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Apr 14 2025 04:39 PM
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IN THE SUPREME COURT OF THE STATE OF NEVADA

AMAZON.COM SERVICES, LLC, Appellant, vs. DWIGHT MALLOY, Respondent.	Case No. 89314

Certified Question from the United States
District Court for the District of Nevada
Case No. 2:22-cv-00286-ART-MDC

APPELLANT'S REPLY BRIEF

Montgomery Y. Paek
Amy Thompson
LITTLER MENDELSON, P.C.
3960 Howard Hughes Parkway, #300
Las Vegas, NV 89169
(702) 862-7718
mpaek@littler.com

Jason C. Schwartz*
Andrew G.I. Kilberg*
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, DC 20036
(202) 955-8242
jschwartz@gibsondunn.com

Megan Cooney*
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Suite 1200
Irvine, CA 92612
(949) 451-4087
mcooney@gibsondunn.com

Bradley L. Hamburger*
GIBSON, DUNN & CRUTCHER LLP
333 S. Grand Avenue
Los Angeles, CA 90071
(213) 229-7658
bhamburger@gibsondunn.com

* Pro hac vice

Attorneys for Appellant Amazon.com Services LLC

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INTRODUCTION

As this Court has recognized, Nevada's wage laws follow federal wage laws unless the language of the statutes is "*expressly*" or "*entirely* conflicting." *Terry v. Sapphire Gentlemen's Club*, 130 Nev. 879, 885, 336 P.3d 951, 956 (2014) (emphases added). There is no such conflict here. Nevada's wage laws are remarkably similar to the federal Fair Labor Standards Act ("FLSA")—in fact, "in many significant respects, Nevada's minimum wage laws and those set federally run parallel." *Id.* at 884, 336 P.3d at 955. Nevada executive-branch officials share this Court's understanding of the relationship between Nevada's wage laws and the FLSA, and legislative history also shows that the Legislature designed Nevada's wage laws to operate harmoniously with federal law. Considerations of public policy similarly favor interpreting Nevada's wage laws consistent with federal law for the benefit of employers and employees alike. All this permits only one conclusion: Nevada's wage laws incorporate the federal definition of work as amended by the Portal-to-Portal Act.

Malloy's brief does little to rebut Amazon's arguments in support of that conclusion. In fact, Malloy expressly concedes that *Terry* controls and that this Court must "look to federal law to ascertain whether the activities at issue here were 'work.'" Respondent's Answering Brief ("RAB") 39. He nevertheless insists that

this Court can look to only one half of the federal definition, primarily based on two unpersuasive arguments.

Malloy first claims that NRS 608.016 creates an express conflict between Nevada and federal law. But while Malloy labels that statute the "Anti-Portal-to-Portal Act"—a title that Malloy has conjured to support his arguments in this case, not one actually used by the Legislature—NRS 608.016 neither purports to define nor even address the definition of work under Nevada's wage laws, and it says nothing expressly about the Portal-to-Portal Act. One would think that if the Legislature had wanted to reject application of the Portal-to-Portal Act, as Malloy suggests, it would have "signal[ed] its intent" far more "clearly." *Terry*, 130 Nev. at 888, 336 P.3d at 958. The Legislature knows how to diverge from federal law when it wants to in this area of the law. And the default rule, as *Terry* explained, is to assume an intent to track federal law. Nothing in NRS 608.016 indicates any intent to deviate from that default rule and create for Nevada a unique definition of work that diverges from the Portal-to-Portal Act.

Malloy's second argument fares no better. He demands that this Court defer to a divided decision of the U.S. Court of Appeals for the Sixth Circuit interpreting Nevada law in *In re: Amazon.com, Inc. Fulfillment Center Fair Labor Standards Act (FLSA) & Wage & Hour Litigation*, 905 F.3d 387 (6th Cir. 2018), which (he says) "fully and finally" resolves the question here. RAB 1. Malloy has this Court's role

in interpreting Nevada law exactly backwards. He also fails to even acknowledge that the Sixth Circuit decision was accompanied by a powerful dissent that persuasively explains why the majority erred in its interpretation of Nevada law. Malloy's silence on the dissent's arguments is telling. This Court—which has the obligation to conclusively interpret Nevada law—should not repeat the errors of the Sixth Circuit majority.

This Court should answer the certified question by holding that Nevada law incorporates the Portal-to-Portal Act.

ARGUMENT

I. Nevada Law Incorporates The Definition Of Work In The FLSA, Including The Portal-To-Portal Act

Malloy expressly concedes Amazon's core argument that this Court must "look to federal law to ascertain whether the activities at issue here were 'work'" because "there is no contrary definition for 'work'" in Nevada's wage laws. RAB 39. As Amazon explained in its opening brief, this Court has repeatedly recognized that Nevada's wage laws track the FLSA absent a clear textual conflict. That general relationship between Nevada and federal law draws further support from legislative history, executive-branch interpretations, and public policy.

Malloy, however, insists that these longstanding principles of uniformity do not apply in the narrow context of the Portal-to-Portal Act. In his telling, the Legislature would have expressly incorporated the Portal-to-Portal Act into Nevada's wage laws, those laws conflict with the Portal-to-Portal Act, there is a supposed difference between "work" and "compensable work," and this Court should defer to other courts' interpretations of different States' laws. Each of those arguments is mistaken. Nevada law follows the federal definition of "work"—including the Portal-to-Portal Act's amendment of the FLSA.

A. Nevada Law Generally Tracks The FLSA

1. As this Court has repeatedly recognized, Nevada's wage laws track the FLSA unless the statutes' language is "expressly" or "entirely conflicting." *Terry v.*

Sapphire Gentlemen's Club, 130 Nev. 879, 885, 336 P.3d 951, 956 (2014). In *Terry*, this Court held that Nevada's wage laws incorporated the federal "economic realities test" for determining whether workers qualified as employees. *Id*. at 884-86, 336 P.3d at 955-56. The Court recognized that the FLSA's definition of an employee "differ[s]" from the definition of an employee in Nevada's wage laws, *see id*. at 885, 336 P.3d at 955, but nonetheless followed federal law because "the Legislature has not clearly signaled its intent that Nevada's minimum wage scheme should deviate from the federally set course," *id*. at 888, 336 P.3d at 958; *see also Doe Dancer I v. La Fuente, Inc.*, 137 Nev. 20, 25, 481 P.3d 860, 866 (2021) (*Terry* "looked to federal case law interpreting the FLSA" to interpret Nevada's wage laws "despite expressly noting the divergence between the language" of the Nevada and federal statutes).

This Court has repeatedly applied that uniformity rule. In *Doe Dancer I v. La Fuente, Inc.*, 137 Nev. at 24-25, 481 P.3d at 866-67, this Court held that the federal "economic realities test" also applied to the Minimum Wage Amendment because the text of that provision "mirrored" the FLSA. Likewise, in *Gonzalez v. State*, this Court looked to federal law to determine whether the Minimum Wage Amendment applies to inmates because the amendment's "standards . . . run parallel to those of the federal Fair Labor Standards Act" in "many significant aspects." 515 P.3d 318, at *1 (Nev. 2022) (unpub.). And when this Court has held that Nevada's wage laws do *not* track the FLSA, it has reached that conclusion because

specific provisions of state law have "*expressly*" or "*entirely* conflict[ed]" with the FLSA. *Terry*, 130 Nev. at 885, 336 P.3d at 956 (emphases added) (discussing *Jane Roe Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 176 P.3d 271 (2008), and *Boucher v. Shaw*, 124 Nev. 1164, 196 P.3d 959 (2008)).

Applying that rule here shows that Nevada's wage laws incorporate the federal definition of work. The relevant provisions of Nevada's wage laws do not "expressly" or "entirely conflic[t]" with the FLSA or the Portal-to-Portal Act. *Terry*, 130 Nev. at 885, 336 P.3d at 956. Instead, they "closely mirro[r]" the FLSA. *Doe Dancer I*, 137 Nev. at 25, 481 P.3d at 867; *see also, e.g.*, *Terry*, 130 Nev. at 884, 336 P.3d at 955 (noting Nevada's minimum wage law was "a duplication of the FLSA in many aspects" (alteration adopted and citation omitted)). Using similar language, Nevada's wage laws and the FLSA both require employers to pay their employees a minimum wage per hour, *see* NRS 608.250; Nev. Const. art. 15, § 16; 29 U.S.C. § 206(a), and time-and-a-half for overtime, *see* NRS 608.018; 29 U.S.C. § 207(a). Both entitle employees to a minimum level of compensation for every hour they work. *See* NRS 608.016; 29 U.S.C. §§ 206(a), 207(a). And although Malloy insists that Nevada law's minimum-wage and overtime requirements are "*without exception*," RAB 9 (emphasis in original), the relevant statute actually contains two express "except[ions]" that parallel federal law, *see* NRS 608.016 (imposing requirement "[e]xcept as otherwise provided in NRS 608.0195 and 608.215");

compare NRS 608.0195(1) (sleeping time), *and* NRS 608.215(1) (domestic workers), *with* 29 C.F.R. § 785.22(a) (sleeping time), *and* 29 U.S.C. § 213(b)(21) (domestic workers). Under *Terry*, Nevada's wage laws thus follow the federal definition of work.

2. Despite acknowledging *Terry*'s rule that Nevada wage law typically tracks federal law, Malloy nonetheless insists that it does not apply to the federal Portal-to-Portal Act. *See* RAB 27-28, 32. That is wrong. Nothing in *Terry* or its progeny suggests any reason to conclude that Nevada has specifically rejected the Portal-to-Portal Act. The Portal-to-Portal Act, which was enacted in 1947, is an important and longstanding *amendment* to the FLSA. *See Barrentine v. Ark.-Best Freight Sys., Inc*., 450 U.S. 728, 732 n.7, 738 n.13, 741 n.19 (1981) (referring to the statute as "Portal-to-Portal Act of 1947 amendments to the FLSA" and the "Portal-to-Portal Act amendments"); *see also Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 31-32 (2014) (Congress "responded swiftly" to early decisions adopting "broa[d]" interpretations of "'work' or 'workweek'" in the FLSA by enacting the Portal-to-Portal Act to amend the FLSA); *see also id.* at 29 (interpreting "the Fair Labor Standards Act of 1938 . . . as amended by the Portal-to-Portal Act of 1947"). And like the FLSA, it predates Nevada's wage laws by decades and therefore serves as critical background for Nevada's wage laws. *See, e.g.*, *Terry*, 130 Nev. at 881, 336 P.3d at 953 ("[T]he Legislature has long used federal minimum wage *laws* as a

platform for this state's minimum wage scheme" (emphasis added)). Nevada's wage laws should thus be read to incorporate the Portal-to-Portal Act—like the FLSA—unless there is a clear indication to the contrary (which there is not).[1]

When the Legislature intends to depart from federal law in this area, it says so expressly. Malloy heavily relies on *Echeverria v. State*, 137 Nev. 486, 495 P.3d 471 (2021), to argue otherwise. RAB 29-30. But *Echeverria* is inapposite because it involved a statute waiving Nevada's sovereign immunity. 137 Nev. at 486, 495 P.3d at 473. *Terry*'s presumption that Nevada law tracks federal law applies only to Nevada's wage laws. Consistent with *Terry*'s understanding, the Legislature thus has been specific when it deviates from federal law—for example, Nevada employers cannot credit tips against the minimum wage (contrary to federal law), *Jane Roe Dancer*, 124 Nev. at 32, 176 P.3d at 274, and individual managers cannot be held personally liable for violations of Nevada's wage laws (contrary to federal law), *Boucher*, 124 Nev. at 1170, 196 P.3d at 963. Malloy's list of differences between Nevada's wage laws and federal wage laws only underscores this point.

[1] Contrary to Malloy's passing suggestion, Nevada's wage laws were *not* enacted decades before the FLSA or Portal-to-Portal Act. *See* RAB 9 (citing statutes regulating wage payments using acknowledgements of indebtedness, 1911 Nev. Stat. 66, wage assignments, 1917 Nev. Stat. 94, and the timing of wage payments, 1919 Nev. Stat. 121). Instead, Nevada's first generally applicable minimum wage and overtime laws were enacted in the 1970s—decades after the FLSA and Portal-to-Portal Act. Appellant's Opening Br. ("AOB") 8-10.

See RAB 10-11. The failure of Nevada law to expressly contradict the Portal-to-Portal Act is therefore strong indication that it follows the federal definition of work.

Malloy observes that Nevada's wage laws expressly refer to some provisions of federal law but not the Portal-to-Portal Act. *See* RAB 27-28 & nn.9-11. He suggests that this indicates that the Legislature did not intend to incorporate the Portal-to-Portal Act into Nevada's wage laws. *Id*. But this argument ignores the presumption of *Terry*—that Nevada's wage laws track the FLSA absent some express indication to the contrary. Mere silence does not indicate departure.

The references to federal law in various Nevada statutes that Malloy highlights do not suggest the contrary. Many of the examples Malloy cites refer to parts of federal law that are *not* part of the FLSA, *see* RAB 27 n.9 (citing references to federal criminal laws, the Internal Revenue Code, and the Motor Carrier Act, among others), and (as a result) are not presumed to be incorporated into Nevada's laws. Others are designed to avoid preemption problems—again, from federal statutes other than the FLSA. *Id.* at 28 n.11 (citing Nevada statutes addressing family medical leave, wage garnishment, and the deduction of health insurance costs); *see, e.g.*, NRS 608.01975(6)(a) (statute concerning family medical leave does not apply "[t]o the extent prohibited by federal law").

Malloy cites several examples involving the FLSA, *see* RAB 27-28 & nn.9-11, but they do not call into question *Terry*'s applicability here. Instead, many

underscore that Nevada's wage laws are designed to operate harmoniously with federal law. For example, NRS 608.670(2) prohibits a state regulator from adopting overtime regulations that are inconsistent with the FLSA, and other sections instruct the regulator to investigate whether home-care employers comply with "applicable federal . . . laws." NRS 608.620-.640. Two more of Malloy's examples confirm that the Legislature speaks clearly when it intends to diverge from the FLSA. The first *expressly conflicts* with the FLSA by prohibiting employers from paying their disabled employees subminimum wages even when they have received a "special certificate" from federal regulators permitting them to do so. NRS 608.250(2) (effective Jan. 1, 2028); *see also* 29 U.S.C. § 214(c) (governing special certificates). And the second prevents a conflict between Nevada and federal law concerning an overtime exemption for retail or service employees paid by commission. *See* NRS 608.018(3)(c) ("representative period" for determining eligibility for exemption must be, "to the extent allowed pursuant to federal law, not less than 1 month").

Malloy also points to several provisions of Nevada law that incorporate by reference FLSA regulations concerning analogous overtime exceptions. NRS 608.060(3)(a) (defining executive, administrative, and professional employees by reference to 29 C.F.R. §§ 541.100-.304); NRS 608.060(3)(b) (defining outside salesmen by reference to 29 C.F.R. §§ 541.500-.504); NRS 608.0116(2) (defining

creative professionals by reference to 29 C.F.R. § 541.302). Those definitions are extensive and highly technical, and explicitly tying Nevada law to them ensures that Nevada and federal law operate harmoniously. Moreover, similar cross-references in Kentucky regulations, *see* 803 KAR 1:071, did not prevent that State from recognizing that its wage laws incorporated the federal definition of work—including the Portal-to-Portal Act—despite the absence of a specific reference to the Portal-to-Portal Act, *Hughes v. UPS Supply Chain Sols., Inc.*, 677 S.W.3d 273, 278-80 (Ky. 2023).

In sum, all of Malloy's examples are consistent with Amazon's argument that Nevada's wage laws incorporate the Portal-to-Portal Act. They either (1) are consistent with *Terry*'s understanding that Nevada law automatically tracks the FLSA absent an express conflict, (2) involve statutes to which *Terry*'s presumption does not apply, or (3) turn on extensive and highly technical definitions. Nothing in any of the statutes Malloy cites suggests the Legislature sought to adopt a unique definition of "work" that departs from that which governs under federal law.

3. Unable to undermine *Terry*'s uniformity rule directly, Malloy repeatedly claims that the Legislature has enacted an "Anti-Portal-to-Portal Act." RAB 2, 9, 30-32. There is no Nevada statute by that name—this is just a label for NRS 608.016 that Malloy has conjured to misleadingly suggest that the Legislature has expressly

rejected the Portal-to-Portal Act. It is Malloy (not Amazon) who has "self-servingly renamed the statute at issue." *Id*. at 5 n.2.

In any event, NRS 608.016 merely entitles an employee to compensation for "each hour the employee works," and its implementing regulation at NAC 608.115 entitles an employee to compensation for "all time worked." Malloy claims that those phrases are inconsistent with the Portal-to-Portal Act's exclusion of travel time and preliminary and postliminary activities from the definition of "work." *See* RAB 30-32. But NRS 608.016 and the related regulation, NAC 608.115, say nothing about the relevant question—what is "work"—and thus do not clear *Terry*'s high bar to justify a deviation from federal law. What qualifies as "work" is a predicate question that those provisions do not address. The question here is *not* whether employees are entitled to be compensated for all their work (they are), but whether activities preliminary to the tasks employees are paid to perform qualify as work in the first place (they do not).

Federal law confirms that NRS 608.016 and NAC 608.115 are consistent with the Portal-to-Portal Act. FLSA regulations repeatedly recognize that employees are entitled to compensation "for each hour worked." *See, e.g.*, 29 C.F.R. § 778.103 ("[T]he employer must . . . pay overtime compensation for each hour worked in excess of the maximum hours . . . ."); 29 C.F.R. § 778.315 ("Overtime compensation . . . must be paid for each hour worked in the workweek in excess of the applicable

maximum hours standard."); 29 C.F.R. § 780.313 (workers paid on a piece-rate basis "must be paid at least the minimum wage for each hour worked in a particular workweek" if they do not qualify for an exemption); *see also Busk*, 574 U.S. at 31 ("The FLSA established a minimum wage and overtime compensation for each hour worked in excess of 40 hours in each workweek."). It is indisputable that the Portal-to-Portal Act, which amended the FLSA, applies to those federal regulations. That necessarily means that their requirement to pay "for each hour worked" is consistent with the Portal-to-Portal Act because regulations are not "valid" unless they are "consistent with the statute under which they are promulgated." *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 609 (2013) (citation omitted). And because NRS 608.016's text is nearly identical to the text in the federal regulations, NRS 608.016 and its implementing regulation, NAC 608.115, must be consistent with the Portal-to-Portal Act, too.

The laws of other states that incorporate the federal definition of work support for that conclusion. Oregon law similarly requires that employers pay their employees for "*each hour of work time* that the employee is gainfully employed," ORS 653.025 (emphasis added), but the Oregon Supreme Court has nonetheless held that it implicitly incorporates the federal definition of work as amended by the Portal-to-Portal Act, *Buero v. Amazon.com Servs., Inc.*, 521 P.3d 471, 482-84 (Or. 2022). Kentucky law similarly requires overtime pay "for *each hour worked* in

excess of forty (40) hours," 803 KAR 1:061 (emphasis added), but the Kentucky Supreme Court has nonetheless held that it follows the federal definition of work, including the Portal-to-Portal Act, *Hughes*, 677 S.W.3d at 278-80; *see also Vance v. Amazon.com, Inc.*, 852 F.3d 601, 612-13 (6th Cir. 2017).

The Minimum Wage Amendment to Nevada's Constitution further underscores that NRS 608.016 and NAC 608.115 do not "clearly signa[l]" an intent to reject the federal definition of "work." *Terry*, 130 Nev. at 888, 336 P.3d at 958. All agree that the Minimum Wage Amendment and Nevada's wage statutes should be interpreted to use the same definition of "work." *See* RAB 9, 27; *cf. Doe Dancer*, 137 Nev. at 24-25, 481 P.3d at 866-67 (interpreting Minimum Wage Amendment to incorporate same test as Nevada's wage statutes before those statutes had been amended by the Legislature). But under Malloy's reasoning, the Minimum Wage Amendment *would* incorporate the Portal-to-Portal Act because the Amendment does not contain anything like the "each hour" or "all time" language in NRS 608.016 and NAC 608.115, instead prescribing that "each employer shall pay a wage to each employee of not less than twelve dollars ($12) per hour worked." *See* Nev. Const. art. 15, § 16(1). Rather than reading a definition of "work" that does not exist into NRS 608.016 and NAC 608.115 and creating conflict between Nevada's statutory and constitutional wage provisions, this Court should recognize that neither

provision "expressly" or "entirely conflict[s]" with the Portal-to-Portal Act. *Terry*, 130 Nev. at 885, 336 P.3d at 956.[2]

4. Malloy next argues that NRS 608.200 shows that when the Legislature wants to incorporate the Portal-to-Portal Act into Nevada law, it does so expressly. RAB 33-34. Malloy's argument misapprehends the nature of this statute.

NRS 608.200 has nothing to do with what qualifies as "work" for purpose of Nevada's wage laws. The statute limits the amount of time miners can work underground to "8 hours within any 24 hours," excluding from that limit "time consumed for meals or travel into or out of the actual work site." As this Court has recognized for over a century, NRS 608.200 "does not attempt *in any way* to regulate the amount of wages which an employer shall pay." *In re Boyce*, 27 Nev. 299, 75 P. 1, 2 (1904) (emphasis added). Rather, the statute addresses the effects of "unhealthful" conditions on underground miners. *See id*., 75 P. at 2-3; *see also* R.L. §§ 6529-60 (originally codifying statute in list of "Crimes Against Public Health," such as those pertaining to disease, food, drugs, and burials).

[2] In a footnote, Malloy wrongly claims that the FLSA does not require employers to compensate employees for each hour worked because it only requires them to pay a minimum wage rather than an employee's regular rate for the first forty hours worked. *See* RAB 32 n.13. Federal law entitles employees to a minimum level of compensation for each hour worked, including time-and-a-half of the employee's regular rate for each hour of overtime. *See* 29 U.S.C. §§ 206(a), 207(a). To the extent federal and Nevada law differ in *how much* employees are entitled to be compensated for each hour worked, that says nothing about *which hours* are work.

Several other considerations confirm that NRS 608.200 reflects the Legislature's views about safe working conditions for miners—not whether the Portal-to-Portal Act applies to Nevada's wage laws. To begin, the statute predates the FLSA and Nevada's first wage-and-hour statute by decades. The statute's exclusions from the 8-hour limit, furthermore, are materially different from the Portal-to-Portal Act's changes to the federal definition of work. NRS 608.200 addresses time that the Portal-to-Portal Act does not ("time consumed for meals"), and the Portal-to-Portal Act addresses time that NRS 608.200 does not (preliminary and postliminary activities). What's more, between 1949 and 1993, the Legislature expressly *included* meal time and travel time within the 8-hour limit. 1993 Nev. Stat. 821; 1949 Nev. Stat. 197. Yet when the Legislature amended the 8-hour limit for underground workers in 1949 to include that time, it did not apply that change to the 8-hour limits applicable to other types of employees. *See, e.g.*, N.C.L. § 2825.42 (1949 supp.) (women); N.C.L. §§ 2794 (men in positions at the surface of underground mines), 10238-39 (men working at ore smelters and mills), 10242 (men working in plaster and cement mills). The clear implication is that NRS 608.200 reflects the Legislature's evolving views about the safety of a particular profession, not its views about the Portal-to-Portal Act or the nature of "work" under Nevada's wage laws.

5. Finally, Malloy insists that the Portal-to-Portal Act did not change the federal definition of work. RAB 39-41. In his telling, it merely "limited in two specific ways the application of the existing definition" of work. *Id*. at 40. But the only natural way to understand a statute creating such a "limit[ation]" is that it *changed* the "existing definition."

Federal lawmakers, executive branch officials, and courts share that view. Congress passed the Portal-to-Portal Act with the expressed goal of correcting judicial mistakes concerning the proper scope of work that "disregard[ed] . . . long-established customs, practices, and contracts between employers and employees." 29 U.S.C. § 251(a). Federal regulators recognize that federal wage laws entitle employees to compensation for "each hour worked"—not each hour of compensable work, whatever that may mean. *See, e.g.*, 29 C.F.R. §§ 778.103, 778.315, 780.313. And federal courts across the country say that "[t]he Portal-to-Portal Act of 1947 amended the FLSA to exclude [certain] activities from 'working' time." *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 910 (9th Cir. 2004); *accord, e.g.*, *Dep't of Lab. v. E. Penn Mfg. Co., Inc.*, 123 F.4th 643, 649 (3d Cir. 2024); *Chagoya v. City of Chicago*, 992 F.3d 607, 617 (7th Cir. 2021). Thus, it is no "concocted fantasy," RAB 3, or "false legal construct," *id*. at 4, to say that the Portal-to-Portal Act amended the federal definition of "work."

Malloy nevertheless maintains that *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), and 29 C.F.R. § 785.7 support his interpretation of the Portal-to-Portal Act. RAB 39-41. To the contrary, *IBP* confirms Amazon's interpretation. In *IBP*, the Supreme Court wrote that "*[o]ther than its express exceptions for travel . . . and for activities that are preliminary or postliminary to [a] principal activity*, the Portal-to-Portal Act does not purport to change this Court's earlier descriptions of the terms 'work' and 'workweek.'" 546 U.S. at 28 (emphasis added). Likewise, with respect to determining how many hours an employee has worked, 29 C.F.R. § 785.7 states that "[t]he Portal-to-Portal Act did not change the rule *except to provide an exception* for preliminary and postliminary activities." (emphasis added). Because the phrases "[o]ther than" and "except to" introduce qualifications to the statements they modify, they show that the Portal-to-Portal Act *did* "change . . . earlier descriptions of the ter[m] 'work'" and "the rule" for determining an employee's hours of work. In other words, *IBP* and 29 C.F.R. § 785.7 unequivocally (if not directly) state that the Portal-to-Portal Act amended the federal definition of work.

Malloy also claims that *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27 (2014), recognized that activities covered by the Portal-to-Portal Act were included within the federal definition of work. RAB 40-41. But Malloy said the opposite earlier in his brief. *See id*. at 15 (stating that *Busk* "did not opine on whether [postliminary] activity constituted work"). And he provides no explanation or

authority for his new claim that *Busk* recognized that postliminary activities still qualify as work even if they are not compensable.

In any event, nothing in *Busk* indicates that activities covered by the Portal-to-Portal Act qualify as "work" or casts doubt on *IBP*'s explanation that the Portal-to-Portal Act had amended the definition of "work." To the contrary, *Busk* recognized that the Portal-to-Portal Act "exempted employers from liability for . . . two categories of *work-related activities*." 574 U.S. at 32 (emphasis added). If those "work-related activities" still qualified as "work," *Busk* would have referred to them as such. Moreover, in elucidating the test for the phrase "principal activity or activities" (which remain work under the Portal-to-Portal Act), the Court emphasized that it encompasses tasks that are "'indispensable to the performance of [employees'] productive *work* and integrally related thereto.'" *Id.* at 34 (citation omitted and emphasis added). That is, the Portal-to-Portal Act clarified the scope of "work" under the FLSA.

Malloy's remaining arguments grasp at straws. He points to statements of other lawyers at an oral argument and in a brief that (he claims) support the distinction between the concepts of "work" and "compensable work." RAB 17-19 & n.6. But the statements of counsel in a different case are not "authority" of any sort, much less persuasive or binding authority.

Malloy also claims that Amazon itself distinguished between "work" and "compensable [work]" in briefs that it filed before the district court, *see* RAB 6-7 (citing JA0039), and the Sixth Circuit, *see id*. at 4 (citing *In re: Amazon.com, Inc. Fulfillment Ctr. Fair Lab. Standards Act (FLSA) & Wage & Hour Litig.*, 905 F.3d 387, 400 n.2 (6th Cir. 2018)). Those briefs merely argued that the plaintiff had failed to make a threshold showing demonstrating that the activities at issue could qualify as "work" under the definition applied by courts before the Portal-to-Portal Act. Amazon never endorsed Malloy's artificial bifurcation between "work" and "compensable work."

B. The Legislative And Executive Branches Understand Nevada Law To Adopt FLSA Standards

Legislative history and executive-branch understandings of Nevada's wage laws strongly support the conclusion that Nevada's wage laws incorporate the federal definition of "work." *Clark County v. S. Nev. Health Dist.*, 128 Nev. 651, 658 n.4, 289 P.3d 212, 216 n.4 (2012); *see* AOB 27-31. Malloy all but ignores these arguments. Rather, he observes that the Nevada Labor Commissioner supported Nevada's first generally applicable minimum wage law because "there are many workers in Nevada that the people in Washington have forgotten." RAB 8, 37, 38 (quoting Hearing on A.B. 219 Before the Assembly Labor & Mgmt. Comm., 58th Leg. (Nev., Feb. 20, 1975) (statement of Stan Jones, Nev. State Labor Comm'r)). But the Commissioner's statement expressed his support for increasing the

applicable minimum wage—not for diverging from the FLSA generally. *See* Hearing on A.B. 219 (Feb. 20, 1975).

As this Court has recognized, the Legislature designed Nevada's first generally applicable minimum wage law to "operate harmoniously" with the FLSA. *Terry*, 130 Nev. at 886-87, 336 P.3d at 957; *see also* AOB 27-28. Likewise, it enacted exceptions to Nevada's overtime statute that "generally track the [overtime] exceptions" in the FLSA, Hearing on A.B. 44 Before the Assembly Comm. on Commerce and Labor, 73rd Leg. 21 (Nev., Mar. 9, 2005), and has twice amended Nevada's overtime statute to further minimize differences between state and federal law, *see* AOB 28-29.

Likewise, Nevada executive-branch officials for decades have understood that Nevada's wage laws follow the federal definition of work. For example, the Attorney General opined that the Legislature "intended to enact state overtime compensation law that was generally consistent with federal law on the same topic" and that this "intent should be respected." 05-04 Op. Att'y Gen. 12, 24-25 (2005). The Labor Commissioner has similarly relied on the federal method for calculating an employee's "regular wage rate" for purposes of Nevada's overtime statute because that statute does not "*specifically prohibit*" doing so. Office of the Labor Commissioner, Advisory Opinion, December 22, 2016, at 1, 3 (emphasis added). And, of course, overtime cannot be calculated consistent with the federal approach

if Nevada law diverges in its understanding of what activities qualify as "work." Decades of legislative history and executive actions support the common-sense proposition that federal and Nevada wage laws should be read in harmony. Malloy, disregarding this history, offers nothing to discard that well-established pattern here.

C. Economic And Policy Considerations Favor Harmonizing Federal And State Employment Law

Amazon also explained that interpreting Nevada's wage laws to conflict with the federal definition of work would lead to serious "public policy" consequences for employers and employees alike. *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010); *see* AOB 31-33. Malloy, however, accuses Amazon of "concocting a purported public policy problem when none exists." RAB 38. That accusation should come as a surprise to this Court, which has explained that public policy problems motivated the Legislature when it enacted Nevada's wage laws and provide "practical reasons" for interpreting Nevada's wage laws to be "harmonious" with federal law. *Terry*, 130 Nev. at 886-88, 336 P.3d at 957-58. Creating conflicts between state and federal law helps neither employees nor employers. "[A] complicated system of workplace laws puts employees . . . at a serious informational disadvantage" and thereby makes it more difficult for them to enforce their workplace protections. Jeffrey M. Hirsch, *Revolution in Pragmatist Clothing: Nationalizing Workplace Law*, 61 Ala. L. Rev. 1025, 1035 (2010). Inconsistency between federal and state wage laws also means that "even well-

intentioned employers have an extremely difficult task in making their workplaces fully compliant," *id*., and that such employers face additional burdens from having to comply with multiple and distinct sets of laws and regulations, *see Terry*, 130 Nev. at 886-87, 336 P.3d at 957 (collecting legislative history noting this concern).

Malloy's counterarguments fall flat. He observes that Nevada's wage laws were passed to help employees, RAB 37-38, but Nevada's wage laws balance the interests of employees and employers, *see Terry*, 130 Nev. at 886-87, 336 P.3d at 957. As the Supreme Court of the United States recently recognized in a related context, "[m]ost legislation reflects a balance of competing interests," so "the public interest in [FLSA] cases does not fall entirely on the side of employees." *E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45, 53 (2025). Moreover, differences between state and federal law only make it more difficult for employees to understand and enforce their rights. Malloy also argues that Nevada's wage laws already burden employers because they diverge from federal law in some respects. RAB 38-39. But that is no justification for imposing additional and unnecessary burdens on employers (and employees)—particularly as to the basic question of what constitutes work. In addition, where Nevada's wage laws expressly diverge from federal law, the Legislature has determined that countervailing benefits outweigh the costs of conflict. It has made no such determination here. Public policy thus supports Amazon's position, not Malloy's.

D. Other Jurisdictions Have Reached The Same Conclusion

Malloy observes that some courts interpreting other States' wage laws have concluded that those laws do not incorporate the Portal-to-Portal Act. RAB 41-48. But many other courts have reached the opposite conclusion. *Buero v. Amazon.com Servs., Inc.*, 521 P.3d 471, 482-85 (Or. 2022); *Hughes v. UPS Supply Chain Sols., Inc.*, 677 S.W.3d 273, 278-80 (Ky. 2023); *Del Rio v. Amazon.com Servs., Inc.*, 693 F. Supp. 3d 301, 306-09 (D. Conn. 2023), *question certified to Conn. S. Ct.*, 2025 WL 826426 (2d Cir. Mar. 17, 2025); *Thomas v. Amazon.com Servs., Inc.*, 462 F. Supp. 3d 828, 834 (N.D. Ohio 2020).[3] And two of those states—Oregon and Kentucky—have a statute or regulation with language that mirrors NRS 608.016, which Malloy identifies as one of the most important provisions of Nevada law in this case. *Supra* 11-15.

In any event, the vast majority of Malloy's examples involve statutes that (in the courts' view) unambiguously rejected the Portal-to-Portal Act. *See Roberts v. State*, 512 P.3d 1007, 1013-15 (Ariz. 2022) (legislature acquiesced in regulators'

[3] Contrary to Malloy's suggestion, RAB 47 n.15, the *Buero* court concluded that Oregon's wage statutes *themselves* incorporated the Portal-to-Portal Act even in the absence of labor regulations doing the same, *see* 521 P.3d at 482 ("[T]he statute's definition of 'work time' was intended to mirror federal law."). Malloy also misreads Ohio Revised Code § 4111.031, which was enacted after *Thomas*. RAB 45-46. That statute adopts Portal-to-Portal Act principles but creates an exception for preliminary and postliminary activities performed at the "*specific direction* of the employer." ORC § 4111.031 (emphasis added).

rejection of Portal-to-Portal Act); *Frlekin v. Apple Inc.*, 457 P.3d 526, 532 (Cal. 2020) (legislature responded to Portal-to-Portal Act by enacting conflicting definition of work); *Amaya v. DGS Constr., LLC*, 278 A.3d 1216, 1240-41 (Md. 2022) (statute refers to "the federal Fair Labor Standards Act *of 1938*" (emphasis added)); *In re Amazon.com, Inc.*, 255 A.3d 191, 202 (Pa. 2021) (legislature acted with "expressly stated purpose" to reject Portal-to-Portal Act); *Dinkel v. MedStar Health Inc.*, 2015 WL 5168006, at *3 (D.D.C. Sept. 1, 2015) (statute rejects Portal-to-Portal Act by name). In contrast, Nevada's wage laws do not meet the high standard recognized by this Court for departing from federal law. *See Terry*, 130 Nev. at 885, 336 P.3d at 956 (language of statutes must be "expressly" or "entirely conflicting" with federal law).

Malloy's last two examples also offer him no help. The Washington case is merely an intermediate court decision and *assumed* without deciding that the State's wage statutes did not incorporate the Portal-to-Portal Act because the plaintiffs' claims failed under either test. *Anderson v. State Dep't of Soc. & Health Servs.*, 63 P.3d 134, 136-37 (Wash. App. 2003). The New Mexico case similarly is an intermediate appellate court decision that concluded that the time at issue did not qualify as work even under a broader definition of "work." *Segura v. J.W. Drilling, Inc.*, 355 P.3d 845, 850 (N.M. App. 2015). Malloy's tour beyond Nevada thus has little relevance here.

II. The Sixth Circuit's Decision Is Wrong

Recognizing the weakness of his statutory arguments, Malloy falls back on the Sixth Circuit's decision in *In re: Amazon.com, Inc. Fulfillment Center Fair Labor Standards Act (FLSA) & Wage & Hour Litigation*, 905 F.3d 387 (6th Cir. 2018). RAB 1-5. Not only does Malloy ignore the fact that the Sixth Circuit panel was divided, 905 F.3d at 408 (Batchelder, J., dissenting in relevant part), but he also insists that its decision "fully and *finally*" resolves the question here, RAB 1 (emphasis added). That assertion flouts nearly a century's worth of precedent unequivocally upholding the primacy of state supreme courts to interpret their own States' laws. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). This Court's interpretations of Nevada law are binding on federal courts—not the other way around. *See, e.g.*, *Stryker Corp. v. XL Ins. Am.*, 735 F.3d 349, 358 (6th Cir. 2012) (contrary decision by state supreme court overrules *Erie* guess by court of appeals); *Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc) (similar).[4]

[4] Malloy also suggests in a footnote that the Sixth Circuit's decision precludes Amazon from "mounting any defense to the issue of whether Nevada law incorporates the Portal-to-Portal Act." RAB 2 & n.1. But applying any preclusion doctrine here would run contrary to this Court's role in definitively interpreting Nevada law by preventing it from exercising that critical function and correcting the Sixth Circuit's mistakes. And any preclusive effect of the Sixth Circuit's decision is beyond the scope of the certified question. *Leigh-Pink v. Rio Properties, LLC*, 138 Nev. 530, 532, 512 P.3d 322, 325 (2022) (When addressing a certified question, this Court "is limited to answering the questio[n] of law posed by the certifying court" and takes care not to "go beyond" it (quotation omitted)).

In any event, the Sixth Circuit's majority opinion has little persuasive weight because its reasoning reflects the same mistakes that Malloy has advanced here. The Sixth Circuit majority (like Malloy) misapprehended the relationship between Nevada's wage laws and the FLSA. The majority believed that Nevada law required the Legislature to "affirmatively adopt" or "explicitly incorporate" any federal law it wished to follow, including the Portal-to-Portal Act. 905 F.3d at 404. The majority also failed to grapple with *Terry* and therefore turned the relationship between Nevada and federal law on its head.

By contrast, Judge Batchelder's dissent correctly recognized that, under *Terry* and related decisions of this Court, "Nevada courts look to the FLSA unless Nevada's statutory language is materially different." 905 F.3d at 408-09 (citing *Terry*, 130 Nev. 879, 336 P.3d 951; *Csomos v. Venetian Casino Resort, LLC*, 128 Nev. 891, 381 P.3d 605 (2012) (unpub.); and *Rite of Passage v. Nev. Dep't of Bus. & Indus*., 131 Nev. 1338, 2015 WL 9484735 (2015) (unpub.)). As a result, Judge Batchelder correctly concluded that "Nevada's wage-and-hour statutes . . . implicitly incorporate the Portal-to-Portal Act's exclusions" from the federal definition of work because Nevada's wage laws "do not differ materially from the FLSA." *Id*. at 408. As she explained, this conclusion follows directly from *Terry*, which "is likely sufficient on its own to establish that the Nevada Supreme Court would follow the FLSA on this issue rather than differentiate it." *Id*. at 409.

Nevada's wage laws adopt the federal definition of work—including the Portal-to-Portal Act—because the Legislature has not clearly indicated otherwise.

The Sixth Circuit majority (like Malloy) also thought that the Portal-to-Portal Act did not change the FLSA's definition of work. 905 F.3d at 399-401. The Sixth Circuit believed that the passage of that statute created two categories of employee activities: (1) "work" and (2) "certain work activities" that are not "compensable." *Id*. at 399; *see also id*. at 400 ("[T]he Portal-to-Portal Act excludes some 'work' from its bucket of what is compensable activity, but that does not mean it is not 'work.'"). As explained above, that artificial bifurcation is strained, at best. The more natural reading (and the one shared by federal lawmakers, executive-branch officials, and other federal judges) is that the Portal-to-Portal Act amended the federal definition of work. *Supra* 16-19; *see also* 905 F.3d at 408-09 (Batchelder, J., dissenting in relevant part) ("Nevada's wage-and-hour statutes . . . implicitly incorporate the Portal-to-Portal Act's exclusions.").

* * *

Malloy cannot overcome his concession—a necessary one in light of *Terry*–that Nevada's wage laws track the FLSA unless the governing statute is "expressly" or "entirely conflicting" with federal law. *Terry*, 130 Nev. at 885, 336 P.3d at 956; *see* RAB 39. There is no such conflict here. Holding that Nevada does not follow the Portal-to-Portal Act would undermine the Legislature's intent that Nevada's

wage laws operate harmoniously with the FLSA. The Court should hold that Nevada's wage laws track the full definition of work under the FLSA, including as it has been amended by the Portal-to-Portal Act.

CONCLUSION

This Court should answer the certified question by holding that Nevada law incorporates the Portal-to-Portal Act.

/s/ Montgomery Y. Paek
Montgomery Y. Paek
LITTLER MENDELSON, P.C.
3960 Howard Hughes Parkway, #300
Las Vegas, NV 89169
(702) 862-7718
mpaek@littler.com

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that on April 14, 2025, a true and correct copy of the forgoing brief was transmitted electronically through the Court's e-filing system to all counsel of record.

/s/ Montgomery Y. Paek

Montgomery Y. Paek
LITTLER MENDELSON, P.C.
3960 Howard Hughes Parkway, #300
Las Vegas, NV 89169
(702) 862-7718
mpaek@littler.com

CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 32, I hereby certify that this brief complies with the applicable typeface, type style, and type volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14-point font). Exclusive of the portions exempted by NRAP 32(a)(7)(C), this brief contains 6,728 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

I also 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 purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including, 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.

/s/ Montgomery Y. Paek

Montgomery Y. Paek
LITTLER MENDELSON, P.C.
3960 Howard Hughes Parkway, #300
Las Vegas, NV 89169
(702) 862-7718
mpaek@littler.com