IN THE SUPREME COURT FOR THE STATE OF NEVADA

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 REPLY BRIEF

Christine E. Webber (admitted *pro hac vice* to the U.S. District Court for Nevada)
Cohen Milstein Sellers & Toll PLLC
1100 New York Ave. NW, 5th floor
Washington, DC 20005
(202) 408-4600
cwebber@cohenmilstein.com

Alexander Hood, (admitted *pro hac vice* to the U.S. District Court for Nevada)
Towards Justice
PO Box 371680, PMB 44465
Denver, CO 80237-5680
(720) 239-2606
alex@towardsjustice.org

Mark R. Thierman, NV Bar No. 8285
mark@thiermanbuck.com
Joshua D. Buck, NV Bar No. 12187
josh@thiermanbuck.com
Leah L. Jones, NV Bar No. 13161
leah@thiermanbuck.com
Thierman Buck LLP
7287 Lakeside Drive
Reno, Nevada 89511
(775) 284-1500

Attorneys for Appellant

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

CASES

TABLE OF AUTHORITIES

Pages

STATUTES

ARGUMENT

I. THE CERTIFIED QUESTION SHOULD BE REPHRASED TO FOCUS ON A QUESTION OF LAW

Appellant-Plaintiff (hereinafter referred to as "Plaintiff") proposed a rephrase of the question to ensure (a) the focus is on a question of law, not asking this Court to make findings of fact; (b) that the question is relevant to this case, not asking about statutory claims not pursued by Plaintiff here; and (c) the answer will provide the guidance requested by the District Court, so that the District Court can apply the correct legal standard to resolving the motion for summary judgment that is before it. Appellee-Defendant (hereinafter referred to as "Defendant") not only failed to address Plaintiff's justifications but falsely accuses Plaintiff of attempting to trick this Court into resolving factual disputes in his favor.[1] On its face, the proposed rephrased question seeks only a legal standard, and not any factual findings. Indeed, the original question asks this Court to decide how many hours per day Plaintiff must be compensated for, which asks not for a legal standard, but for a determination of how the undecided legal standard would apply to facts in

[1] Defendant's claim that Plaintiff omits NRS Chapter 608 from the question because NRS Chapter 608 would suggest an answer contrary to that which Plaintiff seeks is equally invented. Plaintiff explained (Opening Br. at 19) that his minimum wage claims are pursued under the Constitutional MWA, not NRS Chapter 608. And Plaintiff addresses *infra* at Sec. III why NRS Chapter 608 does not provide any different legal standard than what Plaintiff proposes in any event.

this case. This Court, however, is not here to resolve the disputes of fact identified in the underlying motion for summary judgment. Thus, the proposed rephrasing simply reorients the question's focus around the issue the Court must actually decide: what is the meaning of work under the Constitutional MWA?

The parties agree that this Court must accept facts stated in the certified question as true. *See* Answering Br. at 21-22. However, Defendant repeatedly tries to dispute specific facts included in the certified question, making counter-factual claims without support or evidence specific to Plaintiff, demonstrating why rephrasing the question to focus on providing a legal standard rather than evaluating facts is more appropriate. For example, contradicting the question's statement that "Plaintiff was not allowed to leave," Defendant repeatedly claims that Plaintiff could leave the camp to engage in various activities. *See* Answering Br. at 20, 26 n.14, 36. The certified question includes that Plaintiff "was always performing some job duties," but Defendant repeatedly claims otherwise, asserting that there is an entire category of Plaintiff's time "spent free to engage in personal activities" that should not be paid under the FLSA. *See* Answering Br. at 33-34. While the certified question includes that "some of the time [Plaintiff] spent on the range was for his personal benefit," it does not specify what time that was, how much time that was, or whether any of that time was not when he was *also* performing job duties, since the question states Plaintiff was "always" performing

job duties. For example, while a truck driver may be driving and having a phone conversation at the same time, that does not mean that time driving is not work time, even if the phone conversation is for personal benefit. Defendant's attempt to entangle this Court in factual disputes confirms that Plaintiff's proposed rephrased question that asks this Court to set forth the governing legal standard is the more appropriately framed question.

Regardless of whether this Court agrees to Plaintiff's proposed rephrasing of the certified question, the answer must remain the same. In order to answer the question of whether Plaintiff should be paid for hours when he was always performing some job duties and was restricted to the range – even if there was some time spent for personal benefit *while* he was performing job duties – this Court must decide the definition of what work is.

II. DEFENDANT IGNORES NEVADA LAW GOVERNING INTERPRETATION OF NEVADA'S CONSTITUTION AND THE MINIMUM WAGE AMENDMENT

Defendant concedes that the plain language of MWA does not provide an answer to the question of how "work" is defined, but then fails to follow Nevada law directing that the purpose of the provision or guidance from parallel federal law be used to aid in interpreting unclear terms.

A. Defendant's Argument that it Has Discerned the Intent of the Voters as a Guide to Interpreting the MWA is Unsupported

This Court has looked to public policy in order to determine the intention of the Legislature. *See Sala v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 14 P.3d 511, 513-14 (2000), *as amended* (Dec. 29, 2000). The parties agree that the intent of the drafters or voters as to an abstract purpose may not be used to interpret the MWA in a way that is contrary to the clear textual meaning of the statute. *See* Answering Br. at 29-30 (citing *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. 484, 490, 327 P.3d 518 (Nev. 2014)). This Court has previously identified the MWA's purpose plainly: to *broaden* workers entitlement to minimum wage, not restrict it. *See Terry v. Sapphire Gentlemen's Club*, 130 Nev. 879, 884, 336 P.3d 951, 955 (2014) (the MWA "signal[s] this state's voters' wish that more, not fewer, persons would receive minimum wage protections.").[2] Since Defendant has

[2] Both Defendant and the Sheep Industry Amici employ hyperbole when predicting the disastrous effects that a finding for Plaintiff in this matter would have on the Nevada sheep industry. *See* Answering Br. at 6-7; Amicus Br. at 9. These exaggerated concerns are both hypocritical, as Amici claim to care about the mainly Peruvian herders that they are actively arguing should not be compensated for their work (Amicus Br. at 8-9), and counter to the social policy underlying the MWA as discussed above. Arguments that paying workers minimum wage will cost businesses money are routine, but do not change the interpretation of the law, nor empower this Court to second-guess the policy decisions made by legislature or voters in establishing the MWA.

not identified any clear textual meaning, the MWA must be interpreted in accordance with its identified purpose.

Instead of looking to the precedent of this Court, Defendant attempts to play soothsayer by stating – without any evidence, or "extensive borrowing from regulatory guidance or caselaw" – that the voters in favor of the MWA did not intend to expand the definition of hours worked beyond those the ordinary voter understood employees to be working, and, moreover, proposing that the average voter had a narrow understanding of hours worked. Answering Br. at 30. This is self-serving, and Defendant provides no support for its naked assertion that the voters intended a narrower definition of work.

Defendant's assertion that it is "unreasonable" to suggest that voters in favor of the MWA intended to adopt the FLSA's regulatory scheme, including the FLSA's definition of hours worked, is contrary to the cannons of construction, as well as common sense.[3] Answering Br. at 30. It is an established cannon of construction that the constitutional MWA was enacted with full knowledge of existing federal statutes relating to the same subject, including the FLSA, and with the presumption that such parallel federal statutes would be looked to for guidance

[3] Defendant also cites the dictionary definition of "work," but cites no authority on constitutional interpretation supporting the resort to such a source.

when needed. *See* Opening Br. at 24; *Century Steel, Inc. v. State, Div. of Indus. Rels., Occup. Safety & Health Section*, 122 Nev. 584, 589, 137 P.3d 1155, 1159 (2006) (recognizing the presumption that "the legislature knew and intended to adopt the construction" of federal statutes by federal courts when adopting a substantially similar state statute). Voters in Nevada had been living with the FLSA definition of work for decades when the MWA was passed. Thus, to the extent voters had any particular thoughts about how the MWA might define "work," it would be more likely they would assume it was similar to the FLSA rather than inventing their own definition of work.

B. Defendant Cannot Support its Argument that the Court Should Prioritize NRS Chapter 608 in Discerning the Meaning of "Work" Under the MWA

The FLSA is the appropriate external interpretation aid in this situation because it provides a usable standard for when time spent "engaged to wait" counts as "work" for this Court to look to when interpreting the MWA. *See* Opening Br. at 25-26 (collecting cases in which Nevada courts look to the FLSA to interpret various aspects of the MWA). Defendant cannot point to any evidence showing that the provisions contained in NRS Chapter 608 can provide similarly appropriate guidance. Instead, NRS Chapter 608 only leads to more ambiguity and guesswork – exactly the issue that predicated the parties appearing before this Court in the first place.

The only case Defendant cites for this argument is *Myers v. Reno Cab Co., Inc.*, 137 Nev. 365, 374, 492 P.3d 545, 554 (2021). *See* Answering Br. at 23-24. However, as Defendant seems to acknowledge, *Myers* stands for the proposition that a definition included in NRS Chapter 608 may differ from that included in the MWA. *See Myers*, 137 Nev. at 374, 492 P.3d at 554 (rejecting assertion that "if they are employees for constitutional purposes, they may seek statutory waiting time penalties regardless of their status under NRS 608.0155."). Even where NRS 608.0155 provides clear and explicit guidance on employee status,[4] the *Myers* court maintained the importance of a separate economic realities test for employee status under the MWA, noting that NRS 608.0155 may "exclude workers who are employees under the economic realities test." *Myers*, 137 Nev. at 373, 492 P.3d at 553. If anything, *Myers* stands for the proposition that *if* NRS Chapter 608 provided a clear definition of work – it does not – then that definition of work would *only* apply to Plaintiff's waiting time claims under NRS 608.040.[5] Read

---

[4] While NRS 608.0155 contains a clear definition of independent contractor, it does not contain any definition of work. *See* NRS 608.0155; *see also Myers*, at 373 (noting that NRS 608.0155 was enacted specifically because the "Legislature sought to clarify the scope of NRS Chapter 608 by setting a more structured test for independent contractor status under that chapter."). The Nevada Legislature has not passed a parallel provision with a definition of work, and certainly not one that applies to the MWA.

[5] Plaintiff's contract claim is based in Defendant's contractual obligation to pay Nevada minimum wage and the requirements of the MWA. *See* Second

together, *Myers* and its predecessor *Doe Dancer I* confirm that definitions contained in NRS Chapter 608 apply only "to the statutory chapter in which it sits," and not to claims under the constitutional MWA, leading the Court back to the task at hand – defining "work" under the Nevada constitution. *Myers*, 137 Nev. at 374, 492 P.3d at 554 (quoting *Doe Dancer I v. La Fuente, Inc.*, 137 Nev. 20, 31, 481 P.3d 860, 871 (2021)).

By contrast, Plaintiff has cited ample authority that, in the absence of a plain meaning for "work" in the MWA itself, Nevada courts look to case law interpreting "work" under the FLSA as the Court's primary analytical vehicle. *See* Opening Br. at 20-26; *see, e.g.*, *Hartford Fire Ins. Co. v. Trustees of Const. Indus.*, 125 Nev. 149, 155, 158, 208 P.3d 884, 888, 890 (2009) (recognizing that "federal caselaw interpreting" a federal statute is persuasive when there is sparse Nevada precedent addressing the state statute, and the two statutes are substantially similar). In fact, this Court has previously looked to the FLSA when interpreting Nevada state law or the MWA. *See Terry*, 130 Nev. at 881, 336 P.3d at 953 (adopting the FLSA's "economic realities" test to determine employee status under NRS 608.010); *Gonzalez v. State*, 515 P.3d 318 (Table) (Nev. 2022), No. 82762,

---

Amended Compl., counts 1 – 8, 11 – 14, 16 – 18. Plaintiff's only NRS Chapter 608 claim is for Defendant's failure to pay him all wages owed upon his termination, under NRS 608.140, .020, .040, and .050. *See id.*, counts 9 – 10, 15.

2022 WL 3151751, at *1-2 (disposition decision) (August 4, 2022) ("In many significant aspects…the standards under the MWA run parallel to those of the federal Fair Labor Standards Act (FLSA)." (internal citations omitted)).

Instead of addressing the plethora of case law Plaintiff provided supporting its analysis, Defendant ignores it in favor of arguing that this Court should look to NRS Chapter 608 – a solution that is found nowhere in Nevada's canons of statutory interpretation.

III. LOOKING TO NRS CHAPTER 608 INSTEAD OF FLSA FOR GUIDANCE DOES NOT CHANGE THE ANSWER TO THE MEANING OF "WORK" UNDER THE NEVADA CONSTITUTION

While, as set forth above, it would depart from recognized canons of construction in Nevada to do so, if the Court prioritized NRS Chapter 608 guidance over FLSA, that would not yield a different answer to the question at hand – that time spent "engaged to wait" is work under the MWA. Defendant urges the Court to look to several provisions of NRS Chapter 608 to try to cobble together a definition of "work." These provisions address incongruous employment situations that do not encompass the same conditions of employment faced by herders and are therefore not only unhelpful but inappropriate aids to the Court in defining "work."

Notably, Nevada law plainly states that when looking to parallel federal statutes, such as the FLSA, to interpret state law, the Court will not follow

provisions in the federal law that do not exist under Nevada law, even if the FLSA otherwise provides guidance where the statutes are parallel. *See* Opening Br. at 25 n.29 (citing *Jane Roe Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 32-33, 176 P.3d 271, 274 (2008) and *Terry*, 130 Nev. at 885, 336 P.3d at 956); *see also infra* Sec. IV.B. Thus, any consideration of NRS Chapter 608 as a source of guidance must similarly disregard such guidance if NRS Chapter 608 spells out an exemption, exception, or element that does not appear in the MWA. *See, e.g.*, *Myers*, 137 Nev. at 374, 492 P.3d at 554 ("A claim for waiting time penalties under NRS 608.040 requires the plaintiff to prove certain elements, and we do not read the MWA as abrogating those requirements."); *Doe Dancer*, 137 Nev. at 35, 481 P.3d at 873 (statutory definition of "independent contractor" does not abrogate constitutional protections if workers qualify as employees under MWA).

If the Court choses to look to NRS Chapter 608 for guidance regardless, then it should find that any insights these provisions offer into the Legislature's intent support Plaintiff's argument that this Court should adopt a definition of "work" that treats a worker's time spent "engaged to wait" as "work".

A. Provisions of NRS Chapter 608 Defendant Cites to Do Not Define "Work"

Defendant cites to NRS 608.016, .0126, and .012 to define "work", but these provisions do not provide any definition for the term. Answering Br. at 24-25. Both NRS 608.016 and .012 demonstrate the necessity of this Court defining

"work" so that WRA can pay Plaintiff his wages[6] in accordance with NRS 608.016, that requires the employer to pay "the employee wages for each hour the employee *works*."[7] Both provisions rely on this Court providing a clear definition of "work," rather than the assumptions Defendant attempts to read into these provisions. Finally, the definition of "workday" in NRS 608.0126 as "a period of 24 consecutive hours" appears to acknowledge that it is indeed possible for work to continue for 24 hours a day,[8] contrary to the arguments of both Defendant and Sheep Industry Amici.[9]

---

[6] "Wages" are defined under NRS 608.012 as "the amount which an employer agrees to pay an employee for the time the employee *has worked*."

[7] Even the Nevada Administrative Code provision related to NRS 608.016, NAC 608.115, relies on a clear definition of "work", requiring employers to "pay an employee for all time *worked* by the employee at the direction of the employer[.]" In fact, NAC 608.115 acknowledges that an employer must pay an employee for all hours worked even if those hours are "outside the scheduled hours of work of the employee." NAC 608.115.

[8] The District Court also acknowledged as such, finding that NRS 608.0126, "textually speaking…creates a 24-hour workday, allowing an employee to receive compensation for 24 hours of work, which supports the position that Plaintiff could work and receive compensation for all 24 hours of every day that Plaintiff spent as a sheepherder." AA Vol. 5, pp. 752.

[9] Defendant constructed a strawman by claiming that Plaintiff is attempting to be paid for 24 hours a day, even when sleeping or not working at all. *See* Answering Br. at 12, 35. Sheep Industry Amici, in their brief to the Court in support of WRA, also confuse the issue and presents it as a claim for being paid on a 24-hour basis. *See* Amicus Br. at 4-5. Plaintiff's claim is not that he should be paid 24 hours per day regardless of whether he is working, but that he should get paid for all hours that he worked, which in some instances may amount to 24 hours per day. In fact, it was included in Defendant's contract that herders must be

B. Plaintiff is Not a Domestic Employee, but Consideration of NRS 608.215 Supports Plaintiff's Claim

Defendant claims that Plaintiff's employment and housing situation is akin to working as a domestic service employe who resides in the household where they work. *See* Answering Br. at 25. Not only is this comparison inapt, but the portion of NRS Chapter 608 that Defendant cites to, NRS 608.215 actually supports Plaintiff's claim.

First, the circumstances of the two categories of workers are factually distinct. Residing in an employer's home is entirely different from Plaintiff's experience on the range, where he lacked modern housing structures, toilets and bathing facilities, home electronics, companionship, and most significantly, the ability to leave and go someplace else, for months at a time. A domestic employee can easily leave their place of employment during their non-work hours. Even when a domestic worker is on-call, they would not experience the degree of restrictions experienced by sheepherders, given the significant difference in amenities between living in a sheep camp and living in a home large enough to employ domestic workers full-time. Moreover, for a domestic worker being on-call means just that – they may be called away from personal activities to come

---

available for up to 24 hours a day. *See* Answering Br. at 41; *see also infra* Sec. IV.C.

back to duty. However, for herders, there is no employer to call them, instead, they must maintain constant vigilance to see what the sheep need and provide it without specific requests from the sheep or others. The similarities between the two categories of workers start and end with that they both reside in the same place they work – suggesting anything beyond that is disingenuous.

Second, the principles behind NRS 608.215 support finding herders are engaged in "work" for far more hours than Defendant acknowledges. Under NRS 608.215, time may be ***excluded*** from hours worked ***only*** if (a) agreed to in writing; (b) during mealtimes of at least 30 minutes; (c) for sleep for a maximum of 8 hours; or (d) for other periods "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*. To be excluded from the wages of the domestic service employee pursuant to this paragraph, a period must be of sufficient duration to enable the domestic service employee to make effective use of the time." (emphasis added).

Here, there is no written agreement excluding certain hours from the calculation of hours worked. The certified question presented to the Court states that Plaintiff was "always doing some job duties," and thus none of his time would qualify as a period "of complete freedom from all duties." Also, per the certified question, Plaintiff was not permitted to leave the premises. *See infra* Sec. IV.A.1.

And during the times he was on the premises there was no time spent "for purely personal pursuits," as Plaintiff was required to watch the sheep constantly and would not have chosen as purely personal pursuits the limited options available consistent with his obligation to always be attentive to the sheep.

At most, *if* the Court chose to depart from its established protocol to look to FLSA and instead looked to NRS Chapter 608 to inform its definition of work, and *if* the Court chose to apply the domestic service provision to the factually distinct herding job, and *if* the Court chose to waive the requirement for agreement in writing, at best this provision would support excluding a maximum of 8 hours for sleep time, as there was no other time when the facts conceivably support the claim that Plaintiff had "complete freedom from all duties."

C. The Comparison to Workers in Residential Care Facilities Does Not Control and Does Not Help Defendant

Defendant's attempt to compare herders to workers in residential care facilities under NRS 608.0195 is also inapposite. This provision is limited specifically to employees at residential facilities for the care of a group of persons with specific conditions, and to the employees of agencies who provide personal care services in the home who are on duty and required to remain on the premises for 24 hours or more. As the district court noted (AA Vol. 5, pp. 753) this provision is inapplicable to herders.

By its own terms, the provision does not apply to care of a group of sheep as it does to the care of a group of people. Even if it did, and even if the required written agreement existed, it would permit only excluding a maximum of 8 hours of sleeping time from hours worked – and if interruptions meant fewer than 5 hours sleep, all hours would be compensated, even the sleep hours. Thus, NRS 608.0195 could, at best, support only excluding sleep time from Plaintiff's hours worked, which Plaintiff has already ceded is an open question.[10]

IV. LOOKING TO FLSA – AS NEVADA COURTS ALWAYS HAVE – SUPPORTS PLAINTIFF'S DEFINITION OF "WORK" UNDER NEVADA LAW

An analysis of the *Owens* factors supports finding that Plaintiff's time spent "engaged to wait" qualifies as "work" under the FLSA – and therefore should also count as "work" under Nevada law. However, despite the parties' concurrence that

---

[10] While Defendant and Sheep Industry Amici assert that Plaintiff is attempting to be compensated for sleep time, Plaintiff's opening brief was clear: factual issues remain as to whether Plaintiff should be compensated for sleep time. *See* Opening Br. at 29 n.32. The Ninth Circuit has found that sleep time may be counted as hours worked when workers are not provided reasonable facilities to sleep in and when workers are not able to sleep for 8 uninterrupted hours. *See, e.g.*, *GE Co. v. Porter*, 208 F.2d 805, 815 (9th Cir. 1953); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). These facts remain in dispute between the parties, and whether Plaintiff should be compensated for sleep time is not the question before the Court – regardless of whether this Court believes that sleep time should be considered work time, such a holding would provide no direction as to whether Plaintiff was working the other 16 hours of the day when he was required to be on the range.

it is not this Court's responsibility to resolve factual issues between the parties, Defendant invents a "test" that consists of dividing Plaintiff's time into three categories based on Defendant's view of the facts, rather than applying the legal analysis provided by FLSA case law or proposing any alternative analytical basis for its categories.

A. The *Owens* Factors Support Plaintiff's Definition of "Work"

1. On Premises Living Requirement

Defendant's claim that herders were not required to stay on their employer's premises because the range they were on was "primarily federal land" belonging to the Bureau of Land Management ignores that ranchers had grazing permits or leases for the land and directed Plaintiff and other herders to be there. Answering Br. at 26 n.15, 35. An employer's premises is not limited to a place that it owns rather than rents, and herders were not freely roaming thousands of acres of federal land while on the range – they had to remain where the rancher had a permit to graze sheep. Thus, there was an on-premises living requirement. The relevance of the premises being a sheep camp out on the range is that it made it impossible to go anywhere else. Even if the herder were to be completely relieved of duties for a couple hours – which rarely, if ever, happened to Plaintiff (Opening Br. at 13 n.18) – it consigned the herder to premises and restrictions that significantly limited any possibility of the herder using the time for his own purposes.

2. Geographical Restrictions

Though WRA disputes the geographic proximity of Plaintiff to the herd (Answering Br. at 36) and claims that Plaintiff could leave the premises whenever he wanted to (Answering Br. at 20, 25, 26 n.14), the certified question, as well as the record below, make clear that Plaintiff could not leave the herd. WRA even acknowledges that the certified question states as such but attempts to dispute both Plaintiff and the District Court's factual finding with testimony from ranchers who did not employ Plaintiff, or from herders who did not work with Plaintiff. Answering Br. at 26 n.14. Plaintiff did not have access to a vehicle and was therefore much more restricted in his movement than those who generally live and work in rural areas. This situation is nothing like an office worker who works from home with all the comforts and convenience of home and family. Plaintiff could not freely leave the portion of the range where the sheep were grazing to pursue personal activities.

No one disputes the enjoyment that can be derived from outdoor activities, but it is Defendant who is "insincere" in suggesting that a Nevada resident's experience of going on a recreational hike is somehow equivalent to the experience of Plaintiff, who did not choose to live on the range based on his own preference, but rather endured extreme conditions of isolation, sub-standard housing, and lack of access to anything other than the empty range – no people, no commerce, no

amusement – for months on end as required by his work. *See* Opening Br. at 15-16. Indeed, WRA's argument that Nevada residents love this off-the-grid life is not only unsupported by evidence, but the record establishes that no Nevadans love the idea of life on the range enough to actually agree to take on the job of a herder – H-2A visas can only be issued upon showing that no American workers (whether from Nevada or other states) are willing to do the job.

3. Frequency of Calls, Time to Respond, Use of Pager

As detailed in Plaintiff's opening brief, the factors related to frequency of calls, time to respond, and the use of a pager are only useful for analyzing a work environment where the employee can be in their own home or other place of their choosing, only returning to their employer's premises in response to calls. Opening Br. at 36. That is not the situation here. Defendant's argument assumes what has not been proven – that there was any time when Plaintiff could actually choose his own activities, given the intense restrictions of his work environment. While Defendant frequently claims there was no required time to respond to calls, and that Plaintiff could be at camp so far away from the herd that he could not see or hear the sheep, WRA cites no evidence pertaining to Plaintiff to support this claim. *See* Answering Br. at 25 n.13 (citing testimony not from Plaintiff or his supervisors).

4. Trading Shifts or Respite from on Call

WRA presents no evidence that there were any options for Plaintiff to trade his shift or take respite from on call by trading responsibilities with another herder. WRA's suggestions otherwise are contrary to the record – Defendant suggests Plaintiff could trade shifts with another herder, but testimony confirms that Plaintiff was always alone on the range, without any days off or opportunities to go into town. *See* Opening Br. at 14 n.19, 38. Defendant points to testimony and evidence from other herders who were sent out in pairs, but that was not the case for Plaintiff, and Defendant offers no evidence to show that Plaintiff was ever part of a pair. Indeed, the record shows that even when Plaintiff begged his supervisor to be relieved of duty for long enough to obtain medical attention for a painfully infected tooth, he was denied because "who would stay with the sheep?" *See* Opening Br. at 14 n.20.

Defendant's assertion that guard dogs provide a respite from being on call overnight is false – the dogs would bark and wake Plaintiff up, alerting him that his presence was needed, rather than relieving him of responsibility. Thus, the dogs acted not as co-workers who relieved him from work, but more like an alarm alerting a security guard of the need to rush to the scene of a potential robbery. Even if that alarm may also scare off the would-be robbers who understand that such a noise may lead to the security guard coming to investigate, the alarm itself

cannot perform the same function as the security guard. Finally, unlike many on call workers who may only be on call for one week per month or one day per week, Plaintiff had no such respite from on call responsibilities.

5. Actually Engaged in Activities While on Call

Plaintiff was not able to freely engage in personal pursuits while he was on call. He testified that he was able to access Facebook for a few minutes each day, and briefly speak to his family on the phone while eating. That's it. *See* Opening Br. at 16 n.26. Defendant's description of these two brief occurrences as if each were multiple activities (speaking on the phone and calling his family, using social media and using Facebook Messenger, Answering Br. at 39) shows how desperate Defendant is to stretch the actual record to match its fantasy of herding as a carefree, leisurely lifestyle. Indeed, Defendant's attempted comparison to barge workers who could watch television, movies, play ping-pong or cards, or listen to music while remaining on the barge is inapt; Plaintiff was unable to engage in any similar activities, but instead remained in close proximity to the sheep, in a near constant state of alert.

All of Defendant's claims about hunting, fishing, hiking, or enjoying the natural beauty the Nevada range has to offer are its own invention – not only did Plaintiff not engage in these activities, but he could not because that would take him away from the sheep. Defendant's argument is akin to claiming that because

some people like to go for walks, that a mail carrier walking from house to house and leaving mail is walking for their personal benefit, and only the time opening the mailbox and depositing the mail is time worked, while walking from house to house is personal benefit time.

While the *Owens* factors, taken in concert and applied to the facts at hand clearly show that during the time Plaintiff spent on the range he was "engaged to wait" and therefore was actively working, ultimately, this Court need not resolve disputes of fact or even apply law to facts. This Court need only say what the law of Nevada is, so that the district court can then apply that definition to the facts at hand.

B. Defendant's Attempt to Divide Hours into Three Buckets is Neither Useful Nor Supported by Authority

Defendant's suggestion to divide Plaintiff's hours into three categories does nothing to clarify the analytical framework set forth above. *See* Answering Br. at 33-35. Rather, Defendant again seeks factual findings from this Court about Plaintiff's hours, which both parties have conceded is inappropriate when responding to a certified question seeking to clarify an important point of law. Ultimately, these categories are not helpful to the Court to clarify the definition of what is "work."

The first category of time Defendant believes is clearly not work depends on a showing that Plaintiff was far enough away from the herd to not be able to see or

hear the sheep (Answering Br. at 33) – a fact that, as demonstrated *supra* Sec. IV.A.3, has not been established. WRA cites to *Berry v. Cnty. of Sonoma*, 30 F.3d 1174 (9th Cir. 1994) to justify this category in yet another failed attempt to draw a parallel between herders – who's personal activities are extremely limited while on the range – and other categories of workers with distinguishable circumstances. Answering Br. at 34; *see also* Amicus Br. at 17-18. Unlike the coroners in *Berry*, Plaintiff could not pursue hobbies "such as gardening, working on antique cars, leather crafts and photography" and certainly could not maintain secondary means of employment. *Berry*, 30 F.3d at 1185.

Defendant's second category is one it concedes would be inappropriate to resolve on summary judgment – whether time that Plaintiff was monitoring the herd while also having brief calls with family is work. Answering Br. at 34. In addition, in describing the second category of "work," Defendant claims that time walking to and from the herd is not work under the Portal-to-Portal Act ("P2P"). Answering Br. at 34 n.16. However, P2P has no counterpart in Nevada law and is thus completely inapplicable to this situation. *See In re: Amazon.com, Inc. Fulfillment Ctr. FLSA & Wage & Hour Litig.*, 905 F.3d 387, 401, 403 (6th Cir. 2018) ("[T]he Nevada legislature has chosen not to affirmatively adopt the law [the Portal-to-Portal Act] anywhere in the Nevada state code."). Simply because Plaintiff asserts that the proper canon of construction to define work under Nevada

law is to look to the FLSA does not mean importing the P2P. *See supra* Sec. III; *see also Terry*, 130 Nev. at 885-86, 336 P.3d at 956-57 (noting this Court's "willingness to part ways with the FLSA where the language of Nevada's statutes has so required", but only if there is a "substantive reason to break with the federal courts[.]").[11]

Finally, the third category of time Defendant suggests is comprised of the true work hours is far too limited, as it does not nearly encompass the wide range of tasks Plaintiff undertakes while on the range. Regardless of their inappropriate classifications of Plaintiff's time, Defendant's categories seek this Court to make factual determinations, and are ultimately not useful to developing the legal standard for work under Nevada law.

---

[11] The P2P was passed by Congress as a choice to exclude from hours worked activity that the Supreme Court had otherwise found fell within the definition of "work." *See Tennessee Coal, Iron & R. Co. v. Muscoda Loc. No. 123*, 321 U.S. 590, 598 (1944); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 126 S. Ct. 514, 519-520 (2005). It is commonly described as excluding compensation for commuting time. But even if P2P were part of Nevada law, going from the sheep camp to where the sheep are is not a "commute" because Plaintiff is not starting the journey at home, but is already at his workplace. Going from one part of the workplace to another part of the workplace after the workday has begun is not excluded by P2P. *Alvarez*, 546 U.S. 21,126 S. Ct. at 525; *see also* NAC 608.130 ("Travel by an employee (a) Is considered to be time worked by the employee: (1) If the travel is between different work sites during a workday[.]").

C. Agreement Between the Parties Further Supports that Plaintiff was Required to be On Call, Responding to Issues 24/7

The second part of the *Berry* test looks not only to the actual circumstances of Plaintiff's employment, but also to what the parties agreed to. *See also Skidmore*, 323 U.S. at 137 (to determine whether waiting time is "work" time, courts should scrutinize the agreement between the parties); *see also* Opening Br. at 45 n.33 (even if agreement explicitly states that waiting time is not work, courts must evaluate reasonableness of that agreement). As Defendant acknowledges, the Agreement makes explicit that Plaintiff's employer had an expectation of up to 24/7 on-call duty and that Plaintiff would be paid a salary that encompassed *all work*, rather than being paid for specific tasks. Opening Br. at 6 n.6, 45. Courts have found that similar agreements, where compensation covers a range of time that encompasses both active duty and on-call time, suggest that on-call time is meant to be paid time. *Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931, 939 (9th Cir. 2004) ("[B]ecause [the employees] were compensated for 10 hours of work on each duty shift when they performed only 6 hours of regularly scheduled work – their agreement…demonstrates that the parties characterized duty shift on-call time as time 'worked' within the meaning of FLSA.").

Here, the Agreement between the parties explicitly states Defendant's expectation that Plaintiff would be on-call for up to 24 hours per day, and because compensation was to encompass *all time worked*, with no allocation of pay to only

some of herders' work hours, the Agreement implicitly suggests that on-call time was time "worked," for which compensation would be due. Opening Br. at 44-45. While Defendant bizarrely argues that there is no indication Plaintiff was actually on-call that often, Plaintiff's entire opening brief illustrates just that.

V. THE 2015 DOL RULE SETTING THE ADVERSE EFFECTS WAGE RATE FOR HERDERS EMPLOYED THROUGH THE H-2A VISA PROGRAM IS IRRELEVANT TO THE LEGAL DEFINITION OF WORK UNDER NEVADA LAW

Both Defendant and Amicus Sheep Industry cite to the Department of Labor's 2015 rulemaking regarding H-2A range herding as evidence that herders did not work more than 48 hours per week. *See* Answering Br. at 41-42; Amicus Br. at 12-16. But the DOL rulemaking was not seeking to define "work" under either the FLSA or Nevada law, and it did not do so. The main purpose behind the 2015 DOL H-2A rulemaking was to set a minimum wage ("AEWR") for herders in states where there was no hourly minimum wage applicable due to exemptions for agricultural and/or range work under the FLSA and state statutes. But Nevada's constitution does not include any exemption for agricultural workers or those working on the range like the FLSA does; the MWA requires payment to Plaintiff of at least minimum wage for each hour worked.

Secondly, none of the discussion in the DOL rule about the comments received addressed any standard as to what counted as "work" hours. Seeing reports of hours worked by various parties is irrelevant when each group may have

been using a different definition of "work," and there is no way to know what definition was being used. The suggestion that the comments reached a "consensus" is further based on false premises of equal participation. The "estimates" of hours worked were coming from the ranchers, not the workers, and should have represented a floor, not a ceiling. The input provided by the "worker-advocate" community rested on one comment from one "worker-advocate" who stated only that he had reviewed job orders submitted by a number of ranchers and reported the average number of hours claimed by these various ranchers. There was no evidence that this comment represented the views of workers more broadly. In fact, and as the Sheep Industry acknowledged, another comment submitted a study completed by Colorado Legal Services, which found, based on a survey of *herders* in Colorado, that herders worked 81 or more hours per week – nearly double that of the purported "consensus." *See* Amicus Br. at 14. For both of these reasons, this Court should not factor the DOL Final Rule into its decision-making process. Nothing in the H-2A process of setting AEWR illuminates the factors considered in defining what counts as work under Nevada law.

VI. CONCLUSION

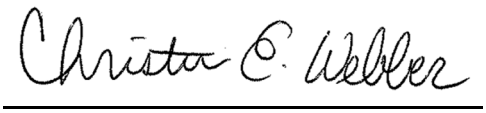
For the foregoing reasons, the Nevada Supreme Court should clarify what constitutes "work" under Nevada law by following clear precedent looking to the

FLSA for guidance, and by doing so, find that Plaintiff Castillo's time spent engaged to wait on the range constituted work under the MWA.

Dated: August 29, 2023

Respectfully Submitted,

COHEN MILSTEIN SELLERS & TOLL PLLC



CHRISTINE E. WEBBER, admitted pro hac vice to
the U.S. District Court for the District of Nevada
cwebber@cohenmilstein.com
1100 New York Ave., NW, 5th floor
Washington, DC 20005
(202) 408-4600

THIERMAN BUCK LLP
MARK R. THIERMAN, ESQ., Nevada State Bar No. 8285
mark@thiermanbuck.com
JOSHUA D. BUCK, ESQ., Nevada State Bar No. 12187
josh@thiermanbuck.com
LEAH L. JONES, ESQ., Nevada State Bar No. 13161
leah@thiermanbuck.com
7287 Lakeside Drive
Reno, Nevada 89511
(775) 284-1500

TOWARDS JUSTICE
ALEXANDER HOOD, admitted pro hac vice to
the U.S. District Court for the District of Nevada
alex@towardsjustice.org
PO Box 371680, PMB 44465
Denver, CO 80237-5680
(720) 239-2606

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2, undersigned counsel certifies that:

1. This Reply 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 7,000 words, approximately 6,728, 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 Reply 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 Reply 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 Reply Brief is not in conformity with the requirement of the Nevada Rules of Appellate Procedure.

DATED this 29th day of August, 2023.

By: Christine E. Webber

CHRISTINE E. WEBBER, admitted pro hac vice to the U.S. District Court for the District of Nevada
Cohen Milstein Sellers & Toll PLLC
1100 New York Ave., NW, 5th floor
Washington, DC 20005

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Cohen, Milstein, Sellers & Toll PLLC and that on the 29th day of August, 2023, a true and correct copy of the above **APPELLANT'S REPLY BRIEF** was e-filed and e-served on all registered parties to the Nevada Supreme Court's electronic filing system as listed below:

Ellen Jean Winograd
Jose Tafoya
WOODBURN AND WEDGE
6100 Neil Road, Suite 500
Reno, Nevada 89511

Anthony Hall
SIMONS HALL JOHNSTON, P.C.
690 Sierra Rose Drive
Reno, Nevada 89511

Attorneys for Respondent-Defendant Western Range Association

DATED this 29th of August, 2023.

By: Christine E. Webber

CHRISTINE E. WEBBER, admitted pro hac vice to
the U.S. District Court for the District of Nevada
Cohen Milstein Sellers & Toll PLLC
1100 New York Ave., NW, 5th floor
Washington, DC 20005

Attorney for Appellant