IN THE SUPREME COURT OF THE STATE OF NEVADA



ABEL CÁNTARO CASTILLO,

Appellant,

vs.

WESTERN RANGE ASSOCIATION,

Respondent.

_____/

No. 85926

# RESPONDENT WESTERN RANGE ASSOCIATION'S ANSWERING BRIEF

ELLEN JEAN WINOGRAD, ESQ.
Nevada State Bar No. 815
JOSE TAFOYA, ESQ.
Nevada State Bar No. 16011
WOODBURN AND WEDGE
6100 Neil Road, Suite 500
Reno, Nevada 89511
Tel: 775-688-3000
Fax: 775-688-3088
ewinograd@woodburnandwedge.com
jtafoya@woodburnandwedge.com

ANTHONY HALL. ESQ.
Nevada State Bar No. 5977
JONATHAN McGUIRE, ESQ.
Nevada State Bar No. 15280
SIMONS HALL JOHNSTON P.C.
690 Sierra Rose Drive
Reno, Nevada 89511
(775) 785-0088
ahall@shjnevada.com
jmcguire@shjnevada.com

ATTORNEYS FOR RESPONDENT
WESTERN RANGE ASSOCIATION

## DISCLOSURE STATEMENT

The undersigned counsel of record certifies that 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.

Western Range Association is represented in this Court and in the underlying case in the United States District Court for the District of Nevada by the law firms of Woodburn and Wedge and Simons Hall Johnston P.C.

Ellen Jean Winograd, Esq.
Jose Tafoya, Esq.
WOODBURN and WEDGE
Anthony Hall, Esq.
Jonathan McGuire, Esq.
SIMONS HALL JOHNSTON P.C.

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## ISSUE PRESENTED FOR CERTIFICATION

The certified question before this Court is the following:

> **"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?"**

In formulating this question for the Supreme Court, the Federal District Court stated:

> As explained in depth below, the Court cannot rule on Defendant's motion for summary judgment because there is a question as to whether, under Nevada law, Plaintiff can receive compensation for time spent sleeping and for personal benefit. If Nevada law does not compensate Plaintiff for all the hours that he spent on the range as a sheepherder and, instead, only compensates him for time spent tending to the sheep, then Defendant's motion for summary judgment is proper.
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> * * *
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> **[T]he Court must look at whether Nevada law requires Defendant to pay Plaintiff for all 24 hours of each day spent tending to the sheep, eating, sleeping, and other time spent for personal benefit.**
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> * * *
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> Nevada law does not answer the question of whether Plaintiff is entitled to minimum wage for all the hours spent on the range. The Constitution of the State of Nevada Article 15 Section 16 provides, in part, that an "employer shall pay a wage to each employee of not less than the hourly rates set forth in this section." While this provision establishes that workers shall receive a minimum wage for work completed, it does not define

> "work" to determine what does and does not qualify as work that receives the minimum wage. . . The Nevada Revised Statutes (NRS) also establishes a minimum wage providing that an "employer shall pay to the employee wages for each hour the employee works." NRS 608.016. . . Moreover the regulation that implements NRS 608.016 states that "[a]n employer shall pay an employee for 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." NAC 608.115. This regulation does nothing more to clear up what "work" is under Nevada law.

5 AA 749: 17-22, 751:1-2, 751:4-17 (emphasis added).

Recognizing the differences between time spent working verses non-worktime, the Federal District Court further stated in certifying and formulating the question:

> Withstanding the definition of ***workday***, the NRS differentiates time spent working from time spent eating, resting, and sleeping. . . . [H]owever, it is difficult to apply these provisions to this matter because Plaintiff asserts that even when he was eating and resting, he was still expected to tend to the sheep.
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> * * *
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> Without a proper understanding of what "work" is defined as under Nevada law, the Court must turn to the Nevada Supreme Court to determine whether the legal precedent of the state's highest court can help the court define "work."
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> * * *
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> "Factors a Federal Court should consider and in exercising this discretion include whether the state law question presents a significant question of important state public policy, whether the issue involved has broad application, whether law from other states is instructive, the state court's case load, and comity and federalism concerns."

* * *

**For all the reasons mentioned previously, the Court will certify the . . . question of law to the Nevada Supreme Court.**

5 AA 752:12-23, 754:2-4, 755:14-18 (emphasis added).

Plaintiff/Appellant Castillo, boldly asserts that "the Court should **rephrase** the certified question so that it only answers determinative issues in the case and avoids advisory opinions." Appellant's Opening Brief, p. 18. This improperly presumes that Plaintiff/Appellant Castillo, and not Federal District Court Judge Jones, can define the narrative herein and determine what the certified question should be. Clearly, Plaintiff/Appellant Castillo would prefer to have the question rephrased because the actual question before the Court, framed by the Federal District Court, is not a question that Appellant likes. However, Respondent/Defendant Western Range Association respectfully submits that the Court phrased the question exactly as it intended, in order to adjudicate Defendant/Respondent WRA's pending Summary Judgment Motion.

## INTRODUCTION

The instant action is a wage and hour lawsuit brought by Plaintiff Abel Cántaro Castillo, a foreign temporary non-immigrant sheep herder from Peru, who claims that he was "underpaid" from 2010 to 2014 because he received [more than] the Nevada Adverse Effect Wage Rate (AEWR) set by the United States

Department of Labor (DOL), rather than the Nevada wage rate plus overtime. 1 AA 104:17-26. His theory is that because he was "on-call" 24 hours per day, seven days per week, he must be paid for each and every hour for 365 days each year he was employed, (or prorated for partial years), whether or not he was actually working.

As a practical matter, a commonsense analysis illustrates that unless public policy requires H-2A range livestock sheep herders to be paid in excess of $72,000[1] annualized, as a public policy matter, actual hours are closer to the 48

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[1] Projected Annual H-2A Sheepherder Salary if "on-call" must be paid for 24 hours per day, each day would be as follows:

| Year | NV Minimum Wage | x Daily Wage 24 Hrs | x 365 Days | Total Annualized Pay |
|---|---|---|---|---|
| * 2010 | $8.25 | $198 | | **$72,270** |
| 01/2011 to 12/31/2011 | $8.25 | $198 | | **$72,270** |
| 01/2012 to 12/31/2012 | $8.25 | $198 | | **$72,270** |
| 01/2013 to 12/31/2013 | $8.25 | $198 | | **$72,270** |
| * 2014 | $8.25 | $198 | | **$72,270** |
| | | **Annualized Over 5 years (2010-2014) Not Prorated)** | | **$361, 350** |

hours per week per the Department of Labor (DOL) Training and Employment Guidance Letters (TEGL) 32-10 (c) 1.[2] To hold otherwise has broad implications to Nevada sheep ranches, upon which much of our food and textile production relies. It impacts small Nevada businesses (the member ranches) who would be gravely damaged by Plaintiff/Appellant Castillo's steep proposed pay rate, in ways that also effect small business member ranches, consumers, the herders themselves and each and every entity along and within the food and textile supply chains.

## STATEMENT OF THE CASE

### A. OVERVIEW

This is a wage-and-hour lawsuit unsuccessfully brought as an FRCP 23 Class Action,[3] regarding H-2A Visa non-immigrant worker Abel Cántaro Castillo,

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(FN 1 Continued)* These were years in which Plaintiff/Appellant Castillo did not work the entire year, but the annualized pay calculation remains the same.

Although agricultural workers are statutorily exempt from overtime pay pursuant to NRS 608.018(3)(k), if overtime were paid for 16 of the "24 hours" per day, Plaintiff/Appellant Castillo's annualized total pay as a sheepherder for 2010-2014 would be $96,360 plus room and board.

[2] DEP'T LABOR, Training and Employment Guidance Letter No. 32-10, (c)(1), Jun. 14, 2011 (https://www.dol.gov/agencies/eta/advisories/training -and-employment-guidance-letter-no-32-10).

[3] As mentioned above, FRCP 23 Class Certification was denied by the Federal District Court based in part on a finding that wages, duties and hours worked by Nevada Western Range Member herders were all different, thus defeating

Appellant herein alleged he was underpaid wages pursuant to Nevada's Minimum Wage Amendment ("MWA") (Article 15§16 of the Nevada Constitution). 1 AA 103–04. Plaintiff/Appellant Castillo claims that he "worked" 24 hours every day, seven days a week, even when he was eating, sleeping, using his Facebook account and otherwise not actually tending sheep. 8 RA 1588:6-17; 4 AA 464:9-25, 465:1-6, discussed in greater detail, *infra.*

Following lengthy written, expert and percipient witness discovery, the District Court below denied FRCP 23 Class Certification, making Abel Cántaro Castillo the sole plaintiff herein. 5 AA 759:12-13.

In certifying the question to the Nevada Supreme Court, the Nevada Federal District Court observed that the matter is unclear in its interpretation as to Nevada law and an issue of both first impression and public policy. 5 AA 755:19-21, 756:1-2.

This issue effects the viability of the range livestock herding industry within Nevada; the consequences of this Court's solution to this certified question, will

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(FN 3 Continued): commonality. 5 AA 758:1-7; 8 RA 1633:7-9, 1639:18-20, 1661:20-22, 1678:6-9, 1685:6-8, 1691:13, 1697:22-23, 1704:11-12; 9 RA 1710:5-6, 1716:1-2. This is pivotal on the issue presented by the certified question, because most of the same factors (factual) found by the Federal District Court, provide guidance as to the legal issue presented herein.

have cultural, policy and economic impact both on the State and more specifically on the small business family generational sheep herding and goat herding ranches that are so integral to Nevada's history and now, its future. As the Federal District Court stated, it is a matter involving significant public policy. 5 AA 755:19-21, 756:1-2.

## B. THE H-2A NON-IMMIGRANT FOREIGN WORKER PROGRAM

The H-2A Non Immigrant Foreign Worker Visa Program has existed to allow U.S. employers or their agents who meet specific regulatory requirements, to bring foreign nationals to the U.S. to fill temporary agricultural jobs when U.S. workers are unable to meet demand.

This shortage of agricultural labor during and after World War II created a crisis in the sheep industry of the American West, causing some sheep ranchers to drastically reduce the size of their grazing operations. Ranchers organized to pass immigration laws so that they could hire Basque sheepherders from the Pyrenees.[4] After successfully lobbying in the 1950's on behalf of the Western states ranchers, the "Sheepherder Bills" were passed that allowed ranchers to sponsor herders from the Basque country. The California Range Association became the Western Range

[4] Sheepherders of Northern Nevada, University of Nevada, Reno, Mathewson-IGT Knowledge Center Special Collections.

Association. Initially, Western Range played an international role in working with the government of Spain to set up a sheepherder recruiter in Bilbao.[5]

When the 1970 improvement of economic conditions in the Basque country made it more difficult to recruit Pyrenees herders to work in the U.S., Western Range redirected its recruiting efforts to Peru, Mexico and the other South American countries. WRA facilitates recruitment and employment of skilled guest workers under H-2A visa, from countries, primarily within South and Central America.[6]

C. PARTIES

The following is a brief summary of the parties to this action.

1) Plaintiff/Appellant Abel Cántaro Castillo

Plaintiff/Appellant Castillo alleged that he was an H-2A herder at Western Range Member Ranch El Tejon, where he divided his time between California and Nevada. 1 AA 83:3-9. Plaintiff/Appellant Castillo was initially the "representative" of a putative class, never certified and now he is the sole Plaintiff

[5] Sheepherders of Northern Nevada, University of Nevada, Reno, Mathewson-IGT Knowledge Center Special Collections.

[6] Western Range was a Joint Employer for H-2A purposes until approximately 2021, at which time its status was officially changed with the United States Department of Labor and USCIS to Agent.

in the underlying action and the sole Appellant herein. 1 AA 93:2-6; 5 AA 744:8, 759:12-13. Plaintiff did not work for any of the Western Range member ranches except for El Tejon. 1 AA 81:10-11.

2) Respondent/Defendant Western Range Association

Defendant/Respondent Western Range Association a California Non-Profit Association with its prior principal place of business in Salt Lake City, Utah and its current principal place of business in Twin Falls, Idaho. 1 AA 150:3-4; 8 RA 1496:3-4. Defendant/Respondent Western Range Association is not a direct employer of H-2A Non-Immigrant temporary foreign sheepherders, but rather facilitates the recruitment and employment of skilled guest workers under the H-2A Visa program. 5 AA 744:21-24, 745:1-5.

D. PROCEDURAL BACKGROUND

On May 3, 2016 Plaintiff/Appellant Castillo filed suit against Western Range Association (Western Range), El Tejon Sheep Company (El Tejon) and Melchor Gragirena (Gragirena) stating causes of action for violations of the Fair Labor Standards Act (FLSA). On October 13, 2016, Plaintiff/Appellant Castillo plus newly named Plaintiff Ramos filed a First Amended Complaint ("FAC") wherein additional Defendants Mountain Plains Agricultural Service (MPAS), Estill Ranches, LLC and John Estill were added and 17 new causes of action were

also alleged. 1 AA 27-68.[7] The FAC omitted the previously asserted FLSA cause of action. 1 AA 21. The Federal District Court dismissed the FAC as to all parties on April 13, 2017. 2 RA 333:9. On May 15, 2017, the three Plaintiffs then filed a Second Amended Complaint (SAC) against Defendants El Tejon Sheep Company, Melchor Gragirena, MPAS, Estill Ranches, LLC and Western Range Association, again with jurisdiction based upon under 28 USC § 1331 (d) referred to as the Class Action Fairness Act ("CAFA"). 1 AA 71-120. The SAC was dismissed by the Federal District Court on February 13, 2018 on jurisdictional grounds, holding that Plaintiff failed to meet the burden of establishing subject matter jurisdiction under CAFA. 2 RA 338:1-11.

On March 9, 2018, Plaintiff/Appellant Castillo appealed the Federal District Court's dismissal to the 9th Circuit Court of Appeals and on June 19, 2019. In a 2 to 1 decision with dissenting opinion, the 9th Circuit Court of Appeals reversed the Federal District Court's CAFA jurisdictional dismissal and remanded this action back to Federal District Court. 1 AA 152:19-22.

Although this was originally brought as a putative "class action" lawsuit with Plaintiff/Appellant Castillo as the representative on behalf of former and/or

[7] Only Counts I, III, IV, V and IX of Plaintiff/Appellant Castillo's Second Amended Complaint were alleged against Western Range Association. 1 AA 103-106, 109.

current Nevada based H-2A herders [1 AA 44-46, 93-95], pursuant to Respondent Western Range Association's Motion, [8 RA 1484-1533; 1 AA 141-63], the Federal District Court denied FRCP 23 Class Certification Court stating in part:

> [A]s Defendant points out, the prospective class members worked in different areas of Nevada, causing them to endure different conditions for sheep tending, resulting in different hours worked. These differences are important in this matter because the prospective class members claim that they were not paid for all the hours spent tending to the sheep. . . For example, one prospective class member claimed that the heat caused his sheep to sleep more often, which helped him worry less about the sheep and get better rest. . . Another sheepherder stated that the time of year allowed him to work 35 hours a week because his sheep did not need much attention. In sum, some prospective class members allegedly got sleep . . . some barely worked. . . The stark contrast in experiences makes it difficult for each prospective class member to allege that they were adversely affected by the same sheep herding conditions, which caused them to work more hours than they were paid.
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> * * *
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> The prospective class members do not share typicality. As mentioned previously, some prospective class members **worked** many hours, and some **worked** very few hours. Just based on these factual circumstances alone, the prospective class members' claims are not typical.

5 AA 757:16-24, 758:1-7, 759:1-3 (emphasis added).

The same September 26, 2022 Order Denying Class Certification, certified the instant issue to this Court. *See generally* 1 AA 743-59; *see also* 5 AA 760.

The parties are now before the Nevada Supreme Court to obtain guidance requested by the Nevada Federal District Court, in situations wherein the Court already factually recognized H-2A herders spent some or most of each day sleeping or doing other free time activities for personal benefit, including playing soccer, sleeping, watching movies, surfing the web, playing the guitar, etc. 5 AA 758:1-14, 761-62, 8 RA 1632:11-14, 1632:18-19, 1639:4-7, 1646:21-23; 9 RA 1709:14-16.

## SUMMARY OF RESPONDENT WESTERN RANGE ASSOCIATION'S ARGUMENT

The issue in this matter is whether H-2A range sheep herders in Nevada were intended to receive pay for each and every minute and hour of each and every day ("on-call up to 24/7") on or off range, whether or not they were actually working.

Western Range Association respectfully submits that this Court should adopt the logic of NRS 608.0195. This Court should find that the drafters of NRS 608 (pertaining to calculation of wages), as well as an interpretation of the Minimum Wage Amendment to the Nevada Constitution ( Article 16§15), both recognize that an H-2A non-immigrant foreign sheep herder employed to herd sheep on the open range, is not "working" 24/7 and was never intended to be paid for every hour of the day regardless of what he was doing or not doing or the purpose of their

activity or inactivity. The drafters of NRS 608 and the electorate intended for the Minimum Wage Amendment to apply only to time an employee is actually working.

Taken in concert with the intent of the H-2A program which allows foreign workers to obtain H-2A Visas to perform range sheep herding and goat herding in Nevada, the MWA should not be interpreted to allow time spent pursing personal matters on or off the range, to constitute work under the dictionary definition, the intent of the H-2A program or Nevada's Minimum Wage Amendment.

## STATEMENT OF FACTS

### A. FACTS DETERMINED BY FEDERAL DISTRICT COURT

As set forth above, the Federal District Court found that Plaintiff/Appellant Castillo ate, slept and spent time for personal benefit. 5 AA 750:4-14, 758:1-14. Whether and under what circumstances this qualifies as "work" under the MWA is the question before the Court.

### B. FEDERAL GUIDANCE IDENTIFIES A 48 HOUR WORK WEEK

There is a presumptive designation of a 48-hour work week pursuant to the Federal H-2A Training Employment Guidance Letters (TEGL). 5 AA 738:9-13.

The DOL uses 48 hours a week as the assumption for purposes of calculating the monthly salary. The DOL discussed that in the preamble to the final rule in 2015,[8] including, notably, referring to that number appearing in the comments from worker advocates led by Ed Tuddenham[9]. After picking-up that 48 hour work week assumption, DOL used it throughout the rule for purposes of calculating a monthly salary.

Interestingly, DOL had originally proposed using a 44 hour work week in the Notice of Proposed Rulemaking (but multiplying that by a much higher hourly rate).[10] That reference pre-NPRM submissions from WRA and MPAS, as well as ASI's Economist arguing for work weeks in that 44-48 hour range on average (longer in some months, shorter in others). *Id.*

C. UNDISPUTED FACTS

Plaintiff was a former sheep herder from 2007-2014, employed by Western Range Association member ranch El Tejon Sheep Company. 1 AA 77:5-7. Plaintiff divided his time between California and Nevada during his work as a herder. 1 AA

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[8] Temporary Agricultural Employment of H-2A Foreign Workers, 80 Fed. Reg. 200, 62958, 62987, (Oct. 15, 2015) (to be codified at 20 C.F.R. § 655) (https://www.govinfo.gov/content/pkg/FR-2015-10-16/pdf/2015-26252.pdf)
[9] *Id.* at 62987 (bottom of left column).
[10] Temporary Agricultural Employment of H-2A Foreign Workers, 80 Fed. Reg. 72, 20309 (Apr. 15, 2015) (http://www.govinfo.gov/content/pkg/FR-2015-04-15/pdf/2015-08505.pdf).

77:5-7, 83:6-9. He was part of the Foreign Non-Immigrant Work Visa Program, having come to the United States from Peru. AA 4. Plaintiff left his employment with El Tejon Ranch in 2014 and brought suit in 2016, ultimately claiming five causes of action against Western Range and 13 additional causes of action against other Defendants. The claims against Western Range were: failure to pay minimum wage in violation of the Nevada Minimum Wage Amendment (Count I), Breach of Contract or Quasi Contract (Count III), Promissory Estoppel (Count IV), Unjust Enrichment and Quantum Meruit (Count V), and Failure to Pay Separated Employees' Wages when due (Count IX). 1 AA 103-06, 109. The remaining 18 causes of action were against other formers Defendants, El Tejon Sheep Co., Melchor Gragirena, Mountain Plains Agricultural Service and Estill Ranches, LLC. 1 AA 103-119.

The action before the Federal District Court was originally captioned as a Fair Labor Standards "Class Action Lawsuit" on behalf of Plaintiff and "all of those similarly situated." 1 AA 19:9-21.

The Second Amended Complaint before the Federal District Court pertained to the alleged underpayment of wages which Plaintiff claims was in violation of the Nevada Minimum Wage Amendment (Constitution, Article 15§16). 1 AA

103:2-14. Class Certification was denied on September 26, 2022 [5 AA 743-759], so Abel Cántaro Castillo is the sole Plaintiff.

Plaintiff/Appellant Castillo claims to have worked from about October to mid-April (seven months out of the year) in California and from mid-April to September or early October (the remaining five months of the year) in Nevada. Defendant El Tejon, a WRA member, paid Plaintiff/Appellant Castillo the higher California H-2A rate of $1,422.00 per month during his entire course of employment. 1 AA 74:25-28, 91:6-9.

The Federal District Court already factually recognized that other herders work 35 hours per week, and some worked "very few hours". 5 AA 758:1-7, 759:1-3. The direct testimony of other herders clearly shows a huge variation in the number of hours that they feel they work per day, including that they only worked, respectively, 5-6.8 hours per day (5 AA 758:1-7),[11] 4-5 hours per day (8 RA 1639:18-20), 6.7-6.8 hours per day (8 RA 1661:20-22), 4-6 hours per day (8 RA 1678:6-9), 8 hours on average per day (8 RA 1685:6-8, 1691:13, 1697:22-23, 1704:11-12; 9 RA 1716:5-6), and 7-8 hours per day (9 RA 1710:5-6).

[11] Testimony about weekly hours was converted to daily hours by dividing the weekly estimate by 7 days.

Further, the sheepherders themselves testified that during the hours they were not working they were free to engage in their own personal pursuits, without control, direction or any duties imposed on them by their employers. 8 RA 1632:11-14, 1632:18-19, 1639:4-7, 1646:21-23; 5 AA 677:2-5; 2 AA 263:6-9. These activities were varied and wide ranging, including playing games (like chess and soccer), watching movies and videos, talking to family and friends on the phone, surfing the Internet, walking to hang out with other herders, playing apps on their phone, using Facebook and WhatsApp, sleeping, preparing meals and eating, writing letters, playing the guitar, washing clothes, taking care of personal hygiene, fishing, etc. *Id.*

Castillo glossed over the differences in the daily routines that presented each herder. Castillo attempts to have this Court view each day as the same as the day before; identical, uniform and without regard to where a camp was located or the time of year. Plaintiff/Appellant Castillo asserts that what activities were occurring when a herder was "on call" as something that can be easily addressed. This simplistic view does not fit with the facts. For example, the distance varied from day-to-day from where the sheep were located to where the camp was located. On some days the sheep would be bedded down within sight and hearing of the herder, while on other days the sheep could neither be seen nor heard by the herder when

he was at his residence. 8 RA 1684:20-23, 1690:19-20, 1697:1-3, 1646:4-5. Also of significance, the sheep are normally bedded down twice per day. Once after being taken to water in the morning (where they typically bed down during the heat of the afternoon) and again (in the mid to late afternoon) when they are moved to their evening bedding spot. 8 RA 1684:13-19, 1690:21-26, 1691:1-2; 9 RA 1715:12-15. Further, even this practice varied. For example, the sheep may be located in a valley that has plentiful feed and water. As a result, the herder may not need to move them for days or even a week and the valley may be as far away as 1 ½ walking hours from their camp. 8 RA 1696:10-12, 1697:1-3; 5 RA 857:20-23; 5 AA 677:2–5. This creates several important non-disputed facts that Castillo ignored: a) that the sheep are sometimes located during their midday and evening bedding locations where the herder can neither see nor hear them from their camp/residence; b) Castillo has failed to present any facts to establish the frequency of when the sheep were located within his sight and hearing; and c) Castillo has failed to establish any facts concerning the frequency (on the days when the sheep could be heard while he was sleeping) that his sleep was actually interrupted.

It is undisputed that during the time the herders are on the range, much of the range is open BLM and Forest Service land, that is not owned by the ranches. 5

AA 616:1-3, 635:24-27; 5 RA 858:2-5. This has several important effects on this matter, since it is undisputed that Castillo failed to establish: a) that his employer owns or even controls the worksite; b) that he was restricted in his movement to pursue personal pursuits; c) how often (if ever) he was interrupted during the day when he left the camp to pursue personal pursuits; and d) any facts which limited him in how far he could go from the camp.

D. DISPUTED FACTS

Castillo claims that even when he was sleeping he was required to monitor the sheep. However, as pointed out above, he conveniently ignores the fact that on some days such monitoring is physically impossible since the sheep can neither be seen nor heard. With regard to the nights when they could be heard, other herders and ranch owners testified to exactly the opposite. Specifically, that herders should not go out at night. 8 RA 1646:4-5, 1677:3-6, 1690:16-18, 1703:15-17. While it is not for this court to decide which story to believe, the version presented by the other herders and owners makes more sense given the danger presented to a herder of going out into the night, with a loaded weapon, and attempting to confront a predator. Castillo's story becomes even more incredible when the trier of fact considers that there are trained dogs with the sheep whose sole purpose is to protect the sheep from predators.

Castillo also admitted that he used his phone to establish and use Facebook and talked to his family using WhatsApp. 4 AA 464:9-25. What Plaintiff failed to address is the fact, known to anyone who has experienced Nevada's rural treasures, that cell phone reception varies greatly. The Court should keep in mind that Castillo bears the burden of establishing the hours he worked and he has failed to establish undisputed facts regarding how often during the day he left all sight and sound of the sheep in order to pursue his own personal pursuits (e.g., visit other camps, fish, hike to find reception, etc.). His ability to leave the sight and sound of the sheep, or to ignore them when they are bedded down and protected by the dogs, certainly affects if the "on call" time should qualify as "work" time under the MWA.

## ARGUMENT

### I STANDARD OF REVIEW

NRAP 5 authorizes the Nevada Supreme Court to answer certified questions of law that may be determinative of the cause then pending in the certifying court. *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 747. The decision to consider any certified question is within the discretion of the Nevada Supreme Court. *Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co.*, 124 Nev. 319, 322. The answering court is

"limited to answering the questions of law posed to the answering court." *See Progressive Gulf Ins. Co. v. Faehnrich*, 130 Nev. 167, 170; *In re Fontainebleau Las Vegas Holdings, L.L.C.*, 127 Nev. 941 (2011). The certifying court retains the duty to determine the facts and to apply the law provided by the answering court to those facts. *Id.* Accepting "the facts as stated in the certification order and its attachment[s]," if any, we limit our role "to answering the questions of law posed." *Mack v. Williams*, 522 P.3d 434, 440. See *In re Fontainebleau Las Vegas Holdings, LLC*, 127 Nev. 941, 955, 267 P.3d 786, 794-95 (2011). *In re Fontainebleau Las Vegas Holdings, LLC*, 127 Nev. 941, 955, 267 P.3d 786, 794-95 (2011). *See Echeverria v. State*, 495 P.3d 471, 474.

In the instant case, the Federal District Court has already determined that H-2A range livestock herders work different numbers of hours. 5 AA 757:16-24, 759: 1-3. As discussed above, Plaintiff/Appellant Castillo analyzed the number of hours he allegedly worked and the Federal District Court already factually recognized that some previously prospective class members including Castillo's co-workers at the El Tejon ranch work 35 hours per week, and some worked "only a few hours a day". 5 AA 758:1-7.

In the case at bar, Castillo stated that he was "working" when he slept, was on Facebook or otherwise not tending sheep. 4 AA 464:9-25. In contrast, 13 other

herder Declarations (filed with the Federal District Court) led the Court to factually conclude that not all of Plaintiff/Appellant Castillo's days/time spent on the range were spent tending sheep, some was spent "eating, sleeping and for personal benefit". 8 RA 1632:11-14, 1632:18-19, 1639:4-7, 1646:21-23; 9 RA 1709:14-16.

## II. THIS COURT DOES NOT NEED TO REPHRASE THE CERTIFIED QUESTION

Appellant seeks to rephrase the certified question to remove the factual findings of the district court that are detrimental to Appellant's position in this appeal. However, "[i]n answering certified questions, this court accepts the facts stated by the forwarding court in its certification order." *Parsons v. Colts Mfg. Co. LLC*, 137 Nev. 698, 702, 499 P.3d 602, 606 (2021) (citing *SFR Invs. Pool 1, LLC v. Bank of N.Y. Mellon*, 134 Nev. 483, 489 n.5, 422 P.3d 1248, 1253 n.5 (2018)). Indeed, "the certifying court retains the duty to determine the . . . [t]his approach prevents the answering court from intruding into the certifying court's sphere by making factual findings or resolving factual disputes." *In re Fontainebleau Las Vegas Holdings*, 127 Nev. 941, 956, 267 P.3d 786, 795 (2011) (citations omitted). Furthermore, "this court may not use information in the appendix to contradict the certification order." *Id.*

Appellant would like to relitigate the district court's factual findings because it knows that regardless of what standard is applied, if it is true that "some of the time [Plaintiff] spent on the range was for his personal benefit" then Plaintiff is not entitled to pay for twenty-four (24) hours per day, seven days per week as Plaintiff's claims seek. Indeed, Appellant admits as much when it states "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."[12] Opening Br. at 20. For this reason, it is important this Court avoid rephrasing the question in a way that would permit Appellants to manipulate the process to result in a finding that contradicts the district court's factual findings contained within the certified question.

A second reason Appellants seek to rephrase the certified question is to delete the district court's reference to NRS 608. This is because NRS Chapter 608 contains several provisions which, if read together, give a clear indication of how the Nevada Legislature intended to set the outer-limits of what constitutes "work" under NRS 608. Appellant attempts to sidestep this analysis by arguing its claims

[12] It is likely that regardless of which set of laws this Court decides to apply, the answer to the certified question will be that Nevada law does not require Defendant to pay Plaintiff 24 hours of wages, seven days a week. This is because the district court has found Plaintiff spent time on the range for his personal benefit, and that such time is consistently determined not to include "work" under multiple different tests.

under NRS 608 are solely for the failure to pay wages, and the wages are determined by the MWA. However, this Court recently rejected a similar argument that if a group of individuals were "employees" for constitutional purposes, then consequently they would also be "employees" for purposes of applying NRS 608.040. *See Myers v. Reno Cab Co., Inc.*, 137 Nev. 365, 374, 492 P.3d 545, 554 (2021) (noting "[t]he separateness of the claims for relief is clear." This is consistent with the plain reading of the statutes Appellant is pursuing claims under. *See* NRS 608.140 ("for wages earned and due according to the terms of his or her employment"), NRS 608.040 ("the wages or compensation of the employee"), and NRS 608.050 ("the amount of any wages or salary then due them."). As a prior condition to determining what wages are owed, the Court would necessarily have to determine what hours the employee worked.

Fortunately, NRS 608 provides several indicators of what the Legislature intended to define as work. NRS 608.016 provides that an employer shall pay an employee wages "for each hour the employee works." Additionally, NRS 608.0126 provide that "workday" means "a period of 24 consecutive hours which begins when the employee begins work." This definition states an employee's workday does not begin until an employee begins work. Additionally, NRS 608.012's definition of "wages" provides that it includes the amount "for the time

the employee has worked, computed in proportion to time. . . ." This would indicate the presumption in NRS 608 is that there are periods within which an employee is working, and an employee is not working.

Appellant's employment relationship was unique in that he was living in a mobile residence that was varying distances from the sheep,[13] but this is not unprecedented. NRS 608.215 contains an entire scheme that defines how employees working as domestic service employees who reside in the household where they work should be compensated. *See* NRS 608.215(1). NRS 608.215(1) permits an employer under certain conditions to exclude from work time periods for meals, periods for sleep, and "[a]ny other period of complete freedom from all duties during which the domestic service employee may either leave the premises or stay on the premises for purely personal pursuits." Importantly, if during one of these periods of exclusion the employee is interrupted "by a call to duty by the employer, only the period of the interruption must be counted as hours worked for

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[13] The distance varied from day-to-day. On some days the sheep would be bedded down within sight and hearing of the herder, while on other days the sheep could neither be seen nor heard by the herder when he was at his residence. 8 RA 1677:3-6, 1684:20-23, 1690:16-20, 1697:1-3, 1646: 4-5; 1703:15-17 . Also of significance, the sheep are normally bedded down twice per day. Once after being taken to water in the morning and again when they are moved to their evening bedding spot. 8 RA 1684:13-19, 1690:21-26, 1691:1-2; 9 RA 1715:12-15. Further, even this routine varied. For example, the sheep may be located in a valley that has feed and water. As a result, the herder may not need to move them for days or even a week. 8 RA 1696:10-12.

which compensation must be paid." NRS 608.215(2). A similar framework would make sense for H-2A workers like Appellant. Appellant is permitted meal breaks, periods for sleep, and spends time for his personal benefit. These are all categories of time that would logically be excluded from the period of time Appellant claims he worked.

Additionally, NRS 608.215(1)(c) provides this Court with some clarity regarding the juxtaposition raised in the certified question that while Plaintiff was not allowed to leave,[14] he still had time for his personal benefit. NRS 608.215(1)(c) contemplates a scenario where an employee is unable to leave the home, but nevertheless is permitted to stay on the employer's premises and pursue personal pursuits. In the same way, even if Plaintiff was required to stay on the range,[15] it is lawful for an employer in other contexts to deduct those hours the employee was permitted to pursue purely personal pursuits, and there is no reason

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[14] This is disputed. Evidence indicates that the herder was free to leave the camp and hike, fish, find reception to call friends or family, play soccer, visit other herders, etc. 8 RA 1632:11-14, 1632:18-19, 1639:4-7, 1646:21-23; 9 RA 1709:14-16; 2 AA 263:6-9; 5 AA 671:18-21, 677:2-5.

[15] This phrasing itself can be tricky and somewhat misleading. Unlike other workplaces where the work location is controlled by the employer (e.g. residence, fire house, security shack, etc.) the majority of the "range" is on open BLM land. 2 AA 263:6-9; 5 AA 671:18-21, 677: 2-5; 5 RA 858:2-5. As a result, the herder likely has access to hundreds, if not thousands, of acres of space to roam, hunt, explore, etc., all of which area is not controlled by the employer.

this case should be any different. While this statute is not controlling authority for how this Court should resolve the certified question pursuant to NRS 608, it is persuasive Nevada authority this Court can use as a guide to the policy underlying the question presented.

Similarly, NRS 608.0195 provides an additional example of how the Nevada Legislature handles time spent sleeping for individuals who are considered "on duty" for the purposes of providing care to certain groups of persons either in a facility or in the recipient's home. In addition to permitting the parties to exclude up to (8) hours of wages for sleep, NRS 608.0195(2) is enlightening as to how to handle periods of interruptions for any call to service. NRS 608.0195(2) requires only periods of interruptions to be counted as "hours worked" and it also provides that if the interruption results in the sleeping period being less than five (5) hours, "the employee must be paid for the entire sleeping period."

NRS 608.0195(2) creates the strong presumption that those employees the statute covers, and for periods assigned to sleep, even where the employee remains "on duty" those are not necessarily work hours absent an "interruption." Additionally, it is also logical that for certain other types of calls for service that result in an employee rendering services "to such an extent that the sleeping period is less than 5 hours" that the employee would be entitled to payment for the entire

period. However, the underlying presumption present in both of these scenarios is that the employee actually receives a call for service that results in an interruption of the sleeping period. As explained above, Plaintiff has failed to demonstrate how often he was interrupted and as a result cannot as a matter of law succeed in bearing his burden of proving underpayment claims.

Plaintiff's disputed allegations that even during his periods of sleep he needed to remain alert to protect the sheep from being eaten by a predator are analogous to the responsibility of a home care worker tasked with caring for an elderly patient in the patient's home. In determining whether Plaintiff is entitled to wages for the time Plaintiff spent sleeping, this Court should adopt the logic of NRS 608.0195 and find that if Plaintiff did not actually receive a call for service that resulted in an interruption of his sleeping period, he is not entitled to be compensated for the time he spent sleeping as that was for his personal benefit.

The Court can sensibly and analytically utilize the framework suggested by NRS 608 to determine how to decide how to calculate the wages owed to Appellant pursuant to the Minimum Wage Amendment as well. As this Court has observed, "'the interpretation of a ... constitutional provision will be harmonized with other statutes.'" *Landreth v. Malik*, 127 Nev. 175, 180, 251 P.3d 163, 166 (2011) (citing *We the People Nevada*, 124 Nev. at 881, 192 P.3d at 1171). Where

Nevada state statutes have already created a readily available and reliable method for determining whether periods of time spent for the employee's personal benefit are compensable, it is not necessary for this Court to adopt the Fair Labor Standards Act complex precedents surrounding compensable time.

In the event this Court is unwilling to fashion a framework from the pronouncements contained within NRS 608, this Court should avoid making broad pronouncements regarding the applicable standards for a Court to use in determining "what is work." Both parties' arguments recognize that Plaintiff's employment situation in this case is unique and at least somewhat dissimilar to a majority of work environments this Court is confronted with many unique to Nevada. As a result, this is not the appropriate factual setting for this Court to resolve broader issues of work in other employment situations. Instead, this Court should accept the certified question as written and respond in the negative.

## III. The Drafters and the Electorate Intended the MWA to Only Apply to Time the Employee was Actually Working

"In interpreting an amendment to our Constitution, we look to rules of statutory interpretation to determine the intent of **both** the **drafters and the electorate** that approved it." *Ramsey v. City of N. Las Vegas*, 133 Nev. 96, 98, 392 P.3d 614, 616 (2017). In interpreting the MWA this Court has recognized "[t]o seek the intent of the provision's drafters or to attempt to aggregate the intentions

of Nevada's voters into some abstract general purpose underlying the Amendment, contrary to the intent expressed by the provision's clear textual meaning, is not the proper way to perform constitutional interpretation." *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. 484, 490, 327 P.3d 518, 522 (2014) (citations omitted).

Regardless of what question this Court elects to answer, in analyzing the MWA there is no indication from the text of the MWA that when it set the rate of "($5.15) per hour worked" that it meant to expand the definition of hours worked beyond those hours the ordinary voter understood employees to be working. It is unreasonable to suggest that when the voters enacted the MWA they implicitly intended to adopt the complex regulatory scheme of the FLSA. In fact, the definitions section of the FLSA alone is more than three (3) times the length of the entire MWA. *Compare* Article 15, Section 16 of the Nevada Constitution *with* 29 U.S.C. §203.

"'The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Pohlabel v. State*, 128 Nev. 1, 9, 268 P.3d 1264, 1269 (2012) (citations omitted). Interpreting the intention of the voters in enacting the MWA is not some esoteric concept that requires extensive borrowing from regulatory guidance or caselaw. The concept of work is simple, "[p]hysical or mental effort or activity

directed toward the production or accomplishment of something . . . [s]omething that has been done, made, or performed as a result of one's occupation, effort, or activity." WORK, Webster's II New Riverside University Dictionary (1st ed. 1984). It is plain that when Plaintiff was not directing his efforts towards the "production or accomplishment of something" he was not working in the eyes of the voters who enacted the MWA. *Id.* Additionally, during those periods of time in which the thing Plaintiff was doing, making, or performing was not as a result of his occupation, effort, or activity, that would not be considered work.

If, by enacting the MWA, the voters or drafters had intended to create a new framework that would alter Nevada law surrounding how the state treats employees who may or may not be considered "on call" or "on duty", they could have done so. But they did not, and this Court should not read such a complex regulatory framework into the use of the word "worked" in the MWA.

Separate from the voters intentions, there is little evidence to indicate what the drafters of the MWA intended regarding the definition of "work." However, in the same way the MWA does not define "work" it also does not define "health insurance." After the passing of the MWA, the drafters of the MWA were consulted regarding their opinions regarding how to approach handling the ambiguity. *See Discussion of the Impacts of the New Minimum Wage Law*, 74th

Sess. (Fed. 8, 2007) (statement of Michael Tancheck, State Labor Commissioner). The Labor Commissioner discussed his approach to clarifying the ambiguity was to adopt the standard from NRS 363A and 363B, stating this was a practical solution and that they "were able to get a good consensus for that approach from business and the drafters of the amendment." *Id.* at 9. As a result, in an analogous circumstance where a term was not expressly defined, the drafters of the MWA supported relying upon existing Nevada statutes in determining what would constitute a different undefined term.

It is worth noting that the Nevada electorate recently amended the Nevada MWA and although it is not effective until July 2024, it remains instructive that the language regarding "per hour worked" remained unchanged. This is further confirmation that the voters of Nevada intended for this to be a simple amendment that entitled employees in Nevada to a minimum wage for the hours they actually worked, not those hours they might have been called upon to work or those hours where they were not even conscious.

## IV. Even if this Court Elects to Rephrase the Certified Question and Apply the FLSA Principles to the MWA, WRA Would Still Prevail

Even if this Court was persuaded that it should rephrase the certified question to eliminate any of the factual assumptions, and even if this Court is

determined to adopt the framework pursuant to the FLSA for determining what is work time, WRA would still succeed under any such framework.

The Ninth Circuit Court of Appeals has long recognized that it cannot "lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time." *Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931, 935 (9th Cir. 2004) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 136, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). However, "the two predominant factors in determining whether an employee's on-call waiting time is compensable overtime are '(1) the degree to which the employee is free to engage in personal activities; and (2) the agreements between the parties.'" *Id.* (quoting *Berry v. Cnty. of Sonoma*, 30 F.3d 1174, 1180 (9th Cir. 1994)).

In examining the degree to which Plaintiff was free to engage in personal activities, we believe this Court should divide the time Plaintiff spent on the range into three categories. First, the time Plaintiff spent free to engage in personal activities including sleeping, relaxing, talking with friends and family, relaxing, and doing any of the foregoing activities either when the herd was outside the ability of the herder to see or hear them. 8 RA 1632:11-14, 1632:18-19, 1639:4-7, 1646:4-5, 1646:21-23, 1677:3-6, 1684:13-23, 1690:16-26, 1691:1-2, 1697:1-3, 1703:15-17; 9 RA 1709:14-16, 1715:12-15; 2 AA 263:6-9; 5 AA 671:18-21, 677:

2-5. This personal time is clearly not paid time under the FLSA. *Berry v. Cnty. of Sonoma*, 30 F.3d 1174, 1187 (9th Cir. 1994) (noting the coroners were "able to effectively use on-call time for personal pursuits" in denying FLSA claim); *Halferty v. Pulse Drug Co.*, 864 F.2d 1185, 1189 (5th Cir. 1989); 29 C.F.R. § 785.23.

The second category of time is time that falls under the FLSA rubric may or may not be considered "working" time, depending on the circumstances. This would include those periods of time during which Plaintiff was engaging in personal activities but was also monitoring the herd, and separately analyzed is time spent walking to and from the herd from his residence.[16] *See* 8 RA 1690:19-20, 1697:1-3. The time in this category would raise questions of fact that would be inappropriate for the district court to resolve on summary judgment. *Eikleberry v. Washoe Cnty.*, No. 3:12-CV-00607-RCJ, 2013 WL 5881711, at *4 (D. Nev. Oct. 30, 2013); *Armitage v. City of Emporia, Kan.*, 982 F.2d 430, 432 (10th Cir.1992); *Birdwell v. City of Gadsden*, 970 F.2d 802 (11th Cir.1992).

The third category of time is the time during which Plaintiff indisputably should be compensated. This would include the time he spent moving the herd to

[16] The Portal to Portal Act means that time spent commuting to and from work is not normally work time. Thus, such commute time is not work time unless Plaintiff can establish an exception. *Rutti v. Lojack Corp.*, 596 F.3d 1046, 1053 (9th Cir. 2010).

another location, tending to sick or injured sheep, rounding up strays, drenching sheep, or assisting in lambing, docking and shearing sheep.

With these three (3) categories in mind, Plaintiff would lead this Court to believe that all of the time he spent "on the range" is compensable time because every hour of every day he was "engaged to wait" and he was never provided with any time to engage in personal activities for the primary benefit of Plaintiff. This is simply incorrect.

The seven factors outlined by the Ninth Circuit are not particularly helpful on the facts before this Court:

> (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

*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) (citations omitted).

One of the things that makes this case unique is that although the ranch provided Plaintiff with housing, he actually did not spend his time on the employer's premises. Plaintiff spent the vast majority of his time on the range, primarily federal land.

Similarly, the restrictions on Plaintiff's geographical movements are unclear because Plaintiff's geographic proximity to the herd was constantly changing. 8 RA 1590:4-25, 1591:1-2, 1690:19-20, 1697:1-3; 5 AA 671:18-21, 677: 2-5. Plaintiff has provided no evidence that he was prohibited from taking a hike, fishing, or climbing a mountain to obtain cell phone signal, to name just a few of the myriad of outdoor activities available to a person with access to Nevada's great outdoors. As a result, there were few, if any, geographic restrictions placed on Plaintiff other than those inherent to living and working in remote and rural Nevada areas.

This factor raises an important consideration for this Court regarding responding to the certified question narrowly, so as to avoid creating any unintended precedent for alternative types or forms of employment. In today's "workplace" many employers have embraced a hybrid or work from home model. The clear dividing line between work and home that pervaded in the background of many of the FLSA cases no longer exists. Further, the New York based counsel for Plaintiff clearly fail to understand and appreciate the lure and joy many Nevadans derive from living in rural and even "off the grid" situations. One does not need to have access to symphonies, museums, restaurants, theaters, or shopping to engage in meaningful personal pursuits when one is surrounded by nature.

Crafting and applying a standard that relies upon outdated and metro-centric notions of work and home, ignores the difference in life between the urban, suburban, rural, and "off the grid", and would be shortsighted and have unforeseen consequences.

The frequency of calls in this case would be measured by how often Plaintiff's time spent for personal enjoyment was interrupted by calls from the herd. On these facts, Plaintiff's argument is incredibly weak here as there is little evidence before this Court that Plaintiff actually had to interrupt his personal activities, or even his sleep, and respond to the sheep.[17] Instead, Plaintiff relies upon conclusory generalizations regarding his subjective belief that he needed to remain vigilant over the herd, ignoring that he rarely if ever actually had to protect the herd from predators or rise in the night to care for a member of the flock.

There was no fixed time limit for Plaintiff to respond to the herd. Given the fact that the herd and Plaintiff's camp was always moving, is over broken terrain without roads, it would have been logistically impossible for the ranch to hold Plaintiff to any certain response time. Indeed, at times, Plaintiff's camp was so far

[17] Indeed, as was explained by multiple witnesses, the specifically trained dogs did all the work when left alone with the sheep. 8 RA 1632:1-2, 1646:3-4, 1677:3-6. Further, for safety reasons herders were told not to go to the sheep during inclement weather. 5 AA 600:5-16.

from the herd that he could not even hear the sheep and would have been unable to respond to a sheep in distress even if it had occurred.

Plaintiff had two avenues through which he could have traded "on-call" responsibilities. First, when working, with another herder, which enabled them to trade off which herder would care for the flock on particular days. 8 RA 1632:11-14, 18-19, 1646:21-23. Second, and perhaps most importantly, the ranch Plaintiff worked on provided the herders with specially trained guard dogs that were tasked with monitoring and protecting the sheep when they were bedded down. 8 RA 1632:1-2, 1646:3-5, 1677:3-6. This is the equivalent of being able to trade "on call" with a peer because it meant Plaintiff could be relieved of all of his responsibilities.

A pager or cell phone would likely not limit or ease any alleged restrictions in this context given the type of work being performed.

Plaintiff indisputably spent at least some of his time on the range for his own personal benefit. Plaintiff's brief presents his remote location as though it was impossible for him to engage in pursuits for his own personal benefit in nature. This ignores the reality that many people spend their free time in nature going hunting, fishing, backpacking, hiking, and enjoying Nevada's beautiful landscape. It is insincere for a metropolitan lawyer to argue that just because the mountain

ranges Plaintiff found himself in lacked a movie theatre that meant he could not engage in otherwise personal pursuits. He testified, *inter alia,* that he spoke on the phone, set up and used social media, called his family, and used Facebook Messenger to communicate with others. 8 RA 1588:6-17; 4 AA 464:9-25, 465:1-6.

Indeed, sleep, in and of itself is a personal activity that is typically not considered compensable so long as an employee receives at least five (5) hours. *See Roy v. Cnty. of Lexington, S.C.*, 141 F.3d 533, 546 (4th Cir. 1998). There is insufficient evidence before this Court or the district court, (on Summary Judgment), that could enable a reasonable juror to find as a matter of law that Plaintiff never received more than five (5) hours of sleep while on the range, and for that reason, during at least some of the times Plaintiff was sleeping, he was waiting to engage, and thus not entitled to compensation.

Even if Plaintiff were required to remain near the sheep during the evenings, that would not be dispositive. Indeed, Plaintiff's circumstances are similar to those of a barge worker who, although the barge worker was required to remain on the barge, the court determined he was not entitled to compensation for off-duty time because the barge worker was "free to sleep, eat, watch television, watch VCR movies, play ping-pong or cards, read, listen to music ... [and] seldom or never did any physical work after their shift ended." *Owens*, 971 F.2d at 352 (quoting

*Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1248 (5th Cir.1986), *cert. denied*, 484 U.S. 827, 108 S.Ct. 95, 98 L.Ed.2d 56 (1987)). Indeed, despite Plaintiff's assertions, the record is relatively empty of the frequency with which Plaintiff's sleep or other off duty time was interrupted by the needs of the sheep. If, like the barge workers in *Rousseau*, Plaintiff was able to sleep through the night, it would be improper for this Court to fashion a rule that entitled Plaintiff to compensation for the time Plaintiff spent sleeping. Plaintiff is also similar to the example of the security guards who were required to remain on the employer's refinery but were otherwise "free to sleep, eat at no expense, watch movies, play pool or cards, exercise, read, or listen to music during their off-duty time. . . ." *Owens*, 971 F.2d at 352 (quoting *Allen v. Atl. Richfield Co.*, 724 F.2d 1131, 1137 (5th Cir. 1984)).

It is important to note these factors are not exclusive, and especially in a case with unique facts like this one, this Court should also consider other factors. If there was any remaining doubt, 29 C.F.R. § 785.23 that applies to employees residing on employer's premises or working from home could not be more explicit in stating "[a]n employee who resides on his employer's premises on a permanent basis or for extended periods of time **is not considered as working all the time** he is on the premises." 29 C.F.R. § 785.23 (emphasis added). The regulation

continues, "[o]rdinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own." As a result, even if the FLSA does apply, it is clear that Plaintiff is not entitled to compensation for those periods of time he was engaging in personal activities.

The "Agreement"[18] between the parties falls squarely in favor of Respondent's position. Indeed, the Agreement states that Plaintiff's "[a]nticipated Hours of Work per Week . . . [were] On Call up 24 hours per day, 7 days a week."[19] 2 AA 215. The subsequent form refers to the anticipated hours as "ON CALL FOR UP TO 24 HOURS PER DAY, 7 DAYS A WEEK." 2 AA 221. The express language of the Agreement indicates that while it was possible for Plaintiff to be on call up to 24/7, there is no indication Plaintiff was actually on call that often.

In fact, the Department of Labor, in issuing its final rulemaking regarding the H-2A range herding, reasoned that the wage requirements for these herders would be based upon a 48-hour workweek. 20 CFR § 211(c)(1); U.S. Dep't of Labor, Emp't and Training Admin. (TEGL), H-2A Final Rule: Range Herding or

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[18] The Agreement is a job order approved by the U.S. Department of Labor for all H-2A workers.

[19] Notably, this language is required by the DOL. *See* TEGL 32-10 at 3:I(C)(1).

Production of Livestock in the United States (2015) at 4. It would be improper for this Court to issue an interpretation of the MWA that would upend years of work by the Department of Labor in conjunction with experts in the industry to fashion a workable solution for H-2A workers.

## CONCLUSION

Based on the foregoing and given the significant public policy that should cause this Court to question whether all Nevada "on-call" H-2A sheep herders are intended to earn over $72,000 per year from 2010-2014. Respondent respectfully submits that this Court must find, as a matter of Nevada law, that the DOL required terms "on-call" and "24/7" do not equal to Plaintiff/Appellant Castillo to be paid for 24 hours each day of his H-2A employment.

Respectfully submitted,

WOODBURN AND WEDGE

By _____

Ellen Jean Winograd, Esq.
Jose Tafoya, Esq.
and
SIMONS HALL JOHNSTON P.C.
Anthony Hall, Esq.

## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2017 in Times New Roman 14 point font.

2. I further certify that this brief complies with the page or type- volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 10,590 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purposes. I further certify that this 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 appendix where the matter relied on is to be found. I understand

that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 26th day of June, 2023.

WOODBURN AND WEDGE

By _____
Ellen Jean Winograd, Esq.
Jose Tafoya, Esq.
and
SIMONS HALL JOHNSTON P.C.
Anthony Hall, Esq.

## CERTIFICATE OF SERVICE

I hereby certify that on June 26th, 2023, I deposited a true and correct copy of the above and foregoing, RESPONDENT'S ANSWERING BRIEF, on this date by electronic transmission through the court's electronic filing program.

*/s/ Candace Kelley*
Candace Kelley
Employee of Woodburn and Wedge