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

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

1. Amazon.com Services LLC's sole member is Amazon.com Sales, Inc. Amazon.com Sales, Inc. is a wholly owned subsidiary of parent company Amazon.com, Inc. Amazon.com, Inc. is a publicly traded company. Amazon.com, Inc. has no parent company, and no other publicly held company owns 10% or more of Amazon.com, Inc.'s stock.

2. The following law firms have appeared on behalf of Amazon.com Services LLC in this case: Littler Mendelson P.C. and Gibson, Dunn & Crutcher LLP.

/s/ Montgomery Y. Paek
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JURISDICTIONAL STATEMENT

The Court has jurisdiction over this matter under NRAP 5.

On July 1, 2024, the U.S. District Court for the District of Nevada certified a question to this Court, and on October 24, 2024, this Court entered an Order accepting the question. *See* Order Accepting Certified Question, No. 89314.

The district court had jurisdiction under 28 U.S.C. § 1332(d)(2).

ROUTING STATEMENT

This appeal is presumptively retained by the Nevada Supreme Court because it is a question of law certified by a federal court. NRAP 17(a)(6).

STATEMENT OF THE ISSUE PRESENTED

This Court accepted the District of Nevada's certification of the below question:

Does Nevada Law incorporate the Portal-to-Portal Act?

Order Accepting Certified Question, No. 89314 (Oct. 24, 2024).

INTRODUCTION

At the height of the COVID-19 pandemic, following emergency directives from the Governor of Nevada and guidance from Nevada's Occupational Safety & Health Administration, Amazon required all hourly employees to undergo pre-shift screenings for COVID-19. These screenings were intended to identify potentially sick employees so they could return home, recover, and isolate to prevent the spread of COVID-19 to the broader community. Plaintiff Dwight Malloy's complaint seeks to punish Amazon for taking those protective measures, as required by public health authorities. Malloy, an Amazon employee during the pandemic, brought this suit on behalf of a sprawling putative class, seeking compensation under Nevada law for the time spent undergoing those pre-shift health screenings.

Under the federal Fair Labor Standards Act (FLSA), these claims would have failed because the FLSA does not require employers to compensate employees for time spent on preliminary activities such as COVID-19 screenings. Specifically, under the Portal-to-Portal Act, which amended the FLSA in 1947, an activity constitutes work (and thus may be compensable) only if it is itself a "principal activity[,] . . . which such employee is employed to perform." 29 U.S.C. § 254(a)(1). The U.S. Supreme Court has interpreted "principal activity" to include activities that are "integral and indispensable to the principal activities that an employee is employed to perform." *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 33, 37 (2014) (quoting

IBP, Inc. v. Alvarez, 546 U.S. 21, 29–30 (2005)). Activities that "are preliminary to or postliminary to said principal activity" are not work. 29 U.S.C. § 254(a)(2); *see also Busk*, 574 U.S. at 32. The screenings Malloy raises in his complaint are classic preliminary acts that are not integral to the employee's work—thus, the screenings are not work.

The district court, however, held that Malloy had stated a claim for unpaid wages because, in its view, Nevada "has not incorporated the Portal-to-Portal Act" and, instead, "Nevada law requires that an employer pay an employee for all work," including time that is not compensable under the FLSA. Volume 2, Joint Appendix, page 227 ("2 App. 227"). That conclusion—that federal law and Nevada law have dramatically distinct conceptions of what constitutes compensable "work"—contradicts this Court's approach to interpreting Nevada's employment laws, which have emphasized consistency with the federal FLSA. And the practical consequences of departing from the FLSA would be significant. The Portal-to-Portal Act was enacted to correct erroneous judicial decisions that "disregard[ed]" the proper bounds of the FLSA and caused an economic "emergency" by triggering a flood of litigation against employers. *See* 29 U.S.C. § 251(a)–(b). This Court should answer the certified question by holding that Nevada law parallels the federal standard under the Portal-to-Portal Act, thus maintaining uniformity between Nevada and federal wage laws.

This Court has repeatedly explained that Nevada employment laws track the standards of the FLSA unless "the language of the relevant statutes [is] entirely conflicting," thereby indicating a clear legislative intent to adopt a different rule. *Terry v. Sapphire Gentlemen's Club*, 130 Nev. 879, 885, 336 P.3d 951, 956 (2014). This Court has interpreted Nevada's wage laws to track the FLSA even when there is "divergence" in language short of an express conflict, but the "federal FLSA law carries even greater persuasive weight" when "the relevant language of" Nevada law "closely mirrors the FLSA." *Doe Dancer I v. La Fuente, Inc.*, 137 Nev. 20, 25, 481 P.3d 860, 866–67 (2021).

There is no textual conflict here. To the contrary, the provisions of the primary Nevada laws at issue expressly parallel provisions of the FLSA. *Compare* NRS 608.016 ("an employer shall pay to the employee wages for each hour the employee works") *and* Nev. Const. art. 15, § 16 ("each employer shall pay a wage to each employee" at a set rate "per hour worked"), *with* 29 U.S.C. § 206(a) ("[e]very employer shall pay to each of his employees . . . wages" at a set rate "an hour"). And the Nevada Legislature also has "long relied on the federal minimum wage law to lay a foundation of worker protections" such that "in many significant respects, Nevada's minimum wage laws and those set federally [*i.e.*, the FLSA] run parallel." *Terry*, 130 Nev. at 884, 336 P.3d at 955. In enacting Nevada's wage laws, the Legislature "repeatedly heard testimony as to the burden on businesses and potential

confusion should Nevada's Minimum Wage Act and the FLSA fail to operate harmoniously," and this Court has, in turn, read Nevada's wage laws to adopt "the federal standard" based on this "administrative need." *Id.* at 886–87, 336 P.3d 957.

The district court went astray by relying on a divided, non-binding decision of the United States Court of Appeals for the Sixth Circuit. 2 App. 276. In *In re: Amazon.com, Inc. Fulfillment Center Fair Labor Standards Act (FLSA) & Wage & Hour Litigation*, two judges read Nevada's wage laws to depart from the FLSA's standard. 905 F.3d 387, 399 (6th Cir. 2018). They did so by misreading the Portal-to-Portal Act to "exclude[] certain work activities from being compensable" but not to "redefine the Supreme Court's earlier definitions of 'work.'" *Id.* The majority then read Nevada's wage laws to incorporate the federal definition of work set out by the Supreme Court in the 1940s, but not the revised definition Congress enacted immediately in response to those decisions in the Portal-to-Portal Act. *Id.* In dissent, Judge Batchelder closely examined this Court's precedents, including cases where this Court "'turn[ed] to the federal courts' interpretation of hours worked under the [FLSA],'" and correctly concluded that Nevada's wage laws "follow the FLSA on this issue." *Id.* at 409 (quoting *Rite of Passage v. Nevada Dep't of Bus. & Indus.*, No. 66388, 2015 WL 9484735, at *1 (Nev. Dec. 23, 2015) (unpub.)). The Sixth Circuit panel majority failed to follow this Court's practice of reading Nevada's

wage laws in parallel with the FLSA, and the district court erred by following that fractured ruling.

The Court should not read into Nevada law an interpretation with no basis in the text that would create conflict between the federal standards and those of this State. The Court should affirm that Nevada law follows the FLSA's definition of work, including the Portal-to-Portal Act.

STATEMENT OF THE CASE

I. Statutory Background

Congress enacted the FLSA in 1938. 29 U.S.C. § 201 *et seq.* The FLSA mandated that "[e]very employer shall pay to each of his employees" a minimum "wage[]" for each "hour" worked. 52 Stat. 1062–63, § 6(a) (1938); *see* 29 U.S.C. § 206(a). The FLSA also required employers to pay "not less than one and one-half times the regular rate" for time worked over 40 hours in a "workweek." 52 Stat. at 1063, § 7(a); *see* 29 U.S.C. § 207(a). The Act did not, however, define "work" or "workweek."

In the years that followed, the Supreme Court interpreted these requirements expansively. It concluded that "work" meant "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R. Co. v. Muscoda Loc. No. 123*, 321 U.S. 590, 598 & n.2 (1944) (miners

must be compensated for time spent traveling to and from "the place in the mine where the miners actually drill and load ore"). And it interpreted "workweek" to "includ[e] all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690–91 (1946) (workweek included time that employees spent "punch[ing] in, walk[ing] to their work benches and perform[ing] preliminary duties"). These cases "provoked a flood of litigation." *Busk*, 574 U.S. at 31. In a mere six months, "unions and employees filed more than 1,500 lawsuits under the FLSA," seeking "nearly $6 billion in back pay and liquidated damages for various preshift and postshift activities." *Id.* at 31–32 (citation omitted).

Congress responded almost immediately. It decried *Tennessee Coal* and *Anderson* as "disregard[ing] . . . long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers." 29 U.S.C. § 251(a). Congress determined that the Supreme Court's interpretation of the FLSA "would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees." *Id.* In 1947, Congress therefore amended the FLSA in the

Portal-to-Portal Act. The Portal-to-Portal Act provides that employers are not required to pay minimum wage or overtime compensation for time spent:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform; and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activity;
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Id. § 254(a).

Many States took inspiration from the FLSA and subsequently enacted wage-and-hour protections of their own. Nevada was one such State. While Nevada had regulated the wages, hours, and working conditions of women employed in private industry since 1937, there was no such regulation applicable to all employees. 243 Op. Att'y Gen. 62, 63–64 (1965); *see* 1937 Nev. Stat. 468 (formerly codified at NRS 609.030) (imposing "safeguards as to hours and compensation" respecting "the health and welfare of female persons").

Then, in a series of enactments beginning in 1965, Nevada adopted wage laws whose terms mirrored those of the FLSA, first only for male employees and then for all employees. In 1965—nearly two decades after Congress passed the Portal-to-Portal Act—the Nevada Legislature enacted its first minimum wage requirement that was applicable to male employees. *See* 1965 Nev. Stat. 696, *codified at*

NRS 608.250 (1965). In 1975, the Legislature revised that same minimum wage requirement to apply to both men and women and to make clear the relationship between Nevada's laws and the federal standard by specifying the "minimum wages which shall be paid to employees . . . who are included within the provisions of 29 U.S.C. § 206(a)(5) (Fair Labor Standards Act of 1938, as amended)." 1975 Nev. Stat. 500, *codified at* NRS 608.250 (1975). And ten years after that, the Legislature mandated that employers "pay to the employee wages for each hour the employee works" and prohibited employers from "requir[ing] an employee to work without wages during a trial or break-in period." 1985 Nev. Stat. 578, *codified at* NRS 608.016. Finally, in 2006, a voter initiative ratified Section 16, Article 15 of the Nevada Constitution, which replicated the language of NRS 608.016 but imposed a higher wage rate. Nev. Const. art. 15, § 16; *see also Terry*, 130 Nev. at 883, 336 P.3d at 955.

Nevada's overtime requirements followed a similar enactment history and similarly mirror language in the FLSA. In 1975, the Legislature added an overtime requirement, again similar to that of the FLSA. *Compare* NRS 608.018(1)–(2) (requiring employers to "pay 1½ times an employee's regular wage rate whenever an employee . . . works than 40 hours in any scheduled week of work,") *with* 29 U.S.C. § 207(a) (employer must pay "not less than one and one-half times the regular rate" to any employees who works "a workweek longer than forty hours").

Taken together, Nevada law now dictates, in language similar to that of the FLSA, that "[e]ach employer shall pay to each employee . . . a wage of not less" than stated hourly rates, NRS 608.250; Nev. Const. art. 15, § 16 (same); *compare* 29 U.S.C. § 206(a) ("[e]very employer shall pay to each of his employees . . . wages at the following rates . . ."). And its overtime law requires that an employer must "pay 1 ½ times an employee's regular wage rate whenever an employee . . . works more than 40 hours in any scheduled week of work; or more than 8 hours in any workday." NRS 608.018 (capitalization altered); *compare* 29 U.S.C. § 207(a) (employer must pay "a rate not less than one and one-half times the regular rate" to an employee "who in any workweek . . . is employed . . . for a workweek longer than forty hours").

II. Factual And Procedural Background

Plaintiff Dwight Malloy worked for Amazon as a fulfillment center associate from approximately August 2020 until April 2021. 1 App. 23. His job duties included moving boxes, stacking packages, and loading boxes. *Id.* He normally worked five days per week, ten hours per day, and he was paid an hourly rate between $15.80 to $16.10 per hour (well above Nevada's minimum wage at the time of $8 to $9 per hour). *Id.*; *see* NRS 608.250(1)(b).

Malloy's employment with Amazon coincided with the height of the COVID-19 pandemic, which "infected over 81 million Americans and caused the death of

over 900,000 Americans." 1 App. 22. As early as April 2020, Nevada's Occupational Safety & Health Administration ("Nevada OSHA") recommended that all businesses that were allowed to continue operating during the pandemic, which included Amazon, "[c]onduct daily surveys of changes to staff/labor health conditions." *See* 1 App. 77. Nevada OSHA specifically "[r]equired" businesses to consult guidance from the federal government, *id.*, and the federal Department of Labor's Occupational Safety and Health Administration similarly instructed employers to "Develop Policies and Procedures for Prompt Identification and Isolation of Sick People," to protect "workers, customers, visitors, and others at a worksite," 1 App. 89. The federal Centers for Disease Control and Prevention instructed employers that "no one with symptoms should be present at the workplace" and that employees "who have symptoms when they arrive at work or become sick during the day should immediately be separated from other employees, customers, and visitors and sent home." Centers for Disease Control and Prevention, General Business Frequently Asked Questions, (Apr. 20, 2020) at 1, 8, *available at* https://stacks.cdc.gov/view/cdc/87267. The CDC gave detailed guidance on how employers could help prevent the spread of COVID by conducting "temperature screening" of employees entering the workplace. *Id.* at 8–9.

On May 7, 2020, the Governor of Nevada issued an emergency directive ordering businesses to "adopt measures that meet or exceed the standards promulgated

by [Nevada] OSHA to minimize the risk of spread of COVID-19." 1 App. 117. The Governor also directed Nevada OSHA to "ensure that businesses reopened pursuant to this Directive or otherwise operating during the state of emergency provide adequate protections to their workers and adopt sanitation protocols that minimize the risk of spread of COVID-19 among their workforce." *Id.* The following day, Nevada OSHA reiterated that employers should conduct daily surveys of their employees' health. 1 App. 124. Nevada OSHA cautioned that "slowing/addressing the spread of COVID-19 is a *required aspect* of all activities/task/services associated with open businesses," and that the agency would "continue to enforce or promote the use of identified measures to address this public health crisis." 1 App. 126 (emphasis added). Nevada OSHA later provided employers with sample COVID-19 screening questions to use, noting that the "most effective" procedures would include "adopting measures to ensure that workers who are infected or potentially infected are separated and sent home from the workplace." 1 App. 128; 1 App. 132.

Amazon heeded this guidance closely. During the pandemic, and consistent with the guidance from Nevada OSHA, "Amazon implemented a company-wide policy requiring each of its hourly, non-exempt employees to undergo a . . . check for symptoms of the Coronavirus each shift." 1 App. 22. The screening happened on Amazon's premises before employees clocked in for their shifts. 1 App. 22–23. According to Malloy, employees were required to form a line six feet apart; approach

a checkpoint at the entrance to the facility; undergo a temperature check; answer questions about their health; and then put on a mask. 1 App. 24. Employees who did not pass the screening had to proceed to a second checkpoint to answer certain follow-up questions. *Id.* All told, the screening allegedly took "approximately 10 minutes to 15 minutes on average." *Id.* Malloy alleges that employees were not paid for this time. 1 App. 23.

On February 15, 2022, Malloy filed this putative class action against Amazon in federal district court. He asserted four claims under Nevada law: (1) failure to compensate "for each hour the employee works," NRS 608.016; (2) failure to pay minimum wages "per hour worked," Nev. Const. art. 15, § 16; (3) failure to pay "1 ½ times an employee's regular wage rate" for the overtime the employee "works," NRS 608.018; and (4) failure to timely pay all wages due upon termination, NRS 608.020-.050.[1] 1 App. 31–36. The theory of each claim is that Malloy and similarly situated employees are entitled to compensation—and where applicable, compensation at an overtime rate—for the time spent undergoing the COVID-19 screenings.

Amazon moved to dismiss on the ground that Nevada law incorporates the FLSA's definition of work, including the Portal-to-Portal Act. 1 App. 42–43. Under that standard, a job-related activity constitutes work only if it was "pursued necessarily and primarily for the benefit of the employer," *and* it was "an integral and

[1] Malloy also requests attorney's fees on each claim under NRS 608.140.

indispensable part of the principal activities" the employee was hired to perform. *Busk*, 574 U.S. at 31, 33 (quotation marks omitted). The COVID-19 screenings do not satisfy this standard. The screenings protected employees from illness, hospitalization, and even death, and thus, they were conducted for the benefit of the employees themselves as well as the general public. 1 App. 44–45. Nor were the screenings "'an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment'"; rather, Amazon "'could have eliminated the screenings altogether without impairing the employees' ability to complete their work.'" 1 App. 49–50 (quoting *Busk*, 574 U.S. at 35).

The District of Nevada denied Amazon's motion to dismiss. Ruling from the bench, the court asserted that Amazon's argument "rests on the premise that Nevada has incorporated the Portal-to-Portal Act," which "it has not done." 2 App. 275–276. The court acknowledged that Nevada law does not define the term "work," and that this Court "has historically looked to the FLSA for the definition of work" when interpreting state law. 2 App. 275. Nevertheless, the court reasoned, Nevada law "conflict[s] with the FLSA" because it "requires that an employer pay an employee for *all* work," whereas the FLSA exempts certain activities. 2 App. 277 (emphasis added). The court thus applied the pre-1947 definition of work—announced by the Supreme Court in *Tennessee Coal* and rejected by Congress decades before the passage of the statutes Malloy invoked in his complaint, NRS 608.016 (enacted 1985),

NRS 608.018 (enacted 1975), NRS 608.250 (enacted 1965), Nev. Const. art. 15, § 16 (ratified 2006), and concluded that Malloy had plausibly alleged that the health screenings constituted "work" because they were "controlled by Amazon" and "primarily for Amazon." 2 App. 278.

The court based its conclusion 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), in which a divided panel held that Nevada law does not follow the federal Portal-to-Portal Act and instead follows the definition of "work" adopted by the Supreme Court in the 1940s under the un-amended FLSA and rejected by Congress in the Portal-to-Portal Act. 2 App. 276–277, 2 App. 279; *see also In re: Amazon*, 905 F.3d at 399–400. The court's oral ruling did not address the dissent's contention in *In re: Amazon*, that decisions of this Court "establish that the Nevada Supreme Court would follow the FLSA on this issue." 905 F.3d at 409. The court therefore concluded that Amazon's employees could assert claims for time spent undergoing mandatory security checks at Amazon facilities. 2 App. 279.

Amazon sought permission to immediately appeal the denial of its motion to dismiss under 28 U.S.C. § 1292(b), or in the alternative, to certify three questions of law to this Court: (1) whether Nevada law incorporates the Portal-to-Portal Act; (2) whether pre-shift COVID-19 screenings were "integral and indispensable" to

Malloy's principal activities and therefore compensable under the Portal-to-Portal Act; and (3) whether time spent undergoing those screening constitutes "work" under Nevada law because it is primarily for Amazon's benefit. 2 App. 281–284. The district court certified the first question, and this Court accepted the certified question. 2 App. 355; Order Accepting Certified Question, No. 89314 (October 24, 2024).

SUMMARY OF THE ARGUMENT

While Nevada law does not define the term "work," this Court has long recognized that Nevada's wage laws generally track the FLSA. Nevada's statutes were enacted decades after their federal equivalents, and with the benefit of a robust body of federal case law that had already developed in the FLSA context. Given this well-established federal backdrop, the Nevada Legislature carefully considered the FLSA when enacting and amending Nevada's wage laws. And when the Legislature has chosen to depart from federal standards in this area, it has done so expressly. There is no express departure here. Thus, Nevada law follows federal law on the concept of work, which in turn means that Nevada law incorporates the Portal-to-Portal Act.

The district court, relying on the Sixth Circuit's divided decision in *In re: Amazon.com, Inc. Fulfillment Center Fair Labor Standards Act (FLSA) & Wage & Hour Litigation*, 905 F.3d 387 (6th Cir. 2018), erred in concluding otherwise. The Sixth Circuit panel majority artificially divided the relevant inquiry into two steps—

whether Nevada law incorporates the FLSA's definition of "work," and whether Nevada law incorporates the Portal-to-Portal Act's definition of "compensable work." *Id.* at 400–02. Having done that, the Sixth Circuit panel majority concluded that Nevada law incorporates the FLSA without incorporating the changes effected by the Portal-to-Portal Act. *Id.* at 401. That conclusion makes no sense. The Portal-to-Portal Act conclusively amended the FLSA's definition of "work"—and it did so long before the enactment of the Nevada statutes at issue. Absent a more explicit instruction from the Legislature, Nevada law either incorporates the whole standard or it does not. Interpreted correctly, there is no conflict whatsoever between state and federal law, and therefore no reason to depart from the federal standard. Both Nevada law and the FLSA require an employer to pay for all hours worked, and the FLSA—as amended by the Portal-to-Portal Act—simply clarifies that certain activities are not work.

Because the Nevada Legislature has chosen to follow federal standards on what constitutes work, and there is no indication that it desired to reject the Portal-to-Portal Act's clarification of what qualifies as work under the FLSA, 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

This Court has consistently interpreted Nevada's wage laws to follow the standards set in the FLSA, absent some express provision requiring a different Nevada law rule. The wage and hour provisions invoked by Malloy closely follow the parallel provisions of the FLSA and no provision of Nevada law indicates an express intent that they should deviate from the definition of "work" under the FLSA. Imposing differing standards, as Malloy urges, would fly in the face of the Legislature's intent to create a practical and predictable system and would place significant burdens on businesses throughout Nevada.

This Court certified the question "Does Nevada law incorporate the [Portal-to-Portal Act]." Order Accepting Certified Question at 1. "A certified question" from a district court "presents a pure question of law, which this court answers de novo." *Echeverria v. State*, 137 Nev. 486, 488, 495 P.3d 471, 474 (2021). This Court should hold that Nevada's laws track the FLSA's meaning of "work" by incorporating the Portal-to-Portal Act.

A. Nevada Law Generally Tracks The FLSA

The starting point for any question of statutory interpretation is "the plain language of the statute." *Bigpond v. State*, 128 Nev. 108, 114, 270 P.3d 1244, 1248 (2012). If the text is "clear on its face," the court "cannot go beyond [it]." *Cabrera*

v. State, 135 Nev. 492, 495, 454 P.3d 722, 724 (2019) (quotation marks omitted). But if the statute is ambiguous, the court must look to other sources to discern its meaning. *Artmor Invs., LLC v. Nye County*, 138 Nev. 573, 574, 512 P.3d 1249, 1250 (2022). These sources can include "legislative history," *id.*, "the reasoning that induced the Legislature to enact that statute," *Clark County v. S. Nevada Health Dist.*, 128 Nev. 651, 658 n.4, 289 P.3d 212, 216 n.4 (2012), and considerations of "public policy," *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010).

The interpretation of analogous laws from other jurisdictions—including parallel federal laws—also informs the meaning of Nevada statutes. Where "state and federal statutes are nearly identical" and "the state statute does not reflect a legislative intent contrary to the federal statute," this Court assumes that "the Legislature intended to adopt the construction of [statutory terms] placed on the federal statute by federal courts." *Century Steel, Inc. v. State, Div. of Indus. Relations, Occupational Safety and Health Section*, 122 Nev. 584, 589, 137 P.3d 1155, 1158–59 (2006); *see also Bigpond*, 128 Nev. at 115, 270 P.3d at 1249 (citing "the national consensus on the meaning of [Nevada law's] federal counterpart" when interpreting an evidentiary rule); *Middleton v. State*, 114 Nev. 1089, 1107 n.4, 968 P.2d 296, 309 n.4 (1998) (looking to federal law to interpret state statute because the two were "largely equivalent").

This Court regularly looks to the FLSA as a guide to interpreting parallel provisions of Nevada employment law. In *Terry v. Sapphire Gentlemen's Club*, 130 Nev. 879, 336 P.3d 951 (2014), for example, the Court addressed whether performers at a men's club fell within the definition of an "employee" for purposes of Nevada's minimum wage statute. That statute defines employees as "persons in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." NRS 608.010. The language "differs" from "the relevant FLSA provisions," which "define[] an 'employer' as one who suffers or permits another to work" (with no corresponding definition of employee). *Terry*, 130 Nev. at 884, 336 P.3d at 955 (citing 29 U.S.C. § 203(d), (g)).

Despite these differences, the Court interpreted the Nevada statute according to the "economic realities test" that federal courts have developed in the context of the FLSA. *Id.* at 884, 886, 336 P.3d at 955–56. The Court explained that the Nevada Legislature "has long relied on the federal minimum wage law to lay a foundation of worker protections that this State could build upon, and so in many significant respects, Nevada's minimum wage laws and those set federally run parallel." *Id.* at 884, 336 P.3d 955 (citation omitted); *see also id.* (quoting Hearing on A.B. 219 Before the Assembly Labor & Mgmt. Comm., 58th Leg. (Nev. Feb. 18, 1975) (testimony explaining the 1975 amendments were "a duplication of the [FLSA] in many

aspects") *available at* https://www.leg.state.nv.us/Division/Research/Library/LegHistory/Minutes/1975/Assembly/LaborMgt/2-18-75.pdf). And the differences in statutory language were not "material[]" enough to justify adopting a different standard. *Id.* at 885, 336 P.3d at 956. Divergent state and federal interpretations would create a "burden on businesses and potential confusion"—and the Legislature had carefully considered this problem when drafting Nevada law. *Id.* at 886–87, 336 P.3d at 957. Thus, the Court concluded that "judicial efficiency implores us to use the same test as the federal courts under the FLSA." *Id.* (quotations omitted).

A few years after the decision in *Terry*, performers at a different men's club asserted a right to minimum wages under Article 15, Section 16 of the Nevada Constitution—the same provision invoked by Malloy in this case. *See Doe Dancer I v. La Fuente, Inc.*, 137 Nev. 20, 20–21, 481 P.3d 860, 864 (2021). Once more, the Court followed the FLSA and adopted the economic realities test. *Id.* at 25–26, 481 P.3d at 866–67. As in *Terry*, the text was "ambiguous," and the relevant context was "unhelpful." *Id.* at 25, 481 P.3d at 866. The Court thus looked to the FLSA because it "predates the [constitutional amendment] by decades, and courts' applications of the economic realities test . . . have been nearly ubiquitous during that period." *Id.*, 481 P.3d at 867 (quotations omitted). The Court explained that "[t]his canon of construction promotes legal stability; put differently, the members of the bar practicing in this field of law should be able to 'assume that the same term bears

the same meaning,' absent some clear indicia to the contrary." *Id.* at 25–26, 481 P.3d at 867 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 324 (2012)).

The Court again looked to federal law in *Gonzalez v. State*, 515 P.3d 318 (Nev. 2022) (unpub.), which held that inmates in work programs are not guaranteed a minimum wage under the Nevada Constitution. *Gonzalez* reiterated that "[i]n many significant aspects . . . the standards under the [Nevada Constitution] run parallel to those of the federal Fair Labor Standards Act (FLSA)." *Id.* at *1.

Given this caselaw, it is not surprising that the Ninth Circuit has concluded that "the Nevada Supreme Court would follow federal precedent" on minimum wage standards. *Rivera v. Pen & Sons Farms, Inc.*, 735 F.3d 892, 900–01 (9th Cir. 2013). In *Rivera*, the Ninth Circuit observed that Nevada courts "interpret Nevada law to follow federal law" on wage and hour issues where the state and federal statutes do not "contain materially different language" and highlighted two express provisions in Nevada's wage laws paralleling federal provisions. *Id.* at 900 (citing NRS 608.250 (requiring state officials to set the minimum wage "in accordance with federal law") and Nev. Admin. Code 608.160(2)(a) (mirroring federal language)).

In the rare instances where this Court has departed from the FLSA, it has done so because "the language of Nevada's statutes has so required" by expressly rejecting or irreconcilably conflicting with the FLSA. *Terry*, 130 Nev. at 885, 336 P.3d

at 956. The key inquiry is whether "the language of the relevant statutes [is] *entirely* conflicting," thus indicating a clear legislative intent to adopt a different rule for Nevada. *Id.* (emphasis added); *see, e.g.*, *Jane Roe Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 32, 176 P.3d 271, 274 (2008) (FLSA "permits an employer to credit an employee's tips against the federal minimum wage" whereas Nevada law expressly "prohibits any person from '[a]pply[ing] as a credit toward the payment of the statutory minimum hourly wage . . . any tips or gratuities'" (quoting NRS 608.160(1)(b))); *Boucher v. Shaw*, 124 Nev. 1164, 1170, 196 P.3d 959, 963 (2008) (individual managers can be held personally liable under the FLSA but not NRS Chapter 608).

The laws at issue here track the FLSA. The provisions Malloy invokes require employers to pay employees for "each hour the employee works," NRS 608.016; to "pay a wage to each employee of not less than the hourly rates set forth in this section" (which sets the rates "per hour worked"), Nev. Const. art. 15, § 16; and to pay "1 1/2 times an employee's regular wage rate whenever an employee . . . works more than 40 hours in any scheduled week." NRS 608.018(1)–(2). None of these laws define "work"—or otherwise provide any indication of what sorts of activities are included within their scope. But in other respects, they parallel provisions of the FLSA that require employers to pay "wages" at a specific "rate[] . . . an hour," and "one and one-half times the regular rate at which [the worker] is employed" for any

time "in excess of" "a workweek longer than forty hours." 29 U.S.C. §§ 206(a), 207(a).

Moreover, as this Court recognized in *Terry*, *Doe Dancer I*, and *Gonzalez*, Nevada wage laws were enacted against the backdrop of the FLSA and a sophisticated body of case law interpreting the FLSA. *Doe Dancer I*, 137 Nev. at 25, 481 P.3d at 867. Given the interplay between Congress and the courts leading to the enactment of the Portal-to-Portal Act, Nevada lawmakers could not have been unaware of the scope of what constitutes work under the FLSA, and the treatment of preliminary and postliminary activities. Straying from the Portal-to-Portal Act would have risked exposing Nevada employers to precisely the same "flood of litigation" that followed the U.S. Supreme Court's early rulings defining "work" under the FLSA. *Busk*, 574 U.S. at 31. If that was indeed the Legislature's intent, it would have said so expressly. Yet none of these laws contain language that is "entirely conflicting" with federal law or indicating any intent to depart from the federal standard. *Terry*, 130 Nev. at 885, 336 P.3d at 956. Nevada law therefore incorporates the understanding of "work" from the FLSA—an understanding that necessarily includes the Portal-to-Portal Act's clarification of what does not constitute work. And under that standard, an activity constitutes work if it is "pursued necessarily and primarily for the benefit of the employer," and it is "an integral and indispensable

part of the principal activities" that the employee was hired to perform. *Busk*, 574 U.S. at 31, 33.

Malloy points to several provisions of Nevada law purportedly departing from the federal standard of "work," but none creates a conflict or justifies the district court's ruling. NRS 608.016 requires an employer to "pay to the employee wages for each hour the employee works." *See* Nev. Admin. Code 608.115 (similar). That provision works in tandem with Nevada's minimum wage and overtime standards. While the precise wording of NRS 608.016 does not appear in the FLSA, nothing in NRS 608.016 purports to define what is "work" or even suggests a rejection of the Portal-to-Portal Act's refinement of what is "work." Where, as here, there is no express rejection or overt incompatibility, the mere "divergence between the language of" Nevada's wage laws and the FLSA does not mandate differing standards. *Doe Dancer I*, 137 Nev. at 25, 481 P.3d at 866. In short, because Nevada law neither expressly defines "work," nor expressly rejects the FLSA's standard, Nevada law should be read to align with the federal standard, incorporating the meaning of "work" in the amended FLSA.

Other provisions of NRS 608.016 highlight its compatibility with the federal standard. NRS 608.016 has two exceptions, both of which have analogs in federal law. Where Nevada law exempts "a domestic service employee [who] resides in the household" NRS 608.215(1), federal law exempts "any employee who is employed

in domestic service in a household and who resides in such household," 29 U.S.C. § 213(b)(21). And where Nevada law allows certain employees who are "required to be on duty for 24 hours or more" to agree to exclude from wages "a regularly scheduled sleeping period not to exceed 8 hours," NRS 608.0195(1), federal law allows that an employee who is "required to be on duty for 24 hours or more … may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked," 29 C.F.R. § 785.22(a).[2]

Of course, the two sets of laws have minor differences—for instance, the sleeping-period exemption in Nevada law does not apply to firefighters or members of emergency services crews, whereas the FLSA's does. *Compare* NRS 608.0195(3)(b), *with* 29 C.F.R. § 553.222. But the legislature made those specific departures in express terms to require differentiation between state and federal law. Given the legislature's obvious contemplation of the FLSA in NRS 608.016, it would be improper to read departures from the federal standard into Nevada law in the absence of some express deviation of the kind the legislature laid out for firefighters and other first responders. There is no hint of a conflict between the FLSA

[2] The other statute Malloy invokes, NRS 608.018, similarly has provisions that plainly track those in the federal overtime laws. *Compare, e.g.*, NRS 608.018(3)(c) (exempting employees in retail or service business if their regular rate is more than 1½ times the minimum wage, and more than half their compensation comes from commissions); *with* 29 U.S.C. § 207(i) (same); NRS 608.018(3)(f) (referring to the Motor Carrier Act of 1935).

and Nevada law regarding the treatment of preliminary and postliminary activities in NRS 608.016 or any other law invoked by Malloy, demonstrating that Nevada law follows the Portal-to-Portal Act.

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

The legislative history of Nevada's employment laws reaffirms that Nevada follows the FLSA's rules governing work. *See Artmor Inv.*, 138 Nev. at 574, 512 P.3d at 1250 (relying on legislative history to interpret a tax law); *Clark County*, 128 Nev. at 657–59, 289 P.3d at 216–17 (same for law providing state funding). The Nevada Legislature has repeatedly demonstrated its intent to reconcile state and federal employment law, including for the statutes relevant here.

Prior to enacting the 1975 amendments creating a unified Nevada minimum wage law, the Legislature "repeatedly heard testimony as to the burden on businesses and potential confusion should Nevada's Minimum Wage Act and the FLSA fail to operate harmoniously." *Terry*, 130 Nev. at 886, 336 P.3d at 957. Constituents urged the Legislature to draft the amendments "'to read as the FLSA reads' for clarity"—and the Legislature "responded to these concerns by amending the bill." *Id.* at 887, 336 P.3d at 957 (quoting Hearing on A.B. 219 Before the Assembly Labor & Mgmt. Comm., 58th Leg. 2 (Nev., February 24, 1975) *available at* https://www.leg.state.nv.us/Division/Research/Library/LegHistory/Minutes/1975/Assembly/LaborMgt/2-24-75.pdf); *see* 1975 Nev. Stat., ch. 353, § 1, at 500–01. The

amendments passed in 1975 would later serve as the basis for Article 15, Section 16 of the Nevada Constitution. *See Doe Dancer I*, 137 Nev. at 25, 481 P.3d at 866–67. The ratified text of the constitutional provision "closely mirrors" the FLSA, thus indicating that "federal FLSA law carries even greater persuasive weight" in that context. *Id.*

Nevada overtime law followed a similar trajectory. The Legislature initially drafted the exemptions to Nevada's overtime requirements to, as the Labor Commissioner described it, "generally track the exceptions that are in the Fair Labor Standards Act." Hearing on A.B. 44 Before the Assembly Comm. on Commerce and Labor, 73rd Leg. 21 (Nev., March 9, 2005), *available at* https://www.leg.state.nv.us/Session/73rd2005/Minutes/Assembly/CMC/Final/3667.pdf. But in particular areas, the Legislature made express departures from the federal standards. For example, NRS 608.018 expressly conflicted with federal law by excluding employees "who receive compensation for employment at a rate not less than one and one-half times the minimum rate" from the statutory entitlement to heightened overtime pay. *Compare* NRS 608.018(2)(b) (2003), *with* 29 U.S.C. § 213(a). These differing standards created challenges; the Legislature heard testimony about the resulting on-the-ground confusion and how employees would benefit from being able to seek enforcement of overtime requirements from the Nevada Labor Commissioner (and not just the U.S. Department of Labor). *See* Hearing

on A.B. 44, at 15 ("The Labor Commissioner is more in tune with the plight of Nevadans and can take care of issues quicker, and that way help workers who are in need."); *see also id.* at 12–14 ("From the point of view of the workers, it did not make much sense having to go to two different agencies to deal with a complaint."). The Legislature thus amended the inconsistent Nevada provision in 2005 to "mirror federal law" so that Nevada overtime requirements would be "just the same" as federal law. *Id.* at 22.

The Legislature similarly amended Nevada law to expressly harmonize another provision with the FLSA—this time, NRS 608.018's treatment of commissioned salespersons. Hearing on A.B. 84 Before the Senate Commerce and Labor Comm., 75th Leg. 5 (Nev., April 29, 2009) *available at* https://www.leg.state.nv.us/Session/75th2009/Minutes/Senate/CL/Final/1094.pdf. Employers in the state already adhered to "federal employment law" for these employees, and they asked the Legislature to "codify current practice . . . so there is not a misinterpretation." *Id.* at 5–6. The Legislature acquiesced, with legislative statements again emphasizing that "[t]he intent of the proposed amendment is to clarify that Nevada law is consistent with federal law." *Id.* at 5; *see* 29 U.S.C. § 207(i) (2006).

These changes, and the discussions that surrounded them, demonstrate that the Legislature writes Nevada employment law "with full knowledge of existing statutes relating to the same subject"—and with the intent to follow federal law

except where the Legislature affirmatively indicates a departure. *City of Boulder v. Gen. Sales Drivers*, 101 Nev. 117, 118–19, 694 P.2d 498, 500 (1985).

There is no indication that the Legislature approached the Portal-to-Portal Act any differently. The FLSA was amended by the Portal-to-Portal Act in 1947. 29 U.S.C. § 251 *et seq.* So when the Nevada Legislature enacted NRS 608.018 in 1975 (the overtime statute), when it passed NRS 608.016 in 1985 (requiring payment for all hours worked), and when a voter initiative amended the Nevada state constitution to guarantee a minimum wage in 2006, a robust body of federal case law had already developed around the concept of work. The Legislature was familiar with this federal definition, yet it declined to provide a different one. Given Nevada's overt and longstanding reliance on the FLSA, the obvious implication is that the Legislature understood and intended each of Nevada's wage laws to incorporate the same, well-established definition of "work."

The Executive Branch has long shared this understanding of Nevada law. For example, addressing the interpretation of provisions exempting certain employees from overtime pay rules, the Nevada Attorney General explained that, "[o]n the whole, the exclusions from statutory overtime coverage . . . are compl[e]mentary to the exclusions under the FLSA's overtime compensation provisions." 05-04 Op. Att'y Gen. 12, 24 (2005). "Hence, it is apparent that the [Nevada] Legislature intended to enact state overtime compensation law that was generally consistent with

federal law on the same topic." *Id*. at 24–25. The Attorney General stressed that "[t]his intent should be respected." *Id.* at 25.

The Nevada Labor Commissioner has similarly relied on federal regulations whenever they are not inconsistent with Nevada laws. The Commissioner issued an advisory opinion addressing NRS 608.018's requirement that employees be paid "1 1/2 times an employee's regular wage rate" for time worked in excess of 40 hours per week. Office of the Labor Commissioner, Advisory Opinion, December 22, 2016, at 1. Because Nevada law does not define "regular wage rate," the Commissioner interpreted the law to incorporate the method used under federal law. *Id.* at 3. This was appropriate because "[n]either Nevada case law, nor Nevada statutes *specifically prohibit* the use of the [federal] method." *Id.* (emphasis added).

This Court's precedents, legislative history, and executive practice thus all point to the same straightforward conclusion: The definition of "work" under Nevada law follows the FLSA, including the Portal-to-Portal Act.

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

Considerations of "reason and public policy" likewise favor an interpretation that harmonizes federal and state law. *Great Basin Water Network*, 126 Nev. at 196, 234 P.3d at 918. The "use and application of different tests" leads to "confusion" for employers and employees alike. *Buntin v. Schlumberger Tech. Corp.*, 487 P.3d 595, 599–600 (Alaska 2021). "[A] complicated system of workplace laws puts

employees . . . at a serious informational disadvantage," thus hindering them from effectively exercising their rights. Jeffrey M. Hirsch, *Revolution in Pragmatist Clothing: Nationalizing Workplace Law*, 61 Ala. L. Rev. 1025, 1035 (2010). For employers, "[t]he result is that even well-intentioned employers have an extremely difficult task in making their workplaces fully compliant." *Id*. This confusion is "exacerbated" when state and federal laws have a "similar intent" but in fact impose different requirements. David M. Saxowsky et al., *Employing Migrant Agricultural Workers: Overcoming the Challenge of Complying with Employment Laws*, 69 N.D. L. Rev. 307, 314–15 (1993). And "difficulties in understanding, complying with, and enforcing . . . workplace rules means that the policy goals underlying those rules suffer as well." Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 Md. L. Rev. 89, 89–90 (2008).

Divergent federal and state standards also impose unnecessary costs and administrative burdens on employers. Employers must "keep two sets of books" and "increase their operation costs," which "bring[s] about inefficiency." Hearing on A.B. 219 (Feb. 24, 1975), *supra*, at 1. When state wage laws instead "conform with federal law," it "benefit[s] employers, employees, and enforcement agencies." David M. Saxowsky et al., *supra*, at 311.

These policy concerns are heightened in the context of the Portal-to-Portal Act. As Congress recognized, a broader standard would create "immense" liabilities

that could "bring about the financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees." 29 U.S.C. § 251(a). In addition, courts "would be burdened with excessive and needless litigation." *Id.* And employers would be disincentivized from taking measures that provide minimal or indirect benefits to the employer itself, but substantial protection to employees or the public at large. The COVID-19 screenings at issue in this case are the perfect example: Nevada and federal officials urged employers to conduct such screenings because they would promote public health, not because the screenings were somehow necessary to the work of every employee in the State.

D. Other Jurisdictions Have Reached The Same Conclusion

Many other states look to the FLSA when interpreting their own wage laws—and applying that approach, courts have held that similar state laws incorporate the Portal-to-Portal Act. These decisions have repeatedly relied on the temporal relationship between the FLSA and later-enacted state wage laws, and they have reasoned that state legislatures would have been explicit about a departure from federal law in this context.

Oregon's wage statutes, for example, refer to "work time" and "time worked" without providing a definition of either phrase. *See* Or. Rev. Stat. Ann.

§ 653.010(11). The Oregon Supreme Court concluded that "the statute's definition of 'work time' was intended to mirror federal law"—specifically, the FLSA, including the Portal-to-Portal Act. *Buero v. Amazon.com Servs., Inc.*, 521 P.3d 471, 482 (Or. 2022). The court reasoned that while "[t]he text, viewed in isolation, could plausibly take on broad meaning," context and legislative history dictated a narrower interpretation. *Id.* at 483. In enacting these statutes, the Oregon legislature "drew in large measure from federal law," even if it did not "adopt word-for-word every portion of the FLSA." *Id.* at 484. In addition, "[n]othing in the legislative history of the bill indicates that the legislature intended to require compensation for activities that were not compensable under the FLSA, as modified by the Portal-to-Portal Act." *Id.* Because such a decision "would have led to two different rules for determining compensable time," the court expected to see some discussion of the issue—and it was not willing to reach that conclusion without a more overt endorsement from the legislature. *Id.*

The court's analysis in *Del Rio v. Amazon.com Services, Inc.*, 693 F. Supp. 3d 301 (D. Conn. 2023), was similar. There, the court concluded that Connecticut law incorporates the Portal-to-Portal Act. Like Nevada and Oregon, Connecticut requires employers to pay employees "wages" for "hours worked," but "the statute is silent about what constitutes 'work.'" *Id.* at 306. The court noted that wage-hour laws had been enacted decades after both the FLSA and the Portal-to-Portal Act. *Id.*

And the legislative history demonstrated the legislature's understanding that "Connecticut law [is] coextensive with federal overtime law." *Id.* at 307 (quotation marks omitted). The Connecticut legislature had heard testimony about how employers would find two different standards "confusing," and it expressed that its goal was "[t]o extend payment of the same overtime as provided in the federal law." *Belgada v. Hy's Livery Serv., Inc.*, 297 A.3d 199, 210 (Conn. Ct. App. 2023) (quotation marks omitted); *Del Rio*, 693 F. Supp. 3d at 307 (citing analysis in *Belgada*). "Thus, insofar as the [Portal-to-Portal Act] was a federal overtime law when the Connecticut legislature enacted Connecticut's wage laws, . . . the Connecticut legislature intended to incorporate both the FLSA and the [Portal-to-Portal Act] when enacting its overtime scheme." *Del Rio*, 693 F. Supp. 3d at 308–09. There was "simply no extratextual indication" supporting a different interpretation. *Id.* As in *Buero*, the court demanded an express statement from the legislature before it would depart from the Portal-to-Portal standard.

Courts interpreting Kentucky and Ohio law have likewise determined that those states follow the Portal-to-Portal Act. In *Hughes v. UPS Supply Chain Solutions, Inc.*, 677 S.W.3d 273 (Ky. 2023), the Kentucky Supreme Court reasoned that Kentucky law "is ambiguous in that it does not define 'work,'" but the state agency issued regulations that "import[] the Portal-to-Portal Act rule," and the legislature responded with "silence" and "inaction." *Id.* at 278, 280; *see also Vance v.*

Amazon.com, Inc., 852 F.3d 601, 612–13 (6th Cir. 2017) (holding Kentucky law followed the FLSA despite "the lack of Portal-to-Portal Act language" in Kentucky law because there was no "clear indication that the General Assembly considered the revision and deliberately rejected it" (quotations and citations omitted)). And in Ohio, the legislature incorporated the Portal-to-Portal Act by referencing the FLSA "as amended" in the state law at issue. *Thomas v. Amazon.com Servs., Inc.*, 462 F. Supp. 3d 828, 834 (N.D. Ohio 2020).

By contrast, courts that have held that a state does *not* incorporate the Portal-to-Portal Act have done so where there was an express statement of the state legislature's intent to depart from the federal definition of compensable work. For example, California responded to the passage of the Portal-to-Portal Act by revising its laws "to define the term 'hours worked' as meaning 'the time during which an employee is subject to the control of an employer.'" *Frlekin v. Apple Inc.*, 457 P.3d 526, 532 (Cal. 2020) (citation omitted). That is, California expressly codified the pre-1947 FLSA standard, thus indicating that it had "purposely abandoned the narrower standard" in the Portal-to-Portal Act. *Id.* at 532–33. In Maryland, the wage statutes specifically refer to "the federal Fair Labor Standards Act *of 1938*," not the FLSA as amended by the Portal-to-Portal Act. *Amaya v. DGS Constr., LLC*, 278 A.3d 1216, 1240–41 (Md. 2022) (emphasis added). In Pennsylvania, the

"legislature's expressly stated purpose" demonstrated the "evident policy choice" not to follow the Portal-to-Portal Act. *In re Amazon.com, Inc.*, 255 A.3d 191, 202 (Pa. 2021).

The Arizona Supreme Court has also held that Arizona law did not incorporate the Portal-to-Portal Act, but that ruling came on the backdrop of the specific "historical sequence" of Arizona's overtime laws; Arizona courts had long interpreted state law to depart from the federal standard and the legislature had repeatedly amended the statute without refuting that interpretation. *See Roberts v. State*, 512 P.3d 1007, 1013, 1015 (Ariz. 2022). Based on that history, the court concluded that the state law "does not expressly manifest a legislative intent to incorporate the entirety of the FLSA, including the Portal Act and implementing regulations, into Arizona law." *Id.* at 1014.

There is no evidence here indicating a legislative intent to break from the FLSA and impose a different standard under Nevada law. Nevada law fits easily into the first category of cases, where context and legislative history demonstrate that the legislature chose to adhere to well-established federal standards.

II. The District Court Applied The Wrong Standard And Misinterpreted Nevada Law

The district court erred by adopting a strained reading of the FLSA that interprets the Portal-to-Portal Act not as an amendment of what is "work" under the FLSA but instead as a provision creating a new narrower category of "compensable

work" (a term with no grounding in the text) while leaving the meaning of "work" undisturbed. The simpler reading is the better interpretation—after the Supreme Court of the United States interpreted "work" expansively in the mid-1940s, Congress responded with the Portal-to-Portal Act and amended what constitutes "work" under the FLSA.

The Sixth Circuit's panel majority in *In re: Amazon*, which provided the basis for the district court's reasoning below, suffers from the same interpretive error and offers no basis for the district court's ruling. The panel reached that result by disregarding this Court's consistent policy of reading Nevada's wage laws in parallel with their federal counterparts, and by devising the same contorted reading of the FLSA and Portal-to-Portal Act adopted by the district court. Judge Batchelder's dissent, by contrast, correctly reads Nevada's wage laws, based on the decisions of this Court, to work harmoniously with the FLSA. This Court should follow that approach and hold that Nevada law incorporates the Portal-to-Portal Act.

A. The Portal-to-Portal Act Amended The FLSA's Definition of Work

The district court erred in concluding Nevada law silently departs from the FLSA. 2 App. 276. At the outset, the court artificially divided the inquiry into two steps by fabricating a distinction between "work," a term used in different formulations throughout the FLSA, and "compensable work," a phrase with no basis in the statutory text. 2 App. 277. The district court first asked whether Nevada law

incorporated the FLSA's definition of "work" (concluding it did), and then whether Nevada law incorporated the Portal-to-Portal's understanding of "*compensable* work" (concluding it did not). *See* 2 App. 275–277 (emphasis added). The court then reasoned that Nevada law "explicit[ly] . . . parted ways" with "the FLSA provisions on what is compensable work." 2 App. 276–277. The alleged conflict lies in NRS 608.016's mandate that employers "pay to the employee wages for each hour the employee works." According to the district court, this is inconsistent with the Portal-to-Portal Act because the latter does not require compensation for every hour worked; rather, it exempts certain activities from an employer's obligation to pay. 2 App. 276–277.

There is no basis for this distinction between "work" and "compensable work." In enacting the Portal-to-Portal Act, Congress clarified what counts as "work" under the FLSA. Thus, if Nevada law "look[s] to the FLSA for the definition of work"—as the district court agreed that it does—then Nevada law necessarily looks to the definition of work *as set forth in the Portal-to-Portal Act*.

The Portal-to-Portal Act provides that "no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938 . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation" for hours spent on certain preliminary and post-liminary activities. 29 U.S.C. § 254(a). Far from creating a novel bifurcation

between compensable and non-compensable work, the Act reflected Congress's view that the FLSA "has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities," and causing an economic "emergency." *See id.* § 251(a)–(b). In its view, then, Congress enacted the Portal-to-Portal Act to correct erroneous rulings that "disregard" the "long-established customs" setting the scope of work adopted in the original FLSA. *Id.* And, consistent with this intent, Congress made the amendment retroactive, abrogating the onslaught of cases filed in the wake of the Supreme Court's expansive rulings. *See, e.g.*, *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 259 (2d Cir. 1948); *Manosky v. Bethlehem-Hingham Shipyard*, 177 F.2d 529, 532 (1st Cir. 1949).

Courts have therefore properly understood the Portal-to-Portal Act as an amendment to the FLSA, rather than as a separate statute that stands alone. *See, e.g.*, *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 910 (9th Cir. 2004) ("The Portal-to-Portal Act of 1947 amended the FLSA to exclude the following activities from 'working' time . . . ."); *Chagoya v. City of Chicago*, 992 F.3d 607, 617 (7th Cir. 2021) ("The Portal-to-Portal Act amended the FLSA by creating two categories of work-related activities for which employers were not liable."); *see also Dep't of Labor v. East Penn Mfg.*, --- F.4th ---, 2024 WL 5163218, at *2 (3d Cir. Dec. 19, 2024) ("Congress amended the statute to provide that preliminary walking activities are

not work"). The definition of "work" thus comes from *both* the FLSA and the Portal-to-Portal Act—not one or the other. As the Supreme Court has explained, "[o]ther than its express exceptions for travel to and from the location of the employee's 'principal activity,' and for activities that are preliminary or postliminary to that principal activity, the Portal-to-Portal Act does not purport to change this Court's earlier descriptions of the terms 'work' and 'workweek.'" *IBP, Inc.*, 546 U.S. at 28. In other words, the Portal-to-Portal Act expressly clarified that certain activities do not constitute "work" under the FLSA; it did not create a competing category of "compensable work" covering only a subset of all "work."

B. The Sixth Circuit's Decision In *In Re: Amazon* Is Not Persuasive

Throughout its decision, the district court relied heavily on the Sixth Circuit's decision in *In re: Amazon.com, Inc. Fulfillment Ctr. Fair Lab. Standards Act (FLSA) & Wage & Hour Litig.*, 905 F.3d 387 (6th Cir. 2018), which the court found "very persuasive." *See* 2 App. 276–277, f279. But the Sixth Circuit's decision made the same fundamental mistakes by splitting the concept of "work" from "compensable work" under the FLSA and finding a conflict with Nevada law on that basis. *See In re: Amazon*, 905 F.3d at 399–402.

The Sixth Circuit made another significant misstep, too: It required the Nevada Legislature to "affirmatively adopt" any federal law that it intends to follow. *In re: Amazon*, 905 F.3d at 404. The court explained that, if "the Nevada legislature

decides to explicitly incorporate the Portal-to-Portal Act into its Code, it can do so." *Id.* But until then, the court would refuse to infer incorporation. *Id.*; *see also id.* at 403 ("That the Nevada legislature expressly adopted some federal regulations indicates that its failure to adopt others was intentional."). That is plainly contrary to this Court's approach to wage-hour standards, which presume harmony between state standards and the FLSA absent an explicit contrary intent. *Supra* § I.A.

Judge Batchelder, in dissent, more faithfully applied this Court's decisions. *In re: Amazon*, 905 F.3d at 408. As she observed, the majority's analysis was backward: "Nevada courts look to the FLSA unless Nevada's statutory language is materially different." *Id.* She acknowledged that "the Nevada Supreme Court 'has signaled its willingness to part ways with the FLSA where the language of Nevada's statutes has so required,'" but explained that "it appears to limit that willingness to situations in which it finds 'substantive reason to break with the federal courts.'" *Id.* (quoting *Terry*, 130 Nev. at 886, 336 P.3d at 956–57). And there was no reason to do so here. In fact, Judge Batchelder noted, this Court has *already* held that NRS 608.018 tracks the FLSA. *Id.* at 409 (citing *Csomos v. Venetian Casino Resort, LLC*, 128 Nev. 891, 381 P.3d 605, at *3 (2012) (unpub.)). And, Judge Batchelder observed, this Court even "decided the meaning of 'work' based on the FLSA and federal case law" in another unpublished decision. *Id.* at 409 (citing *Rite of Passage v. Nevada Department of Business and Industry*, 2015 WL 9484735, at *1 (Nev.

Dec. 23, 2015)). While Judge Batchelder recognized that these cases did not "establish mandatory precedent," they at least indicated how this Court would likely rule. *Id.*

Judge Batchelder—and not the Sixth Circuit majority—correctly interpreted this Court's case law. *Terry* clearly states the Nevada legislature must "signal[] its intent . . . [to] *deviate* from the federally set course." *Terry*, 130 Nev. at 888, 336 P.3d at 958 (emphasis added). No explicit statement is needed to *follow* federal law. *See id.*

The majority's contrary approach is particularly confusing because it abandons the approach applied by the Sixth Circuit when reviewing the law of another State. Just one year prior, the court had been tasked with deciding whether Kentucky law incorporates the Portal-to-Portal Act. *See Vance*, 852 F.3d at 601. Kentucky law requires employers to pay overtime for hours "in excess of forty (40) hours in a work week," but does not define "work." Ky. Rev. Stat. § 337.285(1). The Sixth Circuit reviewed Kentucky precedent and concluded that "the Kentucky Supreme Court looks to federal precedent for interpretive guidance" unless state law contains "an express, affirmative departure" from federal law. *Vance*, 852 F.3d at 610–11.

The overtime law contained no such departure, "only the state legislature's failure to explicitly incorporate certain Portal-to-Portal Act terms." *Id.* at 611. Given the FLSA's role as a "model statute" for employment law and the well-

established federal case law interpreting it, the Sixth Circuit demanded "a clear indication that the General Assembly considered the [Portal-to-Portal Act] and deliberately rejected it." *Id.* at 612 (quotation marks omitted). As the court explained, "[m]odel-act-based statutes are better interpreted with reference to the circumstances existing at the time of passage," including "the flood of litigation provoked by the Supreme Court's early permissive rulings." *Id.* (quotations omitted). "If the Kentucky General Assembly intended to expose employers to the type of liability Congress foreclosed in the Portal-to-Portal Act, one may reasonably assume it would have done so affirmatively." *Id.* So too here.

This Court should reaffirm the approach that it has already applied countless times and interpret Nevada law to "follow the FLSA on this issue" because of the close parallels between the statutes and the lack of any express statement to the contrary. *In re: Amazon*, 905 F.3d at 409 (Batchelder, J., dissenting).

CONCLUSION

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

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that on December 23, 2024, a true and correct copy of the forgoing brief was transmitted electronically through the Court's e-filing system to all counsel of record.

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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 10,463 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.

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