IN THE SUPREME COURT FOR THE STATE OF NEVADA

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ABEL CÁNTARO CASTILLO,

Appellant,

vs.

WESTERN RANGE ASSOCIATION,

Respondent.

CASE NO. 85926

U.S. District Court Case No.:
3:16-cv-00237-RCJ-CLB

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

1. The Appellant, ABEL CÁNTARO CASTILLO ("Mr. Cántaro Castillo"), is an individual to whom the corporate ownership disclosures under NRAP 26.1(a) are inapplicable because he is a natural person, has no stock or ownership interest in any entity involved in these proceedings, and does not have a parent or subsidiary company or corporation. Mr. Cántaro Castillo is appearing under his proper name and is not using any pseudonym.

2. The undersigned counsel of record has appeared in this matter before the U.S. District Court, and there are no prior proceedings in this matter in the courts of the State of Nevada. The undersigned counsel of record further certifies that the undersigned firms are the only attorneys who have appeared for Appellants in the case (including proceedings before the United States District Court and before an administrative agency) or who are expected to appear in this Court.

DATED this 27th day of March, 2023.

By: Christine E. Webber

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this case pursuant to Rule 5(a) of the Nevada Rules of Appellate Procedure and its Order Accepting Certified Question and Directing Briefing. *See* Appellant's Appendix "AA" Vol. 5, pp. 761-62. This certification proceeding does not require the establishment of timeliness, under NRAP 28(a)(3)(B).

ROUTING STATEMENT

This matter is presumptively and properly retained by the Supreme Court under the authority of NRAP 17(a)(6) which provides that "[t]he Supreme Court shall hear and decide… [q]uestions of law certified by a federal court."

ISSUES PRESENTED FOR CERTIFICATION

The question of law certified by the United States District Court and accepted by this Court is as follows:

> Under the Constitution of the State of Nevada and Chapter 608 of the Nevada Revised Statutes, does Nevada law require Defendant Western Range Association to pay Plaintiff Abel Cantaro Castillo 24 hours of wages for every day worked because Plaintiff Castillo was not allowed to leave and was always performing some job duties even though some of the time he spent on the range was for his personal benefit?

As discussed more fully in Argument Section I below, pursuant to its inherent discretion, *see Echeverria v. State*, 137 Nev. 486, 488-89, 495 P.3d 471, 474 (Nev. 2021), this Court should re-phrase the question of law that was certified by the United States District Court as follows:

> Under the Constitution of the State of Nevada, what is the appropriate standard for determining what is "work" under Nevada's minimum wage law, including specifically the standard for determining when an employee has been "engaged to wait," which renders on call time "work."

STATEMENT OF THE CASE

This is a factually unique case under Nevada's wage and hour laws that involves a sheepherder who remains out "on the range" with a herd of sheep for the six months of each year that he worked in Nevada. The question certified to this Court is how to determine what constitutes "work" under Nevada's wage laws, which require all hours of work to be compensated. Fortunately, the U.S. Court of Appeals for the Sixth Circuit has provided a roadmap by using prior Nevada Supreme Court precedent to assess whether certain activities are deemed "work" under Nevada law. *See In re: Amazon.com, Inc. Fulfillment Ctr. FLSA & Wage & Hour Litig.*, 905 F.3d 387, 397-99, 401 (6th Cir. 2018). As demonstrated by the Sixth Circuit, and the numerous prior precedent setting cases from this Court, federal wage-hour law under the Fair Labor Standards Act (FLSA), and its accompanying regulations, provide the standard for analyzing the certified question posed here.

Plaintiff-Appellant Abel Cántaro Castillo came to the United States under the H-2A visa program and worked as a sheepherder in Nevada. He worked for Defendant-Respondent Western Range Association ("WRA"). In this case

Plaintiff Cántaro Castillo brings claims for violation of his contract with WRA, a contract created by the regulations governing the H-2A program,[1] for violation of Nevada's Minimum Wage Amendment,[2] and for failure to pay all wages due upon termination of employment.[3] Plaintiff's claim for violation of his contract is predicated on the contract's promise to pay Nevada minimum wage if it were higher than federal minimum wage or the "adverse effects wage rate" established by the US Department of Labor under the H-2A regulations. 20 C.F.R. §§ 655.121(a)(1), 655.122(q). Thus, all of Plaintiff's claims turn on interpretation of Nevada's Minimum Wage Amendment ("MWA"), Nev. Const. art. 15, § 16, and whether Plaintiff's activities were "work" under the MWA.

Plaintiff filed this suit as a putative class action in the U.S. District Court for the District of Nevada. An initial dismissal based upon jurisdictional grounds was reversed by the Ninth Circuit. *Cantaro Castillo v. WRA*, 777 F. App'x 866 (9th Cir. 2019). Following discovery, the parties briefed Plaintiff's motion for class

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[1] 20 C.F.R. § 655.121(a)(1), 655.122(q).

[2] Nev. Const. art. 15, § 16.

[3] Nev. Rev. Stat. §§608.140, 608.040, and 608.050. Plaintiff's claim for failure to pay all wages due upon his termination is predicated on his contract and Nevada Minimum Wage Amendment claims.

While originally additional parties were named, the parties are currently limited to Plaintiff, who seeks to represent a class of herders who worked for WRA, and Defendant Western Range Association, which the District Court found was his joint employer.

certification, Plaintiff's motion for partial summary judgment on WRA's status as a joint employer, and Defendant's motion for summary judgment. The district court ruled that WRA was Plaintiff's employer. AA Vol. 5, pp. 743, 744. The district court did not rule on WRA's motion for summary judgment, finding that to determine if Nevada's minimum wage amendment was violated, it needed to know how many hours Plaintiff had worked, which in turn required knowing what hours Nevada would count as work time where Plaintiff was required to remain out "on the range" with a herd of sheep for the six months of each year that he worked in Nevada (his remaining time was worked over the border in California, and is not part of his claims here). As neither parties nor the District Court identified any controlling Nevada authority on the question of what constitutes "work," the District Court certified the question to this Court. The circumstances of Plaintiff (and other herders) are extreme when compared to other cases claiming minimum wage for certain work—sheepherders are (i) out on the range for months on end; (ii) on call at all times when not actively completing required tasks; (iii) responsible for the health and safety of the sheep 24 hours/day, 7 days/week; and (iv) worked under conditions where they could not freely engage in his own chosen pursuits.

STATEMENT OF FACTS

A. WRA Entered a Contractual Agreement to Pay Plaintiff

The H-2A temporary agricultural worker program requires employers seeking approval to bring in temporary foreign workers to file an application with the US Department of Labor ("DOL") which complies with applicable federal regulations. 20 C.F.R. §§ 655.121(a)(1), 655.130, 655.120(a)(2), 655.122, 655.135, and 655.210. These filings are deemed to create an employment contract.[4] The contract created by regulation includes the promise to comply with governing law, including applicable laws regarding wages. Specifically, the contract promises to pay state minimum wage if it is higher than the adverse effects wage rate ("AEWR") established by the DOL.[5] *See also Castillo v. WRA*, 2017 WL 1364584, *6 (D. Nev. July 19, 2019) ("as a matter of law, Plaintiffs' H-2A shepherd contracts included a promise to pay the applicable state minimum wage, if higher than the applicable AEWR") (citing *Ruiz v. Fernandez*, 949 F.Supp.2d 1055, 1072 (E.D. Wash. 2013)). Western Range is a party to this H-2A created contract, and is a joint employer of Plaintiff. *See* AA Vol. 5, pp. 743, 744.

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[4] 20 C.F.R. § 655.122(q); *see also Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1233 n.5 (11th Cir. 2002); *Frederick Cnty. Fruit Growers Ass'n, Inc. v. Martin*, 968 F.2d 1265, 1268 (D.C. Cir. 1992); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1342 (5th Cir. 1985).

[5] 20 C.F.R. § 655.122(q); 20 C.F.R. § 655.121(a)(1); Macker Decl. ¶¶ 7, 13, AA Vol. 2, pp. 204, 205.

The Minimum Wage Amendment to Nevada's Constitution, Nev. Const. art. 15, § 16, unlike the federal Fair Labor Standards Act ("FLSA"), does not include any exemption for agricultural workers or those working out "on the range," as do the herders at issue here. The Minimum Wage Amendment directly requires payment to Plaintiff of at least minimum wage for each hour worked. In addition, since Nevada's minimum wage, considering the number of hours worked, is higher than the AEWR, the Minimum Wage Amendment also establishes the minimum that WRA is contractually obligated to pay to herders, including Plaintiff, who worked in Nevada.

B. Plaintiff's Job Duties, and Hours

1. Required Hours of Work

All of the relevant job orders and H-2A petitions state that Plaintiff was on call for up to 24 hours/day, 7 days/week.[6] If the H-2A petitions did not specify that the herders were required to be available 24/7, then the visas could not have been issued under the special procedures for herders, and would have had to comply with the usual H-2A requirements of recording all hours worked, and paying the

[6] *See, e.g.*, Form 9142 ("On Call** 24 hours"), AA Vol. 2, p. 254; Form 9142 (2009-2010) ("ON CALL 24/7"), AA Vol. 4, p. 444; *see also* I-129 ("24/7 HOURS PER WEEK"), AA Vol. 3, p. 331; *see also* Macker Decl. ¶¶ 9, 15 (other WRA forms across the proposed class period are substantially similar), AA Vol. 2, pp. 204, 206.

minimum wage rate for each hour worked.[7] In reliance on these provisions, neither WRA nor its member ranches such as El Tejon, where Plaintiff worked, maintained a record of hours worked.[8]

While neither WRA nor its member ranches tracked hours worked, the similarity of herders' job duties, the requirements of H-2A, and fundamentally the requirements of open range sheepherding combine to provide substantial corroboration for Plaintiff's testimony regarding his hours worked.[9]

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[7] DOL Training & Employment Guidance Letter, TEGL No. 32-10 (Special Procedures: Labor Certification Process for Employers Engaged in Sheepherding and Goatherding Occupations under the H-2A Program), Att. A, § I.C.1, AA Vol. 2, p. 286 ("If an application file for a sheepherder or goatherder does not include the requirements of being on call 24 hours per day, 7 days per week, the Chicago NPC may not process the employer's application under the special procedures enumerated in this TEGL, and must instead require compliance with all the requirements of the H-2A regulations outlined in 20 C.F.R. 655, Subpart B."); 20 C.F.R. § 655.200(b)(3) ("The procedures in this section … apply to job opportunities with the following unique characteristics ….The work activities generally require the workers to be on call 24 hours per day, 7 days a week.").

If the herder is on call 24/7, and the special procedures apply, then the "employer is exempt from recording the hours actually worked each day." 20 C.F.R. § 655.210(f)(1); TEGL No. 32-10, Att. A, § I.C.7, AA Vol. 2, p. 287-88 ("Because the unique circumstances of employing sheepherders and/or goatherders (i.e., on call 24/7 in remote locations) prevent the monitoring and recording of hours actually worked each day as well as the time the worker begins and ends each workday, the employer is exempt from reporting on these two specific requirements of 20 C.F.R. § 655.122(j) and (k).").

[8] Gragirena Decl. ¶¶ 17-18, AA Vol. 3, p. 348; Youree Dep. 224:11-226:4, 228:14-24 (it was not possible for ranches to track hours, WRA made no record of hours and did not expect ranches to do so), AA Vol. 2, pp. 260, 262, 263.

[9] Plaintiff's proposed expert, Dr. Petersen, performed a pilot survey and wrote

2. Plaintiff's Job Responsibilities

WRA uses virtually identical job descriptions in all of its job orders and H-2A petitions, including on the forms specifically covering Plaintiff. *See, e.g.*, AA Vol. 4, p. 444; *see also* Macker Decl. ¶¶ 8, 14, AA Vol. 2, pp. 204-05. It closely tracks the job description included in the TEGL special regulations, TEGL, Att. A, § I.C.1, which states:

> Attends sheep and/or goat flock grazing on the range or pasture. Herds flock and rounds up strays using trained dogs. Beds down flock near evening campsite. Guards flock from predatory animals and from eating poisonous plants. Drenches sheep and/or goats. May examine animals for signs of illness and administer vaccines, medications, and insecticides according to instructions. May assist in lambing, docking, and shearing. May perform other farm or ranch chores related to the production and husbandry of sheep and/or goats on an incidental basis.

AA Vol. 2, p. 286. WRA's member ranches, including El Tejon where Plaintiff worked, agreed that the job description was generally accurate.[10]

Melchor Gragirena, owner of the WRA member ranch where Plaintiff was assigned, specifically noted that herders guarded sheep from predators, sought to prevent the sheep from eating poisonous plants, and herded sheep to stay within

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an expert report demonstrating the feasibility of scaling up his pilot survey in order to make class-wide projections of hours worked, post-class certification. *See* Petersen Report ¶ 4, AA Vol. 4, p. 355. The responses to the survey provide information from randomly selected herders identifying their job responsibilities and hours worked on the range which further corroborates Plaintiff Cántaro Castillo's testimony.

[10] Gragirena Decl. ¶ 15, AA Vol. 3, p. 347.

the boundaries of their permitted range and avoid overgrazing.[11] Plaintiff Cántaro Castillo testified that during the entire time he was in Nevada, he was out on the range with his band of sheep, responsible for guarding them.[12]

A report commissioned by WRA describes sheepherders' responsibilities:

> The open range sheepherder lives and travels with this band of sheep day and night, protecting the sheep from predators and from eating poisonous plants, moving the band to new grazing land each day and bedding them down at night. Typically, during a portion of the year the sheep range is in the mountains or desert, often in exceedingly remote areas.
>
> …
> A herder's "work day" typically consists of moving the sheep to new pasture in the morning, observing the sheep during the day as they graze to assure that there are no problems, bedding the band down at night, and being alert during the night for possible indications of predators. The presence of predators is usually signaled by the actions of the guard dogs or signs of restiveness among the sheep that experienced herders have learned to recognize.

Holt Report, AA Vol. 4, pp. 470, 475-76.[13] The report author, Dr. Holt, also provided testimony, in which he concluded that, "open range sheepherding, where

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[11] Gragirena Decl. ¶¶ 10, 15, AA Vol. 3, pp. 346, 347.

[12] Cántaro Castillo Dep. 43:17-24, 44:10-14, 45:4-10, 51:6-8, 144:4-24, AA Vol. 4, pp. 453-56, 463.

[13] James S. Holt, Ph.D. was retained by WRA to prepare a report on sheepherding and testify before California's Industrial Wage Commission on behalf of WRA about the work that herders engage in; the Holt report was reviewed and approved by WRA. James S. Holt, Ph.D, The Open Range Sheep Industry ("Holt Report"), AA Vol. 4, p. 470; Richins Dep. 181-83, 193-94, 195, AA Vol. 4, pp. 497-99, 501-02, 503; *see also* WRA Comments, AA Vol. 4, p. 507.

the open range is used for pasture, is a labor-intensive undertaking because of the fact that it does require these herders to be with the sheep constantly." Holt Testimony, AA Vol. 2, pp. 238-39. This is consistent with the H-2A special regulations for herders, which apply only to positions in which the herder will be "on the range" for most of the workdays, and define "range" to exclude "any area where a herder is not required to be available constantly to attend to the livestock and to perform tasks, including but not limited to, ensuring the livestock do not stray, protecting them from predators, and monitoring their health." 20 C.F.R. §§ 655.200(b)(2), 655.201. Plaintiff was undisputedly "on the range" for all of the days he was in Nevada,[14] and thus was in an area where he was "required to be available constantly to attend [the sheep]." *Id.* This evidence all confirms Plaintiff's testimony that "we all worked … all guarding as sheepherders all the time." Cántaro Castillo Dep. 44:10-14, AA Vol. 4, p. 454.[15]

While herders are out on the range, they are on duty every day.[16] Moreover,

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[14] Gragirena Decl. ¶ 8, AA Vol. 3, p. 346.

[15] Plaintiff was also required to answer phone calls from the ranch inquiring about the sheep. Cántaro Castillo Dep. 142:12-14, AA Vol. 4, p. 462. During dry periods, he had to haul water for the sheep. Gragirena Decl. ¶ 15, AA Vol. 3, p. 347.

[16] Cántaro Castillo Dep. 51:9-11, AA Vol. 4, p. 456 (he worked every day); Filbin Dep. 47:13-48:15, AA Vol. 4, pp. 547-48; Espil Dep. 29:18-23, AA Vol. 5, p. 558 (sheep do not take weekends off so herders must watch over them every day); Knudsen Dep. 106:4-12, AA Vol. 5, p. 568; Borda Dep. 66:9-24, AA Vol. 5,

they must be on the lookout for and available to address any issues for the entirety of the day, even if they are not called upon to be active every moment of the day.[17]

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p. 573; Dufurrena Dep. 80:24-81:5, AA Vol. 5, p. 584-85; Inchauspe Dep. 58:10-20, AA Vol. 5, p. 591; Wines Dep. 40:10-20, AA Vol. 5, p. 611; Snow Dep. 35:10-16, AA Vol. 5, p. 616; Little Decl. ¶ 16, AA Vol. 5, p. 627; Olagaray Decl. ¶ 13, AA Vol. 5, p. 634; Wright Dep. 76:4-11, AA Vol. 5, p. 640.

[17] Espil Dep. 30:11-19, AA Vol. 5, p. 559; Knudsen Dep. 41:21-42:8, AA Vol. 5, pp. 563-64; Inchauspe Dep. 58:10-20, 77:12-78:6, 127:14-128:25, AA Vol. 5, pp. 591, 592-93. 604-05 (expect herders to be available and cover job responsibilities except at night when sleeping, even then would be available if called for wildfire or other danger, pays bounty on killing coyotes); 108:8-12, 109:17-110:2, AA Vol. 5, pp. 599, 600-01 (herder should pay attention to any changes in weather, etc., that could impact the sheep; herders should pay attention to sheep because there are always a few who will stray and needed to be brought back), 118:24-119:22, AA Vol. 5, pp. 602-03 (if herder hears thunder which could disturb the sheep, rancher hopes the herder will go out to make sure the storm doesn't scatter the sheep); Wines Dep. 40:10-20, AA Vol. 5, p. 611 (the herders live with the sheep so they are there 24 hours/day and are expected to be available if needed at any time during the 24 hour day); Snow Dep. 50:12-52:14, AA Vol. 5, pp. 617-19 (other than weekly break of 7-8 hours to travel to bunkhouse for shower and clean clothes, herders were expected to be on range with sheep they were responsible for); Dufurrena Dep. 27:23-28:9, AA Vol. 5, pp. 580-81(herders expected to be available in event of emergency); Etcheverry Dep. 43:21-45:5, AA Vol. 5, pp. 645-47 (not on call at night); Filbin Dep. 64:11-21, AA Vol. 4, p. 549 (expected to contact him about emergencies, any time day or night), 75:8-23, AA Vol. 4, p. 552 (expected to kill predators, or at least fire a round to scare them away if is night time), 113:11-17, AA Vol. 4, p. 555 (when on call herders are available for anything that arises, not always engaged in active work); Leinassar Dep. 56:21-57:13, 88:15-89:8, 114:19-115:4, AA Vol. 5, pp. 654-55, 656-57, 658-59 (herders' contract requires them to protect the sheep including from predators, but he also pays bounty for killing predators as incentive to be alert, aware, and watch the sheep; herders should be paying attention to the sheep regardless of where they are and what they are doing, except at night when it is too dark to move around safely); Vogler Dep. 22:3-13, 30:16-32:2, 40:15-24, AA Vol. 5, pp. 663, 664-66, 667 (bad sheepherders sit in their camp and don't watch the sheep as they

Like many jobs—security guards and firefighters, for example—a big part of the herder's job responsibility is to be constantly alert to any problems and able to quickly respond, a scenario referred to as "engaged to wait." As WRA represented to DOL, "Responding to health emergencies experienced by the animals can occur at any time of the day or night, as can responding to threats from predators." WRA Comments, AA Vol. 4, p. 523; *see also* Richins Dep. 185:2-7, AA Vol. 4, p. 500; Cántaro Castillo Dep. 44:10-14, 45:4-10, 51:6-8, 144:4-24, AA Vol. 4, pp. 454, 455, 456, 463. Ranchers pointed out that the sheepherders had agreed to accept this constant responsibility, stating, e.g.:

> I believe in that job description, which is I believe in their native language, when we sign up for the program, all the issues are out there, they're out there to protect the sheep. They're out there to practice good animal husbandry, whether it's a poisonous plant, a predator, or finding the sheep good feed and water. It's not a surprise for them.

Vogler Dep. 40:15-21, AA Vol. 5, p. 667. The same rancher noted that a "poor sheepherder can cost you everything," and described poor sheepherders as:

> Ones that sit in their camp and feel sorry for themselves, don't do their job, don't watch their sheep, let them stray off, let the coyotes eat them. There's many people – not many people that herd sheep, ma'am; it takes a special individual. And when you've got that special individual, you take care of them.

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should; good herders will protect their sheep, even if it means sleeping out with the sheep, instead of in their sheep camp, to keep lambs from getting killed).

Vogler Dep. 22:3-13, AA Vol. 5, p. 663. If there were any question that herders are "engaged to wait"—that having to be ready and able to respond to any issues, while not always having activities to fill their time is one of the hard parts of the job—rancher testimony made clear that is the case:

> I am paying them to go bored out their gourds for about 20 hours a day and then getting out and tending the sheep, and on different days, it's a little longer one way or the other. That's what I am paying them for.

Vogler Dep. 133:15-19, 173:6-19, AA Vol. 5, pp. 668, 677. *See also* Inchauspe Dep. 130:12-131:12, AA Vol. 5, pp. 606-07 (the part of the herder's job that is really tough is the isolation).

WRA has acknowledged that herders "spend most or all of their time in remote areas and therefore do not tend to frequent stores or restaurants or bars." WRA Comments, AA Vol. 4, p. 527. This provides further evidence that herders are never actually relieved from duty. Very rarely, such as with a medical emergency, the member ranch may be able to have another employee take over from the assigned herder for a day or two, and only slightly less rarely—at most a few times a year—a herder may be permitted to take an afternoon off.[18] This was a

[18] Cántaro Castillo Dep. 144:25-145:8, AA Vol. 4, pp. 463-64 (he never had any days off, he never got to go into town); Inchauspe Dep. 82:22-83:17, 84:1-4, AA Vol. 5, pp. 594-95, 596 (occasionally herders are close enough to walk to town, but it is a problem if they leave the sheep to go to town, and it doesn't happen often; if herder needed to go to town, rancher would take them, but it does

particularly rare occurrence in Plaintiff Cántaro Castillo's case. Not only did he never have any days off or chance to go into town,[19] but even when he needed medical attention he was not allowed to seek treatment. When Plaintiff specifically asked to be permitted to go see a doctor, his supervisors responded: "Who's going to be with the sheep?"[20] Plaintiff further testified that while on the range he would sleep little, as he was guarding the sheep even at night, emphasizing that being in constant attendance to the herder was "a lot" of

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not happen often); Borda Dep. 51:9-52:25, AA Vol. 5, pp. 571-72 (during nine months of year, only way to get to town would be for herder to ask Borda for a ride, and that doesn't happen except rare instances of medical appointments; they also may bring one back to the ranch for shower, clean clothes once in a while); Dufurrena Dep. 52:15-53:4, AA Vol. 5, pp. 582-83 (herders in remote areas, can't do things like order a pizza delivery); Etcheverry Dep. 70:4-72:18, AA Vol. 5, pp. 648-50 (they are 50 miles from town, can't just walk there, they would have to ask him for a ride, but they do not do so, except in October when they are near a small town and have access to a truck); Filbin Dep. 65:13-66:7, AA Vol. 4, pp. 550-51 (herders would have to ask for transport to town, and he cannot recall the last time anyone asked to go); Knudsen Dep. 95:24-96:20, 101:8-21, AA Vol. 5, pp. 565-66, 567 (herders are at least an hour's drive from town, would have to ask ranch for a ride, it's not common; too far to order pizza or anything like that); Little Dep. 143:16-144:9, AA Vol. 5, pp. 695-96 (most herders do not ask to go to town or any place else for more than 14 days in year, the amount of vacation time they had); Vogler Dep. 158:21-160:2, AA Vol. 5, pp. 674-76 (not common for herder to ask to take any time away from range to go to town, the most anyone asked was 4 times/year); Wines Dep. 89:17-90:8, AA Vol. 5, pp. 612-13 (herders have the chance to go to town for an afternoon about once/month); Wright Dep. 187:8-12, AA Vol. 5, p. 642 (not sure any went to town, no record).

[19] Cántaro Castillo Dep. 144:25-145:8, AA Vol. 4, pp. 463-64.

[20] Cántaro Castillo Dep. 81:23-82:4; 83:11-84:13, AA Vol. 4, pp. 457-58, 459-60 (emphasizing that he was in the mountains by himself, with a severe infection, and despite being told he would be taken to seek medical treatment, he was not).

responsibility.[21]

3. Plaintiff Worked in Remote Areas, With Rudimentary Housing

Herders, including Plaintiff, spend most of the year living in "sheep camps," essentially a trailer outfitted with bed, propane powered cooking burners and, for Mr. Cántaro Castillo at least, a propane powered refrigerator.[22] The sheep camps do not have electricity, toilets, or modern bathing facilities.[23] Often there are a few months in the summer when the sheep graze in mountains or other land where the sheep camps cannot be hauled to, and the herders must use tents with even fewer facilities.[24] The only electricity comes from batteries or solar panels sufficient to charge the herder's cell phone.[25] As noted above, herders are expected to be available to attend the sheep at any time, nn.16-17 *supra*, and thus even if they do

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[21] Cántaro Castillo Dep. 144:9-12, 45:8-10, AA Vol. 4, pp. 463, 455.

[22] *See* Gragirena Decl. ¶ 9, AA Vol. 3, p. 346; El Tejon Housing Inspections, AA Vol. 5, pp. 723-24.

[23] *Id*.

[24] *See* declarations of herders assigned to the same ranch as Plaintiff: Archi Lozano Decl. ¶ 8, AA Vol. 5, p. 699 (herder lived in a tipi on the range); Cantaro Oteo Decl. ¶ 11, AA Vol. 5, p. 705 (same); Yauri Garcia Decl. ¶ 9, AA Vol. 5, p. 686 (same); Ascanoa Alania Decl. ¶¶ 8-9, AA Vol. 5, pp. 711-12 (same); Lapa Pomahuali Decl. ¶¶ 8-9, AA Vol. 5, pp. 679-80 (same); Melo Castillo Decl. ¶ 8, AA Vol. 5, p. 718 (same).

[25] Gragirena Decl. ¶ 9, AA Vol. 3, p. 346; *see also* Melo Castillo Decl. ¶ 8, AA Vol. 5, p. 718 (there is no electricity); Archi Lozano Decl. ¶ 9, AA Vol. 5, p. 699 (same); Yauri Garcia Decl. ¶ 9, AA Vol. 5, p. 686 (same); Ascanoa Alania Decl. ¶ 9, AA Vol. 5, p. 712 (same). The conditions are similar at other ranches, as described in the cert brief at 20, n.64.

not have active duties, they cannot simply take off for town or other more enjoyable venues—indeed, Plaintiff could not even leave to get needed medical care, *supra* at nn.20. Given their usually remote locations, one member rancher testified, the herders have "no place to go." Filbin Dep. 48:8-15, AA Vol. 4, p. 548. Additionally, Plaintiff was far from free to spend his time making extensive personal calls, testifying that he could only call his family for a few minutes, or message them on Facebook, at the same time that he was eating dinner.[26] Plaintiff was even restricted in the phone calls he was allowed to make, testifying that El Tejon did not allow him to contact his joint employer, WRA.[27] Thus, even when not actively engaged with the sheep or related duties, Plaintiff and other herders are *not* free to pursue their own activities.

SUMMARY OF ARGUMENT

Plaintiff's claims all turn on interpretation of the Nevada Constitution's Minimum Wage Amendment, and which hours the MWA counts as "hours worked." Specifically, in situations when a worker has been hired, in part, to spend time "on call" and under significant restrictions on their activities so that they remain alert to respond to any issues that arise, does the MWA deem such hours "work" which must be paid minimum wage.

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[26] Cántaro Castillo Dep. 145:19-146:6, AA Vol. 4, pp. 464-65.

[27] Cántaro Castillo Dep. 148:12-149:4, AA Vol. 4, pp. 466-67.

While the MWA is comprehensive in its terms, it does not define "work," nor do Nevada's statutory wage provisions contained in Nev. Rev. Stat. ch. 608. However, one federal appellate court has already had the opportunity to address how Nevada law defines "work." In *In re: Amazon.com*, the Sixth Circuit Court of Appeals recognized that Nevada wage-hour laws did not define "work." *In re: Amazon.com, Inc. Fulfillment Ctr. FLSA & Wage & Hour Litig.*, 905 F.3d 387, 397-99, 401 (6th Cir. 2018). In divining how this Court would likely address the issue, the Sixth Circuit recognized that "Nevada courts look to federal law unless the state statutory language is "materially different" from or inconsistent with federal law." *Id.* at 398 (citing *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 900–01 (9th Cir. 2013); *Terry v. Sapphire Gentlemen's Club*, 130 Nev. 879, 336 P.3d 951, 955–56 (2014) (endorsing the rule in *Rivera*).

Pursuant to Nevada's governing principles of constitutional interpretation, this Court should consider the purpose and public policy underlying the MWA, and the meaning attributed to "work" under the FLSA, as the federal counterpart to the MWA. These principles should lead this Court to adopt the federal interpretation of the FLSA to identify what is "work" and when employees have been "engaged to wait," and are entitled to at least minimum wage for each hour they have been engaged to wait. Specifically, the Ninth Circuit cases of *Berry v. Cnty. of Sonoma*, 30 F.3d 1174 (9th Cir. 1994) and *Owens v. Loc. No. 169, Ass'n of W. Pulp &*

Paper Workers, 971 F.2d 347, 351 (9th Cir. 1992), as amended (Aug. 18, 1992) provide a sound framework to analyze the issue. Given that Plaintiff's employer required him to live on the range guarding the sheep, he was not able to depart from the sheep during his on call time, had no respite from his 24-hour on call duties, and no freedom to pursue activities of his own choosing, application of the FLSA's "engaged to wait" standards should lead this Court to conclude that Plaintiff-Appellant was engaged to wait, and is entitled to be paid Nevada's minimum wage for all hours worked, including his on call time, while out on the range.

ARGUMENT

I. THE COURT SHOULD REPHRASE THE CERTIFIED QUESTION SO THAT IT ONLY ANSWERS DETERMINATIVE ISSUES IN THE CASE AND AVOIDS ADVISORY OPINIONS

The certified question should be reframed to avoid an advisory opinion or circular question, and to focus on the question of law. It should read:

> Under the Constitution of the State of Nevada, what is the appropriate standard for determining what is "work" under Nevada's minimum wage law, including specifically the standard for determining when an employee has been "engaged to wait," which renders on call time "work."

Nevada case law is clear that this Court will rephrase a certified question in order to avoid providing an advisory opinion. *Echeverria v. State*, 137 Nev. 49, 495 P.3d 471, 474-75 (2021) (electing to rephrase the certified question by striking "or analogous provisions of state law" because no state law claims were currently

"pending in the certifying court"). The court's "power to answer certified questions is limited to 'questions of law of this state which *may be determinative of the cause then pending* in the certifying court ....'" *Id.* at 474-75 (citing NRAP 5(a)). *See also Mack v. Williams*, 138 Nev. Adv. Op. 86, 522 P.3d 434, 440-41 (2022) (electing to reframe some of the certified questions that would "have, at best, a speculative impact in determining the underlying case.") (internal citation omitted).

Plaintiff does not make a claim under Nevada's Minimum Wage Act, Nev. Rev. Stat. ch. 608. Second Amended Complaint, Counts One, Three, Nine, AA Vol. 1, pp. 103, 104, 109-10. Plaintiff's contract claim is based in Defendant's contractual agreement to pay Nevada's minimum wage and the requirements of Nevada's constitutional minimum wage provision. *Id.* Plaintiff's only claim under ch. 608 is his claim under §§ 608.140, 608.040, and 608.050, for Defendant's failure to pay him all wages owed upon his termination. *Id.* at Count Nine, AA Vol. 1, pp. 109-10. The "wages owed" portion of that claim refers to wages owed under the contract and constitutional provision, not wages owed under the minimum wage act. Thus, asking for an interpretation of the minimum wage act with respect to work time seeks an advisory opinion. While the minimum wage amendment and minimum wage act would be interpreted the same way with respect to the question of hours worked, the question addressed should nonetheless

be clarified to avoid rendering an advisory opinion. *See In re: Amazon.com*, 905 F.3d at 398-401 (conducting same analysis to assess meaning of "work" for claims brought under Nevada statutes and the Nevada Constitution).

Finally, the question of what is deemed to be "hours worked" generally involves consideration of whether a worker was engaged to work (including being engaged to wait), or whether he was so free to use the time for his own purposes that he was not deemed to be engaged in work. Thus, to ask whether time engaged in personal pursuits is "hours worked" is to ask a circular question that assumes what this Court's answer will be. Plaintiff's proposed re-phrasing avoids these issues and provides this Court an important opportunity to clarify the legal standard for what is "work," specifically with respect to circumstances when a worker is required to remain on the employer's premises, but may not be engaged in active labor for all hours. Certified questions ask this Court to address questions of law, not to make findings of fact. *Echeverria*, 137 Nev. at 489, 495 P.3d at 474-75.

II. PURSUANT TO NEVADA'S RULES OF CONSTRUCTION, THIS COURT SHOULD ASSESS THE MEANING OF "WORK" AS USED IN THE MWA BY EXAMINING THE MEANING OF "WORK" IN FEDERAL FLSA CASES

A. Nevada's Methods of Construing its Constitution Point to Reliance on Parallel FLSA Interpretation in this Instance

To determine whether Plaintiff Cántaro Castillo is entitled to additional

compensation for his time spent as a sheepherder on the range, this Court is tasked with defining "work" as it is used in the Nevada Constitution's Minimum Wage Amendment ("MWA"). Nevada case law has established three principles of construction to guide the Court in this task. This Court's prior pronouncements state it will look to: 1) the plain meaning of "work" as used in the MWA; 2) the purpose and public policy underlying the MWA; and 3) the meaning ascribed to "work" in federal legislation comparable to the MWA, which, in this case, is the Federal Labor Standards Act ("FLSA"). Each of these three principles of construction is addressed below.

1. Plain Meaning

Where the language in a constitutional provision is "plain and its meaning clear, the courts will apply that plain language." *Doe Dancer I v. La Fuente, Inc.*, 137 Nev. 20, 24, 481 P.3d 860, 866 (2021) (citing *Leven v. Frey,* 123 Nev. 399, 403, 168 P.3d 712, 715 (2007)); *see also In re: Amazon.com*, 905 F.3d at 397. Here, while the MWA clearly states that employees are entitled to receive the minimum wage for all of their completed "work," it fails to provide any further definition of "work," in language plain or otherwise.

In a past case requiring this Court to interpret an ambiguous term in the MWA, the Court looked outside the four corners of the Amendment to derive the meaning of the term. The Court held that because the MWA addresses

"employee" in sweeping terms, "the definition's text is not alone sufficient to guide [the Court's] interpretation," and thus the Court "must look to external aids of interpretation." *Doe Dancer I*, 137 Nev. at 24 (citing *Orion Portfolio Servs. 2, LLC v. Cnty. of Clark,* 126 Nev. 397, 402, 245 P.3d 527, 531 (2010)). This approach is equally applicable to the present matter. As with the term "employee," the MWA's sweeping use of "work"[28] and lack of internal definitions for this term warrant the Court's use of "external aids of interpretation."

2. External Aids of Interpretation

To aid in its assessment of the meaning of "work" as it is used in the MWA, this Court can look to: 1) the purpose and public policy underlying the MWA, and 2) the meaning attributed to "work" under the FLSA, as the federal counterpart to the MWA. While the purpose of the MWA establishes the broad social principles with which the Court's definition of "work" should align, to develop the precise definition and standard to be presented to the District Court, case law addressing "work" under the FLSA serves as the Court's primary analytical vehicle.

First, in instances "[w]here the statutory language is ambiguous or otherwise does not speak to the issue before [the court]," Nevada Courts "will construe [the language] according to that which 'reason and public policy would indicate the

[28] Employees are to be paid for every hour worked regardless of industry. *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 327 P.3d 518 (Nev. 2014).

legislature intended.'" *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 14 P.3d 511, 513-14 (2000) (quoting *State, Dep't of Mtr. Vehicles v. Lovett*, 110 Nev. 473, 477, 874 P.2d 1247, 1249–50 (1994)); *see also In re: Amazon.com*, 905 F.3d at 397. Here, the public policy underlying the MWA constitutes a clear directive that this Court should define "work" expansively.

"The primary goals of the MWA are two-fold: (1) raise the minimum wage and, (2) broaden the class of workers with access to the minimum wage, so that workers are prevented from falling into substandard living conditions." *Gonzalez v. State*, 515 P.3d 318 (Table) (Nev. 2022), No. 82762, 2022 WL 3151751, at *2 (unpublished disposition) (August 4, 2022); *see MDC Rests*. *v. The Eighth Judicial District Court of Nevada*, 134 Nev. 315, 324, 419 P.3d, 148, 155 (2018). The MWA "signal[s] this state's voters' wish that more, not fewer, persons would receive minimum wage protections." *Terry*, 130 Nev. at 884, 336 P.3d at 955. The purpose and public policy underlying the MWA therefore support this Court assigning a broad meaning to "work" that encompasses compensating a sheepherder such as Plaintiff Cántaro Castillo for waiting time spent on the range.

Second, as an additional external aid of interpretation, the Court should look to case law addressing the meaning of "work" under the FLSA, the federal counterpart to the MWA, for guidance. This mode of analysis is firmly entrenched in Nevada law:

> [W]hen a federal statute is adopted in a statute of this state, a presumption arises that the legislature knew and intended to adopt the construction placed on the federal statute by federal courts. This rule of [statutory] construction is applicable, however, only if the state and federal acts are substantially similar and the state statute does not reflect a contrary legislative intent.

Century Steel, Inc. v. State, Div. of Indus. Rels., Occup. Safety & Health Section, 122 Nev. 584, 589, 137 P.3d 1155, 1159 (2006) (internal citation omitted); *see also Hartford Fire Ins. Co. v. Trustees of Constr. Indus.*, 125 Nev. 149, 155, 158, 208 P.3d 884, 888, 890 (2009); *In re: Amazon.com*, 905 F.3d at 398-99, 401.

In the present matter, both conditions for invoking the presumption are readily satisfied. Regarding the first requirement, the MWA and the FLSA are substantially similar in the manner relevant to this litigation, namely, both require payment of a minimum wage and neither provides a definition of "work" in its text, and thus the meaning of "work" must be derived from external sources. As for the second requirement, the MWA in no way reflects an intent contrary to that of the FLSA. In Nevada, it is presumed "that the Legislature enacted [a] statute with full knowledge of existing statutes relating to the same subject." *Doe Dancer I.*, 137 Nev. at 25-26, 481 P.3d at 867 (adopting this canon of construction to interpret the MWA's terms) (citing *Nev. Att'y for Injured Workers v. Nev. Self-Insurers Ass'n,* 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010)) (internal quotations omitted). Furthermore, the Nevada Legislature "has long relied on the federal minimum wage law to lay a foundation of worker protections that th[e] State could

build upon." *Id.* at 25 (citing *Terry*, 130 Nev. at 884, 336 P.3d at 955). Thus, "in many significant respects, Nevada's minimum wage laws," including the MWA, "and those set federally run parallel." *Terry*, 130 Nev. at 884, 336 P.3d at 955 .

With both conditions met here, the Court should invoke the presumption that in adopting the MWA, Nevada knew and intended to adopt the construction placed on "work" in the FLSA by federal courts. *See Century Steel, Inc*., 122 Nev. at 589, 137 P.3d at 1159. Indeed, past judicial practice supports this approach. The present matter will not be the first time the Nevada Supreme Court has turned to the FLSA to interpret Nevada state law or the MWA.[29] *See Gonzalez*, 515 P.3d at 318, 2022 WL 3151751, at *1 (noting that "[i]n many significant aspects … the standards under the MWA run parallel to those of the federal Fair Labor Standards Act" and finding federal FLSA decisions persuasive in assessing the definition of a term under the MWA) (internal citation omitted); *Doe Dancer I*, 137 Nev. at 25, 481 P.3d at 866-67 (holding that "in the context of the MWA, federal FLSA law carries even greater persuasive weight, given that the relevant language of the

[29] The Nevada Court has only interpreted state counterparts of the FLSA differently when these provisions explicitly used differing language, such as the law on tip credit. *See, e.g.*, *Jane Roe Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 32-33, 176 P.3d 271, 274 (2008); *see also Terry*, 130 Nev. at 885, 336 P.3d at 956 (noting that "in *Golden Coin,* this court held that Nevada law excluded tips from the calculation of an employee's minimum wages—contrary to the rule under the FLSA—because the language of the relevant statutes was entirely conflicting.").

MWA … so closely mirrors the FLSA"); *Rite of Passage, ATCS/Silver State Acad. v. State, Dep't of Bus. & Indus., Off. of Lab. Com'r*, 131 Nev. 1338, 1338 No. 66388, 2015 WL 9484735, at *1 (Table) (unpublished disposition) (Dec. 23, 2015) (finding that "Nevada Law provides little guidance" as to whether an employee "works" within the meaning of Nev. Rev. Stat. § 608.16 and thus "turn[ing] to the federal courts' interpretation of hours worked under the federal Fair Labor Standards Act[.]"); *Terry*, 130 Nev. at 881, 336 P.3d at 953) (adopting the FLSA's "economic realities" test for employment to determine whether performers were employees within the meaning of Nev. Rev. Stat. § 608.010); *In re: Amazon.com*, 905 F.3d at 399, 401 (holding that because the Nevada legislature had not defined what constitutes "work," it was appropriate "to look to the federal law for guidance.") (internal citations omitted).

B. This Court Should Follow Federal Authority to Interpret "Work," Consistent With the Language and Purposes of the MWA

The little guidance Nevada law provides in defining "work" indicates that "hours worked" includes "all time worked by the employee *at the direction of the employer*, including time worked by the employee that is outside the scheduled hours of work of the employee." *In re: Amazon.com*, 905 F.3d at 399 (citing Nev. Admin. Code § 608.115(1)) (emphasis added). Nevada's guidance is in line with the FLSA's broad definition of "work" that encompasses any activity "controlled or required by the employer and pursued necessarily and primarily for the benefit

of the employer and his business." *Id.* (citing *Tennessee Coal, Iron & R. Co. v. Muscoda Loc. No. 123*, 321 U.S. 590, 598 (1944). Federal caselaw further makes clear that an employee's *waiting time* may be "controlled or required by the employer" and "necessarily and primarily" for the employer's benefit, and that under these conditions, such waiting time falls under the broad definition of "work." *Id.*; *see Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944).

Having established, based on Nevada's principles of construction, FLSA caselaw is the appropriate guide for defining "work," this Court should therefore adopt a definition of "work" that treats a worker's time spent "engaged to wait" as "work." This principle is firmly entrenched in U.S. Supreme Court precedent, and has been expanded upon by the Ninth Circuit. *See Armour*, 323 U.S. 133 ("an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve … time spent lying in wait for threats to the safety of the employer's property may be treated … as a benefit to the employer" and thus work time); *see also Skidmore.*, 323 U.S. at 139 ("even though [on call or waiting time was] pleasurably spent," there was no evidence that "it was spent in the ways the

men would have chosen had they been free to do so");[30] *Biggs v. Joshua Hendy Corp.*, 183 F.2d 515, 520 (9th Cir. 1950), supplemented, 187 F.2d 447 (9th Cir. 1951) (finding graveyard employee "worked" during all of his lunch periods because he "was on call at all times and time thus spent was compensable under the F[ai]r Labor Standards Act") (citing *Armour*, 323 U.S. 126; *Swift*, 323 U.S. 134).

Federal courts have developed a multifactor test to determine whether a worker has been "engaged to wait." To start, courts in the Ninth Circuit consider: (1) "the degree to which the employee is free to engage in personal activities, and (2) the agreements between the parties." *Berry v. Cnty. of Sonoma*, 30 F.3d 1174, 1180 (9th Cir. 1994) (citation omitted). To determine the degree to which an employee is free to engage in personal activities, Ninth Circuit courts examine the following:

> (1) Whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employee's movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during call-in time.

[30] There is no evidence *here* that Plaintiff's time on call was "pleasurably spent," and was certainly not what he would freely choose.

Owens v. Loc. No. 169, Ass'n of W. Pulp & Paper Workers, 971 F.2d 347, 351 (9th Cir. 1992), as amended (Aug. 18, 1992).[31] This list is illustrative, not exhaustive, and no single factor is dispositive in determining the degree to which an employee is free to engage in personal activities while on call. *Id.* at 351.

In some circumstances where workers have been found to be "engaged to wait," the Ninth Circuit has held that even sleep time counts as hours worked for on call workers required to remain on the employer's premises while on call. *GE Co. v. Porter*, 208 F.2d 805, 815 (9th Cir. 1953). More commonly courts have held that since the worker would spend 8 hours asleep whether on duty or not, whether on the employer's premises or not, as long as reasonable facilities were provided for the worker to sleep, and the sleep was not regularly interrupted, that sleep time is excluded from work hours. *See*, e.g., *Skidmore*, 323 U.S. at 134.[32]

This federal case law establishing time spent "engaged to wait" as hours worked for minimum wage purposes is consistent with the language and purpose

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[31] The tests set forth in *Berry* and *Owens* are in line with DOL regulations regarding the compensability of on call time hold that "[a]n employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while 'on call.'" 29 C.F.R. § 785.17.

[32] In the case at bar, disputes of fact exist over whether Plaintiff was provided reasonable facilities for sleep, how often he was interrupted and unable to get 8 hours sleep, and the other factors weighed in *Porter* and *Skidmore* in determining whether, in addition to other on call time, sleep time would also be compensated.

of the MWA, which seeks to expand the rights of workers. *See Gonzalez*, 515 P.3d 318, 2022 WL 3151751. In the absence of guidance in the Nevada Constitution itself, this federal law should be used to ascertain the meaning of "work" as used in the MWA.

III. FEDERAL LAW PROVIDES AN APPROPRIATE STANDARD FOR WHEN TIME SPENT "ENGAGED TO WAIT" IS "WORK" THAT THIS COURT SHOULD FOLLOW

As addressed in part II, above, *Berry* and *Owens* provide workable standards for identifying when someone has been "engaged to wait" and thus the time must be counted as hours worked and employees paid at least minimum wage for those work hours. As noted above, the *Owens* factors are illustrative, but not all apply equally to every factual scenario. For example, some of the *Owens* factors do not account for the particular conditions to which Plaintiff was subject while working as a sheepherder living in isolation on the range, for months at a time. Specifically, *Owens* factors 3, 4, and 6 largely assume that the employee's place of work and home will be two distinct settings. However, these factors provide little insight into the degree of freedom retained by an employee, such as Plaintiff Cántaro Castillo, who was not called into work but rather was always out on the range. For situations in which the workplace and home environment have merged into one, the more pertinent inquiry is into the respite available to the employee while on call, and courts have explicitly considered that as an added factor. *Taylor*

v. Am. Guard & Alert, Inc., 162 F.3d 1169, 1998 WL 750922, at *3 (9th Cir. 1998).

To illustrate the appropriateness of following the federal standard here, an analysis of each factor as applied to Plaintiff's work as a sheepherder on the range follows. Currently, there may be questions of fact that this Court need not resolve on a certified question. Plaintiff contends that an examination of the facts clearly demonstrates that Plaintiff was engaged to wait. Nonetheless, even if this Court prefers to send the case back to the U.S. District Court for trial to resolve these issues, anchoring consideration of the factors in the context of the case at bar permits a more concrete elucidation of the appropriate standard to govern when hours count as time worked.

A. Whether There Was an On-Premises Living Requirement

Plaintiff Cántaro Castillo was clearly subject to an on-premises living requirement. At his employer's orders, and in furtherance of his employer's interests, he was mandated to live "on the range" in Nevada for the duration of his employment. *See* n.14 *supra*. The Ninth Circuit has recognized that "[t]he Supreme Court's decision in favor of plaintiffs in *Armour* was predicated on the fact that the company's restrictive on-premises requirement meant the firefighters were 'liable to be called upon at any moment, and not at liberty to go away.'" *Owens*, 971 F.2d at 353 (citing *Armour,* 323 U.S. at 133)). Plaintiff Cántaro

Castillo was similarly not at liberty to leave the range, and was required to be responsive to the needs of the sheep at all times. Whereas the plaintiffs in *Armour* rarely recorded more than a half-hour per week in tasks during their on call time, spending most of the time using the facilities provided for their amusement, could leave the premises to pick up dinner at a nearby restaurant, and were given twenty-four hours of reprieve from their employer's on-premises requirement following each period of on call nighttime duty, Plaintiff Cántaro Castillo was always confined to the range. *Armour,* 323 U.S. at 127. He thus was subject to requirements as restrictive, if not more so, as those in *Armour*.

Drawing on this Supreme Court precedent, the Ninth Circuit has emphasized the "key question" under this factor is "whether [the workers] had to *remain* on site." *Taylor*, 162 F.3d 1169, 1998 WL 750922, at *1 (9th Cir. 1998). Where workers were allowed to travel away from the station while on call, the on-site requirement alone did not support a finding that the workers could not use the time for their personal purposes. *Id. See also Roces*, 300 F.Supp.3d at 1195 (holding though it was "true that Plaintiffs were required to live on RHA premises … in contrast to *Armour* [] … Plaintiffs were free to leave RHA premises during on-call hours."). In evaluating this factor, the Court should explicitly account for the onerous conditions the on-premises living requirement entailed for Plaintiff. He could not leave the area where the sheep were grazing to go into town or engage in

the many personal pursuits permitted in cases where courts found workers' on call time was not deemed to be "work."

As a consequence of living on the range, Plaintiff Cántaro Castillo was denied access, for months at a time, to electricity, toilets, and modern bathing facilities, while living in either a sheep camp or tent. *See* nn. 22-25 *supra*. These conditions stand in stark contrast to those experienced by the dam control worker who was required to reside on site, but in a home that had "a deck, pool, hot tub, and several workshops." *Carman v. Yolo Cnty. Flood Control & Water Conserv. Dist.*, 535 F.Supp.2d 1039, 1045 (E.D. Cal. 2008). The worker in *Carman* also had freedom to leave the premises to go out to dinner, participate in a Masonic lodge, and engage in other activities, while relatively rarely receiving pages that required him to return to work. *Id.* at 1056-57. It is no surprise, therefore, that the plaintiff in *Carman* was found not to have been "engaged to wait." But Plaintiff Cántaro Castillo was subjected to conditions even more onerous than those experienced by the workers found to be "engaged to wait" in *Skidmore*, who were provided "a brick fire hall equipped with steam heat and air-conditioned rooms" as well as "sleeping quarters, a pool table, a domino table, and a radio." *Skidmore*, 323 U.S. at 135-36. Moreover, the workers in *Skidmore* were required to remain in such premises for only three to four nights per week, while for the remainder of the week they were free to return to their homes, families, and regular non-work

pursuits. *Id.* at 135. Plaintiff Cántaro Castillo endured exceptionally more arduous on-premises conditions, and had to remain on premises for months. This factor thus weighs heavily towards finding that he had been "engaged to wait."

B. Whether There Were Excessive Geographical Restrictions on Employee's Movements

As a herder, Plaintiff Cántaro Castillo experienced excessive geographical restrictions on his movements. He was hired to provide 24-hour supervision over the flock and respond in a timely fashion to any needs of the sheep that might arise. *Supra* at nn.6, 16-17. These obligations led to restrictions even more severe than in *Skidmore*, 323 U.S. at 135–36 (requiring employees to "stay in the fire hall on the Company premises, or within a hailing distance."). An employer's limitations on the employee's movements have been found not to be excessive if the employee, though confined, was permitted access to a sufficiently expansive area, such as a town. Thus, this factor did not weigh in favor of finding the time to be "work" where plaintiffs were required to remain within 30 minutes of base during their two-week piloting rotations, because "the 30–minute response time allowed Plaintiffs to go almost anywhere in Barrow while on call." *McCoy v. N. Slope Borough*, No. 13-CV-00064, 2013 WL 4510780, at *17 (D. Alaska Aug. 26, 2013), clarified on denial of reconsideration, No. 13-CV-00064-SLG, 2013 WL 12308204 (D. Alaska Sept. 11, 2013); *see also Roces*, 300 F.Supp.3d at 1195 ("Plaintiffs were free to leave RHA premises during on-call hours"). By contrast,

Plaintiff Cántaro Castillo could not go "almost anywhere," he had to remain within a short walk to his flock of sheep at all times to perform his proscribed duties, and even if there had been any places he could go, he had to remain in close geographical proximity so he could "protect the sheep … practice good animal husbandry," prevent them from eating a poisonous plant, or being eaten by a predator themselves, as well as "finding the sheep good feed and water." *See* Vogler Dep. 40:15-21, AA Vol. 5, p. 667. Plaintiff's conditions thus resemble the "especially restrictive" geographic and response-time limitations imposed on the employees in *Brigham*, who "had to be able to hear their phones ring at all times" and thus "were effectively tethered to their homes." *Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931, 937 (9th Cir. 2004) (finding plaintiffs' on call time was "work" which must be paid).

Even if Plaintiff had been permitted time during which he could leave the sheep, he had no vehicle or other means by which to travel, and the remote areas where he herded sheep lacked any nearby stores, restaurants, movie theaters, or other places to which he could go. *Supra* at p. 12. Plaintiff's work entailed a degree of geographic restriction and isolation beyond that experienced in most jobs, leading this factor to also weigh heavily in favor of finding that he was "engaged to wait."

C. Whether the Frequency of Calls and Fixed Time Limit Was Unduly Restrictive, and Whether Use of a Pager or Cell Phone Could Ease Restrictions

Owens factors 3, 4 and 6 make sense only when an employee can be in his own home, or anywhere else of his choosing, and need only return to the employer's premises in response to calls. In these employment contexts, a cell phone would "ease restrictions, by freeing employees to travel wherever they wish during on-call assignments as long as their destinations have cell phone reception[.]" *Henry v. Med-Staff, Inc.*, No. SA CV 05-603, 2007 WL 1998653, at *11 (C.D. Cal. July 5, 2007). In such employment contexts, these three *Owens* factors would be appropriate to consider in evaluating whether an employee was engaged to wait.

However, when an employee can never leave the employer's premises, and when those premises are in remote areas where cell service is not reliable, asking how often he is called to return to the premises, or how quickly he must return to the premises when called are meaningless questions to consider. The Ninth Circuit has recognized that "[a]s a practical matter, if an employee is not required to remain on the employer's premises, geographical restrictions are imposed according to the required response time for an employee to return to the employer's premises." *Berry*, 30 F.3d at 1185. Such inquiries are inapplicable to the present matter as Plaintiff Cántaro Castillo was not free to leave his employer's

premises during on call hours, regardless of whether he had a pager or cell phone. The degree of restrictions imposed upon him cannot be measured by a required time within which he had to return to the range. Although Plaintiff was required to answer phone calls from the ranch inquiring about the sheep, his duties as a sheepherder were not on pause as he awaited these calls. *See* n. 15 *supra*. Plaintiff was responsible for guarding the sheep and accordingly, had to be alert at all times to avoid sheep wandering off, eating poisonous plants, or being attacked by predators. *See supra* at I.B.2, Plaintiff's Job Responsibilities, also nn. 11-13. The constant demands of his job were comparable to those placed on the workers in *Cross,* who had to constantly monitor a radio for transmissions that would notify them of emergency calls. *Cross v. Arkansas Forestry Comm'n*, 938 F.2d 912, 916–17 (8th Cir. 1991) (holding this factor weighed towards finding on call time was hours worked, which must be paid, as having to listen to monitor the radio would preclude workers from being able to "entertain in their homes, attend social gatherings, [and] attend church services" among other personal pursuits). Unlike residents calling in maintenance requests (*see, e.g., Roces*, 300 F.Supp.3d at 1177-78), sheep could not call to alert Plaintiff that they were going to leave the main herd, were being followed by coyotes, or any of the myriad other things for which Plaintiff needed to keep an eye out. In the context of Plaintiff's role as a herder, for which he was not called into work but rather always out on the range near the

sheep, the more pertinent inquiry for the Court is whether he was provided any respite from this on call duty, as addressed further below.

D. Whether On Call Employee Could Easily Trade On Call Responsibilities or Had Any Respite From On Call Duty

Plaintiff Cántaro Castillo was unable to "trade" his on call responsibilities. This factor is an important consideration when, for example, in addition to a regular work schedule, an employee is on call to return to work on certain evenings or weekend days during each week. In such circumstances, the ease with which the employee can obtain relief from on call responsibilities by trading duties with other employees must be considered in determining whether the on call requirement amounted to the employee being engaged to wait. *See Brigham*, 357 F.3d at 936 ("When an employee was sick, on vacation, or otherwise occupied by personal needs, he usually was able to trade duty shifts with his colleagues," which weighed against finding the on call time was "work").

Here, trading on call responsibilities was not an available option for Plaintiff Cántaro Castillo. Each herder had his own flock to tend to, and thus could not trade responsibilities with Plaintiff. Throughout his six-months on the range in Nevada, Plaintiff was not once permitted to trade his on call duties to go into town or take a day off, even to seek medical treatment. *See* nn. 19-20 *supra*. Plaintiff's inability to trade on call responsibilities constitutes another potent indicator that he was "engaged to wait."

Relatedly, although not listed in *Owens*, courts have considered whether the employee had respite from on call duty as an additional factor in analyzing whether on call time is "work." *See Taylor*, 162 F.3d 1169, 1998 WL 750922, at *3. One court, for example, concluded that forestry service employees who were subject to on call status 24-hours per day every day of a work period lacked respite, and that this weighed in favor of their time being counted as hours worked. *Cross*, 938 F.2d at 916–17. Likewise, Plaintiff Cántaro Castillo lacked any respite as he was required to either be actively working or to be on call 24-hours per day, every day of his six-month employment period in Nevada. The failure of Plaintiff's employer to incorporate any period of respite into this demanding on call schedule further indicates that Plaintiff Cántaro Castillo had been "engaged to wait."

E. Whether Employee Had Actually Engaged in Activities During On Call Time

During on call periods in which Plaintiff Cántaro Castillo had to watch and listen for issues with the sheep, but did not have more active labor, his personal activities nonetheless remained severely limited.

First, in the cases in which courts find workers are not engaged to wait, the workers had *significantly* more freedom for personal pursuits than that available to Plaintiff. The ability to use time for one's own purpose when one cannot leave the open range, and can only retreat to a tent or sheep camp is in stark contrast to plaintiffs with an apartment with all their furnishings, entertainment, and

belongings, as well as the freedom to leave to "coach a youth soccer league team, play in an adult soccer league, socialize with family and friends, prepare and eat meals, dine out, shop, attend regular church services, go to the movies, read, watch television, sleep, write poetry, work in the yard, pursue hobbies," as described in *Roces*, 300 F.Supp.3d at 1195. The court has also denied compensation to workers who attended multiple out-of-town events, participated in bowling and golf, attended church, went fishing, hunting, and engaged in a variety of other personal activities. *Owens*, 971 F.2d at 353. *See also Carman*, 535 F.Supp.2d at 1057 (holding plaintiff could use on call time for personal activities based on record demonstrating he engaged in "a variety of personal pursuits including home improvement, construction projects, having visitors, watching television, and participating at the Masonic Lodge."); *Henry*, 2007 WL 1998653, at *11 (denying compensation for on call time during which employees were "free to engage in a wide array of personal activities" including going to the "movies, weddings, sporting events, school functions, Bible study classes, amusement and water parks, the beach, conventions, concerts, birthday parties, [and] dinner" and some employees "have even gone out of town on vacation during on-call assignments."); *Kennedy v. Las Vegas Sands Corp.*, No. 217CV00880, 2023 WL 1795199, at *8 (D. Nev. Feb. 7, 2023) (denying on call compensation to workers who engaged in a variety of personal activities including going to dinner with family and friends,

watching movies, regularly going to the gym and fitness classes, performing maintenance on personal vehicles, and shopping at liquor and automobile stores). None of those types of activities (but for sleep) were feasible for Plaintiff.

In addition to this wide array of activities, all of which were foreclosed to Plaintiff during his months on the range, Plaintiff also lacked the freedom to engage in any secondary employment—another factor that has been key to the court finding on call time was not hours of work (and thus non-compensable). In denying waiting time compensation to the employees in *Kennedy*, the court emphasized that "[m]ost of the Plaintiffs engaged in secondary employment while on call, including running an internet business, flying or working for other air carriers, and driving for Uber and Lyft." 2023 WL 1795199, at *8. Even in cases where the employees had significantly less freedom to engage in other personal activities, the court weighed participation in secondary employment heavily. For example, in *Berry*, the Ninth Circuit ruled that although the plaintiff-coroners were unable to go out of town, hunt, or, fish, "the ability of coroners to maintain secondary employment while on-call undermine[d] the coroners' position that they [we]re unable to actually pursue personal activities." *Berry*, 30 F.3d at 1185. "Thus, the ability to maintain secondary employment while on-call has been a similar thread in the non-compensable cases of the Ninth Circuit." *Vonbrethorst v. Washington Cnty., Idaho*, No. CV06-0351, 2008 WL 906036, at *8 (D. Idaho Mar.

31, 2008). Plaintiff Cántaro Castillo had neither the opportunity to engage in the many pleasurable activities afforded the employees in these cases, nor the opportunity to maintain secondary employment. His conditions remained severely more restricted than those experienced by the aforementioned plaintiffs, and thus, in contrast to these cases, the court should find this factor weighs in Plaintiff's favor.

Indeed, finding Plaintiff's time was work, entitled to minimum wage, is supported by past cases in which workers had notably *more* freedom than Plaintiff Cántaro Castillo, but the court still ruled that, on balance, the employees had been engaged to wait. *Brigham* is especially instructive: the Ninth Circuit noted that the workers could "watch television, help their children with homework, play games, maintain their homes and yards, work on their motorcycles, and entertain guests." *Brigham,* 357 F.3d at 937. Nevertheless, because the workers "were effectively tethered to their homes" the court ruled the factors weighed, at least narrowly, in favor of the employees. *Id. See also Skidmore*, 323 U.S. at 139 (holding employees were "engaged to wait" during nights they had to remain on employee's premises, even if some time was "pleasurably spent."). Like the plaintiffs in *Brigham* and *Skidmore*, Plaintiff Cántaro Castillo was subject to significant geographic restrictions, yet was even more limited in his personal activities as he had neither the company nor the facilities for the entertainment engaged in by the

plaintiffs in these cases.

Rather, the personal activities available to Plaintiff Cántaro Castillo most closely resemble those available to the workers in *Cross* who had to always be monitoring the radio transmissions. *Cross*, 938 F.2d at 914, 916-17. Due to this demanding requirement, the *Cross* employees were unable to "entertain in their homes, attend social gatherings, attend church services or engage in other personal pursuits" with which radio transmissions would interfere. *Id.* at 916-17. The *Cross* court reversed the summary judgment that had been granted to the employer, finding that based on this factor, among other restrictions imposed on the employees, a reasonable jury could find that the employees were engaged to wait. *Id.* at 916. Similarly, due to the requirements that he stay on the range and constantly monitor the sheep, Plaintiff Cántaro Castillo was afforded only limited means of entertainment. These limitations, as in *Cross*, support this Court finding that Plaintiff was engaged to wait.

Furthermore, even if Plaintiff did use some waiting time for personal activities, that would not automatically disentitle him to compensation for that time. *See Skidmore*, 323 U.S. at 139 ("even though [on call or waiting time was] pleasurably spent," there was no evidence that "it was spent in the ways the men would have chosen had they been free to do so"); *Moon v. Kwon*, 248 F.Supp.2d 201, 230 (S.D.N.Y. 2002) (finding that "[e]ven if [hotel worker] did spend some

time during the evenings socializing in the hotel while waiting for assignments, that is not sufficient to render that waiting time noncompensable."). Compensation for such time is especially warranted here, as Plaintiff Cántaro Castillo's employer expected him to immediately cease any personal activities in which he engaged if the needs of the sheep so required. *See* nn. 6, 16-17 *supra*.

F. Overall, Plaintiff Was Substantially Restricted from Engaging in Personal Pursuits of his Choice

Given the above factors, Plaintiff was substantially restricted from engaging in personal pursuits for the duration of his employment as a sheepherder. His employer required him to live-on premises on the range, and Plaintiff was not able to depart from the sheep during his on call time. He had no respite from his 24-hour on call duties nor the ability to trade on call shifts. For months on end, Plaintiff Cántaro Castillo lacked company, most modes of entertainment, and modern living facilities. These factors, tracking those of *Owens* and other cases, illuminate the particularly harsh and limiting conditions imposed on Plaintiff, and firmly establish that any freedom he retained while working as a herder in Nevada was extremely limited. Accordingly, because his on call time constitutes "work" he must be compensated at least the minimum wages under the MWA.

G. Considering the Agreements Between the Parties Also Supports Concluding that Herders Like Plaintiff Are "Engaged to Wait"

The second component of the *Berry* test, the agreements between the parties,

is confirmed by WRA's expectation, set forth in the H-2A petition and elsewhere, that Plaintiff would be "on call for up to 24 hours per day, seven days per week," and be paid a monthly salary which encompassed all work, rather than being paid only for certain hours deemed "work." *See* n. 6 *supra*. Such agreements have been found to indicate that compensation is due for waiting time. *Skidmore,* 323 U.S. at 135, 137 (firefighters were paid weekly salaries for mix of regular duties and on call time; in evaluating agreements to help determine if waiting time was work, court should consider whether compensation covers both waiting time and tasks, or only tasks, and payment of salary suggests compensation covers both); *Brigham*, 357 F.3d at 933-34, 939 (agreement specified 10 hours of pay for a 24-hour shift which included 6 hours of active duty, with remaining hours on call, establishing that on call time was considered work, since there was at least some compensation beyond the 6 hours of active duty); *Porter*, 208 F.2d at 815 ("[P]ayment of the monthly wage without indicating that the compensation was for only sixteen of the twenty-four hours spent at the fire station indicates a belief on the part of General Electric that it employed the firemen for the full twenty-four hour shift.").[33]

[33] Even where an agreement is explicit that the parties do not consider waiting time to be "work," courts must still consider whether that agreement is reasonable. That is done based on the same factors as used to evaluate the degree to which employees are free to engage in personal activities. *See Brigham,* 357 F.3d at 941.

This Court need not adopt any bright line test but can look to the above two-part *Berry* test, with the *Owens* factors, in order to capture the limited degree of freedom retained by Plaintiff Cántaro Castillo as a sheepherder living in nearly perpetual isolation out on the range and subject to 24-hour on call duty for almost half a year. And thus he was working during this time and is entitled to further compensation for his time on the range, so that he is paid minimum wage for *each* hour worked, including on call time. Accordingly, all of his time on the range, other than eight hours for sleeping, should be treated as "work" and must be compensated under Nevada law.

CONCLUSION

For the foregoing reasons, the Nevada Supreme Court should send the clarify what constitutes "work" and that Plaintiff Cántaro Castillo's waiting time on the range constituted work under the MWA.

Dated: March 27, 2023

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2, undersigned counsel certifies that:

1. This Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman in size 14 point font.

2. I further certify that this Opening Brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains fewer than 14,000 words, approximately 12,321, as measured by Microsoft Office 365's word count, including footnotes, but excluding the disclosure statement, table of contents, table of authorities, required certificate of service, an certificate of compliance with these Rules.

3. Finally, I certify that I have read **Appellant's Opening Brief** and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Opening Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or record on appeal where the matter relied upon is to be found.

I understand that I may be subject to sanctions in the event that the accompanying Opening Brief is not in conformity with the requirement of the Nevada Rules of Appellate Procedure.

DATED this 27th day of March, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Cohen, Milstein, Sellers & Toll PLLC and that on the 27th day of March, 2023, a true and correct copy of the above **APPELLANT'S OPENING BRIEF** was e-filed and e-served on all registered parties to the Nevada Supreme Court's electronic filing system as listed below:

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