.

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

Mr. Gonzalez argues that the MWA impliedly repealed NRS 209.461(8). Mr. Gonzalez 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 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*. *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, at best, 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.

III. Economic Reality Factors Do not Militate in Favor of Mr. Gonzalez's Status as an Employee

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.

Terry at 958-961.

Here, the above factors 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 at 1292.

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(1)(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 The State's 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.*

IV. 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; 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 the Court to determine the economic reality of the alleged employee-employer relationship at hand.

[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 9/28/2021); State of Nevada Statewide Ballot Questions 2006, Pp. 31-34.; https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2006.pdf (last accessed 9/28/2021)

[2] Id.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the district court's Order dismissing Mr. Gonzalez's complaint be affirmed.

Dated this 29th day of September, 2021.

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I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on September 29, 2021.

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