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 RESPONSE TO AMICUS BRIEF OF NEVADA JUSTICE ASSOCIATION IN SUPPORT OF RESPONDENT

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

The Nevada Justice Association ("NJA") amicus brief offers nothing new about this case. Like Malloy, the NJA expressly concedes that Nevada's wage laws follow the federal definition of work. *See* Nevada Justice Association's Amicus Br. ("NJAB") 7 ("Amicus agrees it would be sensible, as suggested by Amazon, to apply the FLSA's definition of 'work' to the NWHL"). The NJA nonetheless insists that Nevada law does not follow the Portal-to-Portal Act's amendments to the definition of work under the FLSA, *see id*. at 7-8, but like Malloy fails to identify any express support for that departure from federal law. That is dispositive, as this Court has recognized that Nevada's wage laws track the FLSA unless a Nevada statute is "expressly" or "entirely conflicting." *Terry v. Sapphire Gentlemen's Club*, 130 Nev. 879, 885, 336 P.3d 951, 956 (2014). There is no such conflict here. While the NJA claims that the Legislature has expressed an intent to reject the Portal-to-Portal Act, *see* NJAB 8, it cites nothing to support that claim. The Court should hold that Nevada law incorporates the *entire* federal definition of work, including the Portal-to-Portal Act.

The NJA recycles the same arguments advanced by Malloy and already rebutted by Amazon in its reply. Like Malloy, the NJA argues that the Portal-to-Portal Act did not amend the federal definition of work but rather made some work activities noncompensable. *See* NJAB 7-8. The NJA relies only on *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), for that counterintuitive claim. But that case says the

opposite. *IBP* observed 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). Because "other than" qualifies the statement that follows, *IBP* confirms that the Portal-to-Portal Act did "change" the federal definition of work as it relates to "travel" and "activities that are preliminary or postliminary to a principal activity." *See* Appellant's Reply Br. ("ARB") 18.

The NJA also asserts (like Malloy) that NRS 608.016's requirement that employers pay employees for "each hour the employee works" is inconsistent with the Portal-to-Portal Act. NJAB 4-5. But NRS 608.016 does not address the question at issue here—namely, what activities qualify as work in the first place. *See* ARB 12. Moreover, federal regulations and the laws of other jurisdictions that follow the Portal-to-Portal Act contain similar language, showing that the requirement to pay for each hour of work does not conflict with that statute. *See id.* 12-14.

Finally, the NJA (again, like Malloy) relies on cases applying the laws of other States. NJAB 8-9. But the NJA ignores the many States—including Oregon and Kentucky—that follow the Portal-to-Portal Act. *See* ARB 24. Those decisions concluded that the Portal-to-Portal Act applies after determining that the State's statutory scheme did not reject the Portal-to-Portal Act. *See* Appellant's Opening

Br. at 33-37. There is no statutory rejection of the Portal-to-Portal here, which is dispositive. *Terry*, 130 Nev. at 885, 336 P.3d at 956.

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 May 15, 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(7)(C), this brief contains 535 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