IN THE SUPREME COURT OF THE STATE OF NEVADA

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

JOINT APPENDIX VOL. 2

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DWIGHT MALLOY, Plaintiff, v. AMAZON.COM SERVICES, LLC, Defendant.	Case No. 2:22-cv-00286-ART-VCF Las Vegas, Nevada Thursday, March 2, 2023 11:03 A.M. - 12:24 P.M. Courtroom 6C MOTION HEARING ***CERTIFIED COPY***

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THE HONORABLE ANNE R. TRAUM
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES: (See next page.)

REPORTED BY: PAIGE M. CHRISTIAN, RPR, CRR, CCR #955
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LAS VEGAS, NEVADA; THURSDAY, MARCH 2, 2023; 11:03 A.M.

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P R O C E E D I N G S

COURTROOM ADMINISTRATOR: This is the date and time set for oral arguments regarding defendant's motion to dismiss in Case No. 2:22-cv-00286-ART-VCF, Dwight Malloy vs. Amazon.com Services, LLC.

Counsel, please state your appearances for the record.

MR. FOTY: Good morning, Your Honor. Don Foty on behalf of the plaintiffs.

THE COURT: Good morning.

MR. PAEK: Good morning, Your Honor. Montgomery Paek of Littler Mendelson on behalf of defendant.

THE COURT: Good morning. So, Mr. Paek, this is your motion.

Would you like -- so I was thinking we'll just have argument. I have some questions. And I'll let you start and then have the final word. But I was -- you know, see how long you take, but maybe 20 minutes a side, or so. See how it goes. Okay. Thank you.

MR. PAEK: Thank you, Your Honor.

Your Honor, the motion before the Court has several alternative arguments, as the Court is aware from the briefing. But the most straightforward test with the clearest guidepost for

the Court is the Portal-to-Portal Act analysis.

To look at that analysis, we must first clear up some mischaracterized framework in the briefing. The question is not whether Nevada has adopted the Portal-to-Portal Act separately from the FLSA and its developed -- developed body of case law. That has never been the test set out by the Nevada Supreme Court.

Instead, the Nevada Supreme Court has held that it shall follow federal minimum wage and overtime law because Nevada's minimum wage and overtime law are modelled after the FLSA. And that includes, by necessity, amendments and related case law, unless the Nevada statutes in question, quote, signals any attempt -- intent to deviate from federal law. And that's the holding in Terry vs. Sapphire.

THE COURT: But isn't the statute -- I'm thinking of, particularly, 608.016.

Isn't the text of that statute a reflection of the legislature's intent that every hour worked gets paid?

MR. PAEK: So the 608.016 gets a little bit more -- it does talk about each hour worked, but that language can't be looked at in a vacuum. And that gets into the legislature's intent of passing that language as to trial and breaking periods.

There is some additional language in 608.016 that was amended later where 608.016 added --

THE COURT: Ask you briefly about the -- the language

on trial periods and break periods, isn't the sum of that language just that work gets paid?

MR. PAEK: No. That's -- that's -- it's not that clearcut, Your Honor. It's -- it's different than the way it's been characterized because really what it's talking about is periods of work. And it's not necessarily conflicting with the definition of work in the FLSA.

And that's the issue is that Terry vs. Sapphire, Nevada Supreme Court said the language can actually be different. It can be different, but the test is whether or not it's, quote, conflicting or, quote/unquote, materially different. And that distinction is important because plaintiff here concedes that Nevada does not define, quote/unquote, work or compensable work. Instead, it asked this Court to look to the FLSA definition of work in cases like Steiner to be that gap filler.

That is the major disconnect in plaintiff's arguments because the FLSA body of case law on compensable work is not separable from Portal -- the Portal-to-Portal Act analysis. In other words, plaintiff --

THE COURT: I mean, I -- I read on the -- the *In Re: Amazon* case --

MR. PAEK: Yes.

THE COURT: -- Fifth Circuit MDL case.

MR. PAEK: Yes.

THE COURT: I mean, that case fairly carefully parses

this issue about differentiating between what is work and what is compensable work under the FLSA --

MR. PAEK: Yes.

THE COURT: -- and signals that there is a distinction there; that --

MR. PAEK: So --

THE COURT: -- Nevada requires that work be paid; that the FLSA, sort of, more narrowly makes exceptions to more narrowly apply what actually must -- not just what is work but what is compensable; and that there's no analog in the Nevada law for that and actually may conflict with the requirement that all work get paid.

MR. PAEK: So, what I would say to that, Your Honor, is the *In Re: Amazon* analysis doesn't -- doesn't talk about -- doesn't talk about why 608.016's language is conflicting with what the FLSA has as work or compensable work.

In other words, in other words, it doesn't -- unlike what the Nevada Supreme Court held in the *Dancer v. Golden Coin* and *Thomas v. Yellow Cab*, those are the two cases where Nevada did find conflict. And what they cited to in those cases, for example, in *Dancer*, Nevada has an exclusion of tips from the minimum wage whereas the FLSA requires -- gives you a tip credit.

And there, they said that is an example of conflicting language. We have two totally opposite terms and two totally different opposite meanings.

In *Thomas v. Yellow Cab*, there was a similar analysis because what happened when the Minimum Wage Amendment or the MWA was passed into the Nevada constitution, it actually had a different exception list to what existed before in the preexisting NRS 608.260 minimum wage exceptions list.

In that case, the issue was whether or not drivers were still included when they weren't included on this new list, and that was another example where the Nevada Supreme Court said it's clearly conflicting.

So I think that's where it has to stand, Your Honor, is that it has to be clearly conflicting. It has to -- there has to be an analysis that -- it clearly cannot fit into the same meaning that because it's the opposite, then they can't stand together.

So, in other words, plaintiff here --

THE COURT: Wait. Say that again. Because they can be the opposite and not conflict --

MR. PAEK: They have to be the opposite of each other to be conflicting. In other words, in other words, when looking at the -- in other words, is 6 -- there anything in 608.016 that is clearly the opposite of what would be the definition of work in the FLSA?

And that's what they can't point to. They can -- they --

THE COURT: Since there is no conflict on the

definition of work --

MR. PAEK: But that's -- yeah. That's what we're talking about here. There is -- yeah. It's silent as to work is what the NRS is, and that's really what we have to zero in on because that's what the argument here is, is not about the -- it's about the definition of work and what is the definition of compensable work.

And so, that's why plaintiff here can't pick and choose one part of the FLSA and then ignore another part. That's wrong. Nevada looks to the FLSA and its amendments and developed case law, as enunciated, to see whether or not there is a conflicting or materially different statute, and if there's not, then we just adopt it.

Here, the parties do not dispute that we must look to what the Nevada Supreme Court would decide since all of the claims are made under the Nevada statutes and NRS 608 or the Minimum Wage Amendment.

Plaintiffs also do not dispute that Nevada modelled its minimum wage in 1965, the predecessor statute, NRS 608.250, and overtime laws in 1975 after the FLSA and the Portal-to-Portal Act was passed in 1947. That's decades after those federal laws were passed and developed.

Thus, in *Terry v. Sapphire*, which this Court has to look at, the Nevada Supreme Court examined whether or not Sapphire's performers were employees subject to the Nevada

minimum wage or independent contractors outside the scope of employees.

And I think this is where the *Terry* analysis is very instructive for this Court, Your Honor, because when examining the definitions -- and this is what I alluded to earlier -- of employer in 608.011 with definition of employer in the FLSA, the Nevada Supreme Court did note that those definitions were different. However, they weren't materially different enough to change the adoption of the Economic Realities Test, which like the integral and indispensable test here, arises from the case law that has been developed off the FLSA and not the actual language that's in the statute. All that analysis should apply here.

In *Terry*, the Nevada Supreme Court did not show any NRS statute that adopted the Economic Realities Test. That's what they're saying needs to be done here. It would turn *Terry* on its head, because *Terry* -- because there is no NRS statute in 608 or anywhere that references the Economic Realities Test. That's the same analysis, just like, for example, it's a variation of their argument. There is no language in the definitions section of NRS 608 that expressly adopts the FLSA definition of work.

You can use that same argument against their arguments that if there's no -- if there's no statute in NRS 608 referencing the FLSA at all, why should we adopt the FLSA at all?

And NRS -- if they want to just rely on the Motor Carrier Act exemption, then really what their argument stands for is only when you reference something directly should it be adopted. That means all of NRS 608 would not on -- on FLSA. It would just be the Motor Carrier Act exemption. And that's not the -- that's not the case, and that's not what the Court detailed in *Terry v. Sapphire*.

That's why the conflicting or materially different analysis is so important to see whether or not -- in other words, there's an assumption. There's an assumption that if those are not there, all of our statutes are modelled after FLSA. We're going to be consistent with it.

Thus, since plaintiff cannot cite any language in Nevada overtime or minimum wage that conflicts with or is materially different than the FLSA as to work, this Court must follow the Portal-to-Portal Act and the integral and indispensable test.

Now, that test, as laid out by the U.S. Supreme Court in --

(Whereupon, the reporter interrupts to preserve the record.)

THE COURT: Slow down.

MR. PAEK: Sorry. -- in *Busk v. Integrity*, that the first step of the Portal-to-Portal Act analysis is pinpointing the, quote, principal activities, meaning the activities that the

employee's employed to perform. Here, plaintiff --

THE COURT: Let me just ask you a question. If you go back, so you're talking now about the Portal-to-Portal Act and this -- the, sort of, whether this is compensable work.

MR. PAEK: Yes.

THE COURT: Can you just address the definition of work in terms of -- are you conceding that this was primarily for the benefit -- like the definition of work before you get to Portal-to-Portal Act, do you concede that Amazon -- that this was primarily for Amazon's benefit on that part?

MR. PAEK: No. And I --

THE COURT: Can you address that?

MR. PAEK: Yeah, I can. I can address that, Your Honor.

THE COURT: Thank you.

MR. PAEK: Even under the primarily for the benefit analysis, plaintiff's claims fail. In its complaint, plaintiff acknowledges that the COVID virus killed more than 900,000 Americans, and COVID screenings were to provide a safe workplace.

Reducing the spread of COVID was a benefit, not only to plaintiff, but also a benefit to many people both inside and outside Amazon.

Employees received the benefit of staying healthy. Their families and friends received the same benefit. The community, in general, benefitted from reducing the spread of

COVID. Customers and the community received the benefit of having an alternative provider of goods when in-person goods were limited and restricted.

Plaintiff alleges that Amazon had the benefit of a healthy workforce. While this is true, this is, by definition, secondary to all of those other benefits to health because that's what COVID screenings are for.

At most, taking that all into account as to Amazon and its employees, there was a secondary or mutual benefit. But that doesn't meet the "primarily for the benefit" standard, and that analysis is similar to the analysis done by the *Perez v. Walmart* court, where they looked at COVID screenings for Walmart employees.

THE COURT: Can I just ask you, in -- was Amazon required by law to implement COVID screenings --

MR. PAEK: So --

THE COURT: -- in order to keep --

MR. PAEK: -- so the regulations that are attached to our motion, Your Honor, and the directive did not specify COVID screenings. What they -- what the government mandated were that employees -- and we're all in this together -- come up with -- come up with ways to reduce exposure.

And, of course, as this Court is well aware, as everyone who lived through the pandemic was aware, that included a combination of things. It could be thermal screenings. Some

employers did that. Some employers didn't. But it was a combination of social distancing, masking, restrictive workspaces. You know, there was a combination of --

THE COURT: But is it your position that Amazon could have, as an essential business, under Nevada law -- and I realize it may be more finely sliced in terms of exactly what period we're talking about.

But was it your -- is it your position that Amazon could keep its doors open, consistent with legal directives in Nevada at the time, and do no screening at all --

MR. PAEK: Well --

THE COURT: -- none?

MR. PAEK: -- so that's part of the -- that's part of the presumption that's made in the -- in the allegations that thermal screenings -- so to -- to assume that, you would have to assume that thermal screenings and thermal screenings alone prevented any COVID outbreak that leads to the scenario that they talk about in this complaint that would have had a mass outbreak in the workforce that would have caused an immediate disruption or shutdown.

We haven't seen that. That's what they --

THE COURT: I just -- I just want an answer to the question.

Could -- is it Amazon's position that during the pandemic, the entire period, so regardless of -- you know, I

realize different things may have been in effect at different times.

But is it Amazon's position that it could have kept -- as an essential business, it could have kept its doors open to its warehouses without implementing any COVID screening procedure, not necessarily the one that was implemented, but that you could -- that Amazon had the choice to keep its doors open during that period and could have done nothing and complied with Nevada legal directives --

MR. PAEK: So -- so -- I understand your question, Your Honor. But not doing the thermal screening, yes. My answer would be yes because that wasn't the only thing they did.

So, in other words, that question hinges on whether or not thermal screenings alone would have prevented outbreaks.

Could they have done alternative measures without the thermal screenings such as they did -- social distancing? Employee self-reporting? Not coming to work when they're sick? Were all those factors?

Those all have to be considered and included in that analysis because all of those were -- although their complaint just focuses on the thermal screenings alone, Amazon actually did a variety of things that all contributed to that --

THE COURT: Right. But my question is, wasn't there a legal requirement to do something, even if Amazon may have --

MR. PAEK: Yes. But --

THE COURT: -- had a choice about what that was?

MR. PAEK: But the mandate was not that they had to do thermal screenings. That was one option --

THE COURT: They had to do something?

MR. PAEK: They had to do -- yeah.

THE COURT: Then Amazon chose that something to be the thermal screenings that are being challenged --

MR. PAEK: Along -- along with everything else.

THE COURT: Right.

MR. PAEK: Along with everything else.

THE COURT: I'm just trying to situate this case different from -- it's different from the antitheft screenings in the sense that no one told --

MR. PAEK: Oh.

THE COURT: -- Amazon that it had to screen for theft --

MR. PAEK: That's true. That's correct, Your Honor.

THE COURT: -- and that was 100 percent, you know, a choice that Amazon made. Whereas here, Amazon may have had a choice about how to implement COVID-19 procedures of some kind, but it didn't have a choice about whether to do nothing or something. It had to do something.

MR. PAEK: That's correct, Your Honor --

THE COURT: Okay.

MR. PAEK: -- that's correct.

So as Your Honor alluded to, yeah. You know, that -- that goes back -- that goes back to what is the -- that touches on the -- the *Busk* analysis. As Your Honor pointed out, the security screenings are different than was ordered here. However, the underlying activity is the same in both cases. And that's why that case is so instructive.

In other words, what was their principal activity?

So in the *Busk* case, the U.S. Supreme Court focused on -- okay. The Ninth Circuit ruled that activities that are necessary can be included, but the U.S. Supreme Court said really what we need to first focus on is the principal activities. That means the activities that the employee's employed to perform. And in that case, like here, similarly, in his amended complaint, plaintiff alleges that the tasks that he was assigned to was, quote -- in paragraph 14 of his complaint -- moving boxes, stacking packages, and loading boxes.

He does not allege that Amazon employed him to get his temperature checked or answer questions about COVID, obviously. Thus, screenings were both separate from and preliminary to plaintiff's principal activities, meaning it is compensable only if it is both, quote, integral and indispensable to his principal activities --

THE COURT: Can I just stop you for a second?

So now you're talking again about the compensable aspect?

MR. PAEK: Yes.

THE COURT: And before, I was just sort of backtracking a little bit to go to the primarily a benefit to Amazon.

I just want to ask you, so Amazon was an essential business during the pandemic --

MR. PAEK: Yes.

THE COURT: -- that was allowed to keep its doors open?

And, I guess, either in Nevada or elsewhere, did Amazon close any of its warehouses during the pandemic due to, sort of, a workforce-related --

MR. PAEK: Yes. Those are not in the facts. I do -- I do -- those aren't in the facts for Nevada. I don't have all the -- all the --

THE COURT: Okay.

MR. PAEK: -- information on the other facilities.

So going back to the -- briefly to the *Busk* analysis, Your Honor, it -- the COVID screenings don't satisfy either prong of the integral and indispensable test because integral, as laid out in *Busk*, is an intrinsic element of principal activities while indispensable means an employee cannot dispense with it if he is to perform his principal activities.

The underlying activity here, as stated, is the same as in the *Busk* court. So there, in *Busk*, the Court held that

they were, quote, not an intrinsic element of retrieving products from warehouse shelves or packaging -- packaging them for shipment and that they could have, quote, been eliminated without impairing the employee's ability to complete their work. Thus, the security screenings in that case were noncompensable preliminary -- postliminary activities.

But here, the analysis is the same. First, getting a temperature check and answering questions about COVID-19 symptoms or exposure were not integral to plaintiff's principal activities because those screening measures are not intrinsic elements of moving, stacking, or loading boxes. And second, the alleged screening procedures were also not indispensable to plaintiff's principal activities because plaintiff still would have been able to move, stack, and load boxes had Amazon eliminated those procedures.

And this is the same analysis that the *Pipich v. O'Reilly Auto Parts* court applied --

THE COURT: Are those -- that *Busk* analysis, just to be clear, that was based on an FLSA claim, and now we're just looking at Nevada claims?

MR. PAEK: Yes. But the --

THE COURT: All of that sort of hinges on the Portal-to-Portal Act applying --

MR. PAEK: Yes.

THE COURT: -- to this specific kind of work?

MR. PAEK: That Nevada looks to the FLSA and incorporates the Portal-to-Portal Act. That's correct.

THE COURT: Okay. I guess I -- I understand that integral and indispensable analysis sort of tethering the specific overlay of -- of some kind of a screening to the job. I guess -- and I realize that the Portal-to-Portal Act covers postliminary -- preliminary and postliminary activities. But this is a little bit different, because if Amazon doesn't have a screening procedure -- granted, it may not be this screening procedure.

But if it doesn't have any workers to do the work, is it -- does it, then, become, sort of, integral and indispensable to the job?

I mean, I think Amazon -- if the governor said, If you don't do this screening or some kind of screening, you are not going to be allowed to operate your warehouses, I think that Amazon would likely be making an indispensability argument to the governor about whether this has to be done. So I'm just wondering if that translates to the actual --

MR. PAEK: Yeah. That kind of goes back to what Your Honor was touching on earlier about the benefit argument. And -- and really, if I can -- if I can elaborate a little bit more on that, that's where, I think, we're comparing the *Boone* and *Vaccaro* reasoning versus the cases we've cited, which are *Pipich v. O'Reilly Auto Parts*, *Perez v. Walmart*. And I think

when the Court looks at those cases, we've got cases on both sides doing the analysis with basically the same set of facts.

And so, what -- what should the Court look to, to see what is the "primarily for the benefit of"?

And I think the key to it is that none of those cases are binding on this Court. They're all persuasive. So if they're all persuasive, I think it really gets to, well, how deep was the analysis on the "primarily for the benefit" on each side, and what did one Court point out that the other Court didn't address?

And I think that's where *Pipich v. O'Reilly Auto Parts* and *Perez v. Walmart* are clearer, because they delve deeper into the "primarily for the benefit" analysis. They talk, as this Court alluded to earlier, as the government mandate being a part of it, about the benefits to the community. And they kind of looked at it overall and looked at all of those and said, Well, in the wash, in *Perez v. Walmart*, we think the closest it comes down to is a mutual benefit, and that's not enough.

That's -- we would -- they held that there is a benefit to the employee, there is a benefit to employer, but that doesn't meet the test. And I think -- I think that analysis and the *Perez* analysis and the *Pipich* analysis get a lot closer to considering all those factors, whereas *Boone* doesn't.

It's -- and it's -- you know, Your Honor's kind of touched on this with the -- the government mandates. It's not as

if the COVID screenings were a practice, you know, unique to Amazon as a business, either. I mean, employers of all types, public institutions, even individualized citizens were all screening from the same virus in different areas and all benefitted from those combined efforts. Our community all benefitted.

So, in sum, it can't be just recharacterized as primarily for the benefit of Amazon, and I think that's what the *Perez* court touched on --

THE COURT: I guess, I would -- it might look a little different factually if the screenings were happening when the workers left the factory. Then you could argue that that benefit is sort of for the community or their families, right, to make sure it's not coming, sort of, on the tail end of the work as opposed to the beginning.

It might be a little different if we're talking about precautions that are specific to Amazon delivery people. And I realize that plaintiffs have made a sort of -- the suggestion that, like, a virus can travel in packages. I think that's probably not accepted science at this time anymore, but -- but if we're looking at something that's more on the back end.

But what we're looking at is when you walk into the warehouse door about activity keeping the warehouse safe and other employees safe, that's -- and with the caveat that people could be sent home and you need to have another worker who passed

those screening tests. But if it -- it does seem that Amazon can't keep its -- can't operate its warehouse at capacity if it doesn't have the worker -- workforce ready to go.

MR. PAEK: Well, I mean, I think that goes, kind of, to how -- kind of, like, how to effectively prevent outbreaks. I guess, the --

THE COURT: Outbreaks at the warehouse?

MR. PAEK: Yeah. I mean, I guess, the corollary to that is if you were to wait till the end of the day, I mean, there's a chance that someone could bring it in. And so, I mean, it gets back to what were, kind of, the collected community's thoughts on what -- what one preventative measure that can be instituted and that can be a part of this, kind of -- these other preventative measures as a whole to just try to reduce bad effect on people's health.

And I -- I get what Your Honor's saying, but I think -- I think the idea is that if the infected person comes in to begin with, that kind of -- it's not going to be cured on the back end, I guess, is the --

THE COURT: Right. But I just -- the location and timing of the screening makes a difference in terms of who is the primary beneficiary of that screening, because Amazon -- I think there's an argument to be made that Amazon is not doing this for the public welfare, and Amazon is not doing this for the families.

Amazon -- I can see your argument, it may be beneficial to the workers that workers are coming to a place that is -- where they're not going to be infected by other workers. But it does seem like the location is specific to making sure that Amazon can have its warehouses operating and keep sickness out of its warehouses, not --

MR. PAEK: I mean, I -- yeah. I don't think it can be -- I understand what Your Honor's saying. I don't know that it can be parsed out like that, because I think -- I think the screenings always went to both. I mean, it always -- it wasn't just -- it was also a means to protect the health of workers and prevent uninfected workers from possibly coming to a place where they might get infected.

I understand that it's kind of connected and intertwined there --

THE COURT: Right.

MR. PAEK: -- but I don't know if --

THE COURT: I mean --

MR. PAEK: -- I don't know if it can be just separated out as to just Amazon's operations without including that component --

THE COURT: Right.

MR. PAEK: -- because the reality is that Amazon without -- without COVID operated without any of that. So --

THE COURT: Right. But I -- but it may just be that

those issues are more factually complex than what might be, sort of, sorted out at a motion to dismiss stage like in *Vaccaro*.

MR. PAEK: Well, I mean, I understand what Your Honor's saying. I think that's -- that's where -- I think that's -- as I mentioned earlier, I think that's where the analysis done by other courts looking at *Busk*, looking at -- looking at the same COVID screenings in *Perez v. Walmart* and *Pipich*, I think that's where they considered the same factors that this Court should consider. And I think -- I think that's where the analysis should kind of lay is -- is the Court kind of looking at those analyses and seeing which ones are the most complete.

THE COURT: Okay. You might want to just spend -- I'm going to give you some time for rebuttal, but you might just want to address to the -- so much of this, kind of, has -- of the four claims really hinges on the definition of work and whether we're looking at work or compensable work under the FLSA.

But if there's anything specific to the minimum wage overtime termination issues, maybe you could address that.

MR. PAEK: Sure, sure, Your Honor.

So I think -- well, as Your Honor is already aware, those -- those compensability issues are kind of the crux of it, and the rest of our arguments are alternative arguments should the -- should the Court find otherwise.

So as to the 608.016 argument, the minimum wage, overtime, 608.050, I can briefly touch on those. The 608.016, as I -- as we talked to at the beginning of the hearing, that language can't, as I said, be looked at through a vacuum. The Nevada Supreme Court says not to look at statutes through a vacuum.

And really, there is a question as to what it stands for. It was passed in 1985, and the statute, if -- if you look at the legislative history, has always stood for the fact that they wanted to make sure that trial and breaking periods were not excepted from work -- for each hour of work.

So as I talked about earlier, that statute's been amended since then by 608.0195 and 608 --

(Whereupon, the reporter interrupts to preserve the record.)

MR. PAEK: 608.0195 and NRS 608.215. And those statutes deal with sleep periods for employees working at a group residential facility or domestic household employees and whether or not their meal and sleep period can be excluded by agreement with the employer from work.

So I would -- I would state to the Court that in line with the legislative history, those are very different issues of periods of time than what the plaintiff is trying to argue here, because what the plaintiff is arguing for is what's known in other jurisdictions and under the FLSA as gap time or straight

time --

THE COURT: Right. There is -- there is language here. I mean, this statute, 608.016, says, with the exception of those two provisions that you just mentioned, An employer shall pay to the employee wages for each --

MR. PAEK: Uh-huh.

THE COURT: -- hour the employee works, period.

How -- so it's important to give force to that language.

MR. PAEK: And to give force to that, you have to read it with the second sentence, which is, An employer shall not require an employee to work without wages during trial or breaking period.

And as to a question as to, well, does it just mean that first sentence and that sentence alone, or does it combine with the second one? That's why we look to the legislative history. And that's why, when looking at the legislative history, it becomes clearer that that's what they were talking about. It's not the best worded statute, but it's a far cry from the gap time statute that they want.

And an example of that, Your Honor, is in their amended complaint, because in paragraph 61 of their amended complaint, they have, under their elements for their NRS 608.016 claim, what they want. They say, quote, Plaintiff demands payment by defendant at their regular hourly rate of pay or the

minimum wage rate, whichever is higher, for all hours worked during the relevant time period.

That is like a gap time statute, Your Honor, where it's filling in the gaps between what is minimum wage and overtime. And this language, what they're asking for as part of their 608.016 is nowhere in the statute of 608.016 or the legislative history.

That's why what their -- their claim is really -- is trying to recharacterize 608.016 to a gap time claim, and there's no legislative history or language in the statute for that. That's the problem.

THE COURT: So if you -- okay. Let's -- let's say, I was reading this paragraph 61, and I was just taking out of the equation what rate would be appropriate but solely looking at the request to be paid for all hours worked.

Would -- that is a 608.016 claim --

MR. PAEK: In -- in the context of all hours worked includes trial and breaking periods and then amended again to say, sleep and meal -- sleep periods and meal and sleep periods will not be excluded, unless there's agreements and you meet these exceptions. That's all -- that's all part of that statute, too --

THE COURT: Do you have a case that actually parses this point you're making about --

MR. PAEK: So --

THE COURT: -- how all hours worked means something other than all hours worked? because I think it's fair to read that second sentence as saying all hours worked means all hours worked and doesn't exclude this category and doesn't exclude another category.

MR. PAEK: So the best we have, Your Honor, is the actual legislative history of 608.016 --

THE COURT: Right. But I don't need legislative history if I can look at the statute.

MR. PAEK: Well, that's -- that's the disagreement on the statutory language --

THE COURT: Okay. Fine.

MR. PAEK: Yeah. So going back to the other alternative arguments, Your Honor, there's the minimum wage calculation and whether or not they met the -- standard for a calculation. That's a pretty straightforward argument that even under -- whether it be FLSA law or Nevada law, through the Nevada regulations promulgated by the labor commissioner and nothing in the -- to the contrary in the Nevada statutes that whenever you're trying to determine minimum wage, you use the workweek method of calculation.

Under both Nevada and federal law, employers can avail themselves to what is known as peace rate payment or other alternative forms of payment. And both federal authorities and Nevada regulations have held that whenever that is done, you take

the amount of hours worked and -- I mean, you take the amount of pay given, and you divide it by the hours worked to get a regular rate.

And that's the problem in this case is that the upper tier rate in 2020, which was the maximum rate that plaintiff had, was $9 per hour. Plaintiff was always paid at a 15- to 16-dollar-an-hour rate. He does not dispute that he was paid overtime for the weeks where he worked 50 hours.

A straight calculation of that shows that it doesn't meet the one-and-a-half time threshold, so they haven't shown a minimum wage violation because they haven't shown that he dipped below the minimum wage at any time during his work.

THE COURT: But you would agree just with the province that the plaintiff wasn't paid at all for the COVID screening times that he's challenging --

MR. PAEK: So --

THE COURT: -- right --

MR. PAEK: -- so --

(Whereupon, the reporter interrupts to preserve the record.)

MR. PAEK: I'm sorry, I'm sorry.

As part of that calculation, Your Honor, we incorporated that if you were to take his maximum of his allegations and plug those in, he still doesn't meet -- he still doesn't dip below the minimum wage threshold. So we're kind of

giving him the benefit of the doubt there --

THE COURT: I see.

MR. PAEK: -- on that argument, not for the rest.

THE COURT: Got you.

MR. PAEK: To the NRS 608.018 weekly overtime argument, this goes back to the Ninth Circuit standard of *Landers v. Quality* for how do we determine wage violations under the (indiscernible) standard. And the *Landers* case held that what the Court should do is look at a specific workweek to see if there's a plausible violation and that generalized allegations are not enough.

Here, in this case, it kind of exemplifies what the problem is because in his allegations, he's alleged that the screenings took 10 to 15 minutes, and what's inherent in those are those are kind of the maximum end screenings, which are like you don't pass the handheld thermal and then you go to a second step, where you would have to do an additional screening.

And the question is, well, did this plaintiff, as a named representative for a proposed class action, actually experience that violation? Did he have a workweek -- and that's why it's so important in this case, especially.

For example, would his allegation be, On this certain week, I did secondary screenings four out of the five days, which make me beyond that threshold that were 15 minutes each?

That would be very different than him specifying a

workweek that said, Well, four to five days, I did ten-second screenings each day and never got to secondary screening.

Those facts matter as to whether or not he passes that plausible threshold.

THE COURT: Uh-huh.

MR. PAEK: So that's basically, in a nutshell, the NRS 608.018 argument.

And then, finally, the 608.020 through .050 argument is -- can be very -- can be a lot to look at. But I would say this. First of all, it's -- as we pointed out, it's derivative, so if the other claims don't hold up, we don't have to look at it.

But, in the alternative, if any claims are -- get through, the 608.020 through .050 has not -- was never meant to apply to a situation where off-the-clock work is alleged and the employer has never been given an opportunity to cure. And the reason for that is in the language of NRS 608.020 through .050 -- and those statutes were all passed at the same time, except for .050, I believe. 608.020 through .040 were passed in 1919, and 608.050 was passed in 1925, I believe.

And at the time, they were called the final paycheck statutes, and the reason why those statutes were passed in the legislative history was because the Nevada legislature -- it was actually in the construction context -- found that construction employers would basically have someone work on a project for

many, many months, and they would stiff them on the last paycheck because they're like, The likelihood of me using that worker again was not very high, so I'll just not pay them the final paycheck.

So the Nevada legislature instituted these penalties. But the key to those provisions is they come into play when an employee is terminated or quits, so it's only upon separation of employment, but then it's 30 days of continuing rate damages until paid, whichever is first.

So, in other words, what's contemplated in that statute is that when it becomes due, an employer can get that, look at that, and say, Well, I owe them that money. I don't want to keep accruing --

THE COURT: Uh-huh.

MR. PAEK: -- these penalties for the 30 days --

THE COURT: Right.

MR. PAEK: -- and I want to just pay them out. I'll pay two weeks of penalties, or whatever it may be.

Applying it to a case like this, where there has never been an amount due, basically takes that cure provision completely away from employer and makes it automatic, unless -- unless the other alternative is that it really doesn't become due until a court like this says it becomes due. And that's when an employer's assessed it, and that's when they could pay it off. So that's kind of the argument on that.

I'll be happy to answer any questions on any of the NRS 608 arguments, but I would like to reserve for rebuttal.

THE COURT: Please.

MR. PAEK: Thank you.

THE COURT: Thank you very much.

MR. PAEK: Thank you, Your Honor.

THE COURT: Go ahead --

MR. FOTY: May I, Your Honor?

THE COURT: Yes. Thanks.

MR. FOTY: Your Honor, this case presents very few issues that have not already been decided by prior courts. In fact, nearly every one of Amazon's arguments have already been rejected in prior decisions. And Amazon is now asking you to take the extraordinary step in disregarding all of those prior decisions.

Now, Your Honor, in terms of background, following the pandemic, Amazon instituted a company-wide policy, requiring all of its warehouse workers across the country, including in Nevada to line up at the start of their shifts, to stand six feet apart, and to go through a health screening one by one, pass that health screening, and then walk hundreds of feet away to go clock in.

If they passed the health screening, they were allowed to clock in. All of that time was spent off the clock.

Given that Amazon did not pay any worker for the time

spent going through the health screening, lawsuits were filed against Amazon across the country.

You have the *Vaccaro* case, which was brought in New Jersey under New Jersey law. You have the *Boone* case in California, which was brought under the Fair Labor Standards Act and under California law. You have the *Vincenzetti* case, which is suing Amazon for the same thing under Colorado law, and you have the *Johnson* case now, which is suing Amazon for the same thing under Illinois law.

Now, Your Honor, in each of those cases with the exception of the *Vincenzetti* case and the *Johnson* case, which was recently filed, Amazon moved to dismiss the screening claim saying it's not compensable. And those cases, the courts rejected their argument.

So to date, there's not been one case that has supported the arguments that Amazon is now making today. I'll start with the Portal-to-Portal Act because I think that's -- that's what gets us -- that's -- essentially, that's the easiest way to reject Amazon's arguments is to address whether or not Nevada law has incorporated the Portal-to-Portal Act.

And, Your Honor, as I mentioned earlier that every argument that Amazon is making has been rejected, well, Amazon's argument that Nevada law has incorporated the Portal-to-Portal Act has already been rejected. And it was rejected in *In Re: Amazon* by the Ninth Circuit.

So, *In Re: Amazon* was an MDL, where multiple lawsuits were filed against Amazon for post-shift security -- post-shift theft screenings. They're all consolidated into an MDL. And the issue of what was compensable in each of the various cases went up to the Sixth Circuit.

And the Sixth Circuit carefully looked at Nevada law and looked at the text of the Nevada law and compared it to the text of the FLSA. And the Sixth Circuit held that the text of the -- of Nevada law and the FLSA regarding what is compensable are materially different, and there's no indication that the Nevada legislature ever adopted an exclusion for compensable work, like the Portal-to-Portal Act, under Nevada law.

THE COURT: So just step back for a second.

In the MDL case, in *In Re: Amazon*, that was -- by that -- that's the same case that went to the Supreme Court on the FLSA issue.

MR. FOTY: On the FLSA issue.

THE COURT: And then, by the time the Sixth Circuit is getting that case, the FLSA issues are out. They're not compensable because of what the Supreme Court said.

MR. FOTY: That's right.

THE COURT: And the In Re -- and the Sixth Circuit was solely looking at claims similar to these in terms of whether this is work.

MR. FOTY: Whether it is work, whether it is work --

THE COURT: Yes.

MR. FOTY: -- exactly.

So the distinction is that the FLSA broadly defines work. And under the FLSA, anything that's controlled or required by employer and done primarily for the benefit of the employer, that's work. Okay?

But when the FLSA was first enacted back in 1937, employers petitioned congress and said, Look, that definition of work is too broad. Okay?

So Congress then enacted the Portal-to-Portal Act. The Portal-to-Portal Act did not change the definition of work. What the Portal-to-Portal Act then said is, Look, not everything that is work has to be paid for by the employer. And that's the critical distinction is that the FLSA broadly defines work and then draws a distinction and says, Look, even if it's work, it may not have to be paid for, and the Portal-to-Portal Act tells you what type of work has to be paid for. Okay?

So now you look at Nevada law. And Nevada law -- well, defense counsel is correct. The Nevada law has not defined work. So in that circumstance, Nevada law can look to the FLSA, because we're looking at what is the definition of work, and work is broadly defined.

Anything that's controlled or required by an employer and done primarily for the benefit of the employer, that's work. But here's the critical distinction is that Nevada law

specifically states -- and there's no language in the FLSA that says this.

Nevada law specifically states, An employer shall pay the employee wages for each hour the employee works.

And it specifically defines what an employer has to pay for, and it says, You have to pay for every hour when an employee is doing work.

There is no corollary, whatsoever, in the FLSA. In fact, that language under 608.016 is materially distinct than the language in the Portal-to-Portal Act. You can't reconcile the two.

Now, defense counsel was saying --

THE COURT: And is that your -- what you're talking about, is that coming from -- just to be clear, is that coming from the 608.016, or is it coming from the administrative code?

MR. FOTY: Well, it's coming from both. So 608.016 and then the administrative -- administrative regulations provide further clarification about that, what that means. And so, the --

(Whereupon, the reporter interrupts to preserve the record.)

MR. FOTY: The administrative regulations further expound on that, and they say -- and they explain what does an employer have to pay for, what is compensable under Nevada law.

And Nevada administrative regulations, 608.115,

specifically states, An employer shall pay an employee for all time worked by the employee at the direction of the employer -- and here's the key language -- including time worked by the employee that is outside scheduled hours of -- including outside the scheduled hours of work of the employee.

There is no corollary language like that under the FLSA. There is no corollary language like that under the Portal-to-Portal Act. In fact, the Portal-to-Portal Act is directly contrary to that language --

THE COURT: So your argument there is that if your shift starts at 9:00 but you have to be there at 8:30 in order -- or 8:45, whatever, five minutes early, even --

MR. FOTY: Right.

THE COURT: If you have to be there at 8:50 in order to --

MR. FOTY: Do some pre-shift work --

THE COURT: -- get in on your shift, which is obviously preliminary to your shift --

MR. FOTY: Correct.

THE COURT: -- and under the Supreme Court law and the FLSA, preliminary work is not compensable, but you're saying this provision says explicitly that preliminary work is work, and it must be paid.

MR. FOTY: That's correct.

THE COURT: So that, in your view, is a direct

conflict?

MR. FOTY: That is correct.

THE COURT: And then tethers to this language from *Terry*, which is, We part -- we rely on the FLSA when we decide to, and we part ways with the FLSA when it's --

MR. FOTY: When it's different.

THE COURT: -- recorded by -- when we're different.

MR. FOTY: Right.

THE COURT: Okay.

MR. FOTY: And, Your Honor, again, this is what the Sixth Circuit -- when they carefully looked at the text of both statutes, they said there's a -- you can't reconcile the two. When it comes to what is compensable, they're different. Under Nevada law --

THE COURT: Can I just ask you what the -- the Sixth Circuit opinion is a Nevada case at the MDL, and I'm just curious what you think about whether it's persuasive or binding in that particular -- it's not binding as, like, law of the case because it's not our case. But I'm just curious about your perspective on that.

MR. FOTY: I think it's not a Ninth Circuit decision. It's a circuit court decision from a different circuit.

I think it is persuasive, but I do think it's highly persuasive because it's addressing the Nevada case that got sucked into the MDL. Okay? That decision would have been made

in Nevada had it not been taken to the MDL.

THE COURT: Uh-huh.

MR. FOTY: But, I think, given that it's a circuit court decision, I think that gives it heightened authority, but it is persuasive.

And, Your Honor, just to further emphasize this point, when the Nevada legislative wants to adopt a provision of the FLSA, the Nevada legislature knows how to do that. And the Nevada legislature has done that multiple times.

So, for instance, under Nevada law, there wasn't originally an exemption, like the Motor Carrier Act exemption. The Motor Carrier Act exemption was progeny of the FLSA because when the motor carrier exemption was issued, there -- the idea was you don't want there to be conflict between anybody who's subject to the Department of Transportation's regulations and someone who's also subject to the Department of Labor's transportation (sic). So the Motor Carrier Act exemption existed to carve out those people who were subject to the Department of Transportation's regulations. Okay?

The Nevada legislature said, Okay. We need a similar exemption in our statute. So then they went and they adopted it. So the Nevada legislature knows how to do this. They know how to adopt specific provisions from the FLSA. And the fact that there simply is nothing in the FLSA that's even -- excuse me, nothing in Nevada law that is even remotely close to the Portal-to-Portal

Act language, I think that's telling.

And, Your Honor, in light of the -- in line with the *Terry* decision that Nevada law must be interpreted liberally in favor of workers, I don't think it's a close call that Nevada law has not adopted the Portal-to-Portal Act.

THE COURT: Can I -- I want to just ask you a little bit about whether this is required by law.

I guess, my first question, just sort of thinking about *In Re: Amazon,* is, does it make a difference at all under your argument whether we're talking about a COVID screening or anything else?

And then, two, to the -- maybe you should just address briefly whether it does make a difference, either under the definition of work or the -- to the extent compensable work applies, whether it makes a difference there.

MR. FOTY: Okay. So in terms of whether this is work, I think it's clear that the COVID -- pre-shift COVID screening that workers have to pass before they can clock in to see if they can work for the shift -- work for the day, I think it's clearly that is work.

And so, to address, I guess -- I think you're -- is there a distinction between a pre-shift COVID screening and a post-shift antitheft screening?

I do think they are materially different. I think they're highly different, because a pre-shift health screening

specifically ties into the work that the worker has to do for the company. Okay?

Let's say -- let's say, a worker has COVID and they have long-haul COVID, and they can't breathe, and their health is affected. They're not going to be able to move packages around an Amazon warehouse that's hundreds of yards and walk from one point to the other and be as efficient as they would had they not had COVID.

Likewise, if they have COVID and they infect the warehouse, they cause a mass outbreak, that warehouse has to shut down. No one can do the work.

There's a specific tie-in between this health screening and the work that the -- that the Amazon employees had to do. And that's why the Department of Labor has consistently held in multiple regulations and multiple opinion letters that if there's a physical examination or a health examination that's required by the employer which is necessary for the employee to do the job, that's compensable. That's compensable work.

And, in fact, the Department of Labor issued an opinion regarding temperature checks for COVID and stated, If it's necessary for you to do your job, you got -- the employers have to pay for it. So this --

THE COURT: So when you're saying that, you're saying that's compensable under *Busk*?

MR. FOTY: I think it's compensable under *Busk*. I

think it's compensable either way.

THE COURT: So that you're also saying *Busk* may -- *Busk* is controlling on that particular search. It wouldn't necessarily --

MR. FOTY: -- apply to here. This is materially --

THE COURT: Okay.

MR. FOTY: Yeah. This is -- this type of screening is materially distinct from the *Busk* screening. And, in fact, since *Busk* was issued -- it was issued in 2014, almost ten years ago -- circuit courts across the country have distinguished *Busk*, so there's a case called *Aguilar v. MTC*, which is a -- involved correctional officers.

And so these correctional officers who have to guard prisons had to go through a pre-shift screening, you know, just kind of like we do here when we go through the metal detector to make sure there's no weapons when we walk into the courthouse. Well, these correctional officers had to do the same thing. And in *Aguilar v. MTC*, the Court specifically held that that time that correctional officers had to go through the security screens in the morning, that's compensable under the FLSA because it's directly tied to the work that those correctional officers had to do, which is -- their job is to maintain security in the prison, and they can't do their job if they inadvertently bring contraband or weapons inside the prison.

And so, they distinguished *Busk* and said, Look, *Busk*

has nothing -- that post-shift antitheft search that Amazon did had nothing to do with the ability of the workers to do their jobs.

In this case, in this pre-shift health screening, this has everything to do with the ability of the workers to do their job. If you eliminate that pre-shift health screening, Amazon was going to have mass outbreaks at each of those facilities, and those facilities were going to shut down, and those workers could not do their jobs.

But Amazon implemented those pre-shift health screenings. Amazon stayed open. And as we know, Amazon's profits skyrocketed during the pandemic because everybody was at home, and they're ordering goods and services from Amazon online. And Amazon needed to stay open. Every single one of its facilities needed to stay open so they could process those -- this mass increase in customer orders.

So, I think -- I think it's clear that it is work. Amazon primarily benefitted from it. There's a -- there's a case that defense counsel did not raise, but it's called *Alvarez v. IBP,* and it's a Ninth Circuit case which would be binding on this court.

And in that case, the Court said that if the employer is requiring an activity to comply with the law and that activity is necessary for the employer to ensure legal compliance, that primarily benefits the employer.

That's the same facts as this case, Your Honor. I mean, Amazon was required to do to ensure a safe workplace for its workers if it was going to stay open, and these pre-shift health screenings were necessary to ensure that Amazon complied with the law. I mean, I think if Amazon did not have these pre-shift health screenings, the governor could have come in there and shut down Amazon. And so, it was necessary to ensure that Amazon complied with the law and stayed open for business.

I'm happy to address all of the other arguments, as well. I think it's -- I think defense counsel's -- well, let me back up.

One thing I want to -- I want to point out, so defense counsel has repeatedly cited to this *Perez v. Walmart* decision. Okay?

I think that decision is a little bit -- I think the citation of that decision is a little bit disingenuous, and here's the reason why. *Perez v. Walmart* was not an FLSA case. The plaintiff did not bring a claim under the FLSA.

What the plaintiff brought in that case was a claim under Missouri common law for unjust enrichment.

There is an FLSA case against Walmart for not paying for pre-shift COVID screenings. That case is called *Haro v. Walmart*. Defense counsel didn't cite to *Haro v. Walmart*.

And *Haro v. Walmart*, that case was recently certified, and it's the -- I believe it's the largest collective

action in U.S. history --

THE COURT: You mean class certified?

MR. FOTY: Well, so in *Haro* -- I'm actually the plaintiffs' lawyer in *Haro*.

THE COURT: Uh-huh.

MR. FOTY: In *Haro*, the plaintiffs brought a claim under California law, under the California Labor Code, and a Fair Labor Standards Act claim. And the same defense lawyer who was in *Perez v. Walmart* is the same defense lawyer who's in *Haro v. Walmart*. And that defense lawyer did not move to dismiss the FLSA claim in *Haro*.

Now, he moved to dismiss the unjust enrichment claim in *Perez*, but that's because it's even shaky whether you can bring an unjust enrichment claim for pre-shift work. Under the FLSA, you can.

And two days ago, the Court in *Haro* certified across the entire country a collective action for all Walmart hourly paid workers who went through a pre-shift COVID screening.

So I think any citation to *Perez* is -- is simply not relevant in light of the *Haro* decision, where you have a pre-shift COVID screening case that's been certified as a national collective action against Walmart for all approximately 2 million workers across the country.

THE COURT: Can you just briefly maybe talk about the workweek theory and maybe just -- yeah, in terms of overtime?

MR. FOTY: So the workweek theory. Well, I think it's -- defense counsel made, I think, two separate arguments: One, that minimum wage must be calculated on a workweek basis.

Again, that's one of those arguments that has already been rejected. So that argument was rejected by the Ninth Circuit in the *Cordius* (phonetic) decision.

THE COURT: Uh-huh.

MR. FOTY: That argument was rejected by a sister court in the District of Nevada in the case of *Nelson v. Walmart*. And that very same argument was rejected by the Sixth Circuit in *In Re: Amazon*. So the argument that workers -- that minimum wage must be calculated on a workweek basis as opposed to on a per hour basis, that's been rejected by every court to have ever considered it, and there's not one court that has supported that argument.

Now, with respect to the overtime claim, the *Landers* decision, *Landers* decision does hold that when an employee is bringing an overtime claim, he has to specify facts to support the overtime claim. It does not say, though, that you have to identify each specific week when you think that you had an overtime claim.

Now, Your Honor, I think we have more than met the *Landers* decision. Here, we have provided Mr. Malloy's start date and end date, his job position, his hourly rate, his work schedule, and his normal hours of work and his normal hours per

shift. Now, we've identified that he was required to work overtime every week from the start of his employment to the end of his employment.

So defense counsel is saying we didn't identify any week. We've identified all the weeks. And if you're already past 40 hours and you do a pre-shift screening off the clock, and even if it's five minutes, you add that five minutes, and you're already in an overtime claim because you're already past 40 hours. So we -- we've surpassed *Landers*.

Regarding the issue of whether or not there's a viable cause of action for not paying all wages due at termination, again, Your Honor, there's -- there's a court decision that's already addressed that and rejected defense counsel's argument. That is the *Demoray* (phonetic) decision.

So, Your Honor, in summary, every argument that is made by Amazon in this case to seek a dismissal has already been rejected. I think it's clear that this case needs to -- the Court needs to deny Amazon's motion to dismiss and allow this case to go into discovery, just like the *Boone* case, just like the *Vincenzetti* case, just like the *Vaccaro* case.

THE COURT: Thank you.

MR. FOTY: Thank you.

MR. PAEK: So, Your Honor, I'll address some of the arguments made in opposition.

As to the *Vaccaro* and *Boone* reasoning, I think we

addressed that earlier. I think those cases are not binding just like *Pipich* and *Perez* are not binding. But I think, as articulated earlier in my motion argument, that really, the Court should look at the analyses in all of those cases and see what is the most complete analysis on the same issue.

And I think, when the Court does that, it will see that *Perez* and *Pipich* go one step further.

To address opposing counsel's comment about *Perez v. Walmart*, it is about unjust enrichment, but the underlying core analysis in that case is still about compensability --

THE COURT: Uh-huh.

MR. PAEK: -- so because of that, the Court looked, not only at the FLSA and analyzed that, but the *Steiner* case that opposing counsel analyzes, and looked into the *Busk* standard, and that's how it came about its decision. That's why that decision is instructive here.

As far as the *In Re: Amazon* ruling, I touched on that earlier. But really, the question before the Court is not what the Sixth Circuit analyzed, but the question, as I talked about at the very beginning of the hearing, is, what would the Nevada Supreme Court do? because these are Nevada statutes.

So to determine what the Nevada Supreme Court does, yet we can look at another court like looking through the lens of *Terry*, but what we're arguing is, really, what we should do is cut to the chase and go straight to those Nevada Supreme Court

cases, go straight to *Terry v. Sapphire* and go to *Csomos v. Venetian*, which is an unpublished case, but it's closer to what the Nevada Supreme Court would actually rule on because it's the Nevada Supreme Court talking about the adoption of NRS 608.018 and how that's related to federal overtime.

Terry establishes how minimum wage is based on federal minimum wage. And then both of the -- and then, both of those cases contrast with the other two cases -- *Dancer v. Golden Coin*, where there is a conflict, and *Thomas v. Yellow Cab*, where there's a conflict.

So I think those are the guideposts of the Nevada Supreme Court. We've got four cases there that lay out what the Court should look at to this core question of what's really conflicting and what's really materially different.

So going back to what opposing counsel touched on and what this Court asked about earlier, the 608.016 language about each hour of work doesn't get to that underlying definition that we're arguing about here, which is the definition of work and what is compensable work. And plaintiff's counsel concedes that since Nevada doesn't have it, we have to look at the FLSA.

So if we're going to look to the FLSA for work, what we're saying is, well, you can't do that and parse out the Portal-to-Portal Act because that's -- that's an -- would we even be talking about this if the Portal-to-Portal Act was called the amended FLSA? I mean, it's a part of it, and the body of case

law, the test that we're arguing over here, the integral and dispensable test, the primarily-for-the-benefit test all arose from the -- all arose from those statutes.

So we can't just pick and choose and say, I'm just going to look at FLSA and *Steiner* from 1956 and ignore everything else. That's -- that's -- and the -- the most recent and most re-critical look at this was *Busk v. Integrity*, which Your Honor knows arose out of this district out of Judge Hunt's court, went up to the Ninth Circuit, he was reversed and then was completely reversed by the U.S. Supreme Court on a relatively 9(o) decision that we don't get too much nowadays. And that Court, even with the concurring opinions of Justices Kagan and Sotomayor both compared and contrasted the *Steiner* case and the cases that plaintiff cites and still found the better test is to look at the principal activity and let's go from there.

And that's the core what we're asking the Court to do. We're asking the Court to look at those cases and do that same analysis and see where we would wind up, instead of just doing it in broad strokes.

I think those were the main points I had to cover, but I'll be happy to answer any further questions that the Court may have. I know we --

THE COURT: No --

MR. PAEK: -- went well above our 20-minute allocation, but --

THE COURT: I think I -- I think I'm good. So I think -- I just really appreciate the argument from both of you.

I'm just going to just take a moment to gather my thoughts. So just hang on -- you can be seated and just hold on for a moment while I gather my thoughts, and I might just check in with my law clerk.

MR. PAEK: Thank you, Your Honor.

THE COURT: Thank you.

(Court and law clerk conferring.)

THE COURT: Okay. I think I'm just going to rule orally in this case because we are at the motion to dismiss stage. So I understand that there are two motions to dismiss. Actually, one of them is sort of related to the original complaint, and the plaintiffs has an amended, so there's a second motion to dismiss. So those are ECF 17 and 22.

Obviously, as we've been talking about, the plaintiffs are claiming that what's at issue here is payment for what they call work during the COVID-19 screening procedures before each shift during the pandemic, and there's four claims that all tether to that definition of work. One is payment for work done under 608.016. That's Claim 1.

Claim 2 is Nevada wage amendment claim under Nevada constitution.

Three is -- pertains to overtime for -- based on the claim that they were legally entitled to overtime -- or could

have been entitled to overtime for that time spent during the screening procedures that might have exceeded their normal hours.

And then, Claim 4 is about payment upon termination of service.

As you know, I'm looking at these -- Amazon moved to dismiss all of these claims for failure to state a claim under 12(b)(6). That is a -- you know, it's a rigorous standard, but is still -- the test is whether there are sufficient facts to state a claim that is plausible on its face. And at this stage, I have to accept in that analysis plaintiffs' allegations as true and can only dismiss if the claims are not plausible.

As we've been talking about here this morning, all of the arguments here turn on the definition of work under Nevada law. And I do find -- I'm going to deny both of the motions to dismiss because I do find that what we're talking about here is either work as a matter of law, or at least there's -- certainly, at this stage, there's a plausible claim that it is -- does qualify as work under Nevada law.

As we've been discussing, Nevada does not define the term -- uses the term "work" in its own statutes but does not define that term and has historically looked to the FLSA for the definition of work.

And there is an argument made that the -- what we really should be looking at is whether this screening time is compensable work. But that depends on -- that rests on the

premise that Nevada has incorporated the Portal-to-Portal Act. And I find that it has not done so; that it has not incorporated the Portal-to-Portal Act.

I'm really relying here on the reasoning, which I found very persuasive and carefully done, in the *In Re: Amazon* case out of the Sixth Circuit, as we've talked about. That was an MDL case, but it was out of Nevada. And it specifically looked in the post-*Busk* phase at claims that were only alleged under Nevada law, just as they are here, because we also do not have any FLSA claims.

And the Court -- I do note also that Nevada Supreme Court has cited *In Re: Amazon* with approval and did so in Doe *Dancer 1 v. La Fuente Incorporated*, 481 P.3d 860, 867, Nevada 2021. That decision, *Doe Dancer*, explicitly says that it's sort of a next step after *Terry*. And it was -- its analysis did not rely on the same issue that we have here, but it definitely cited *In Re: Amazon* with approval, which I find makes the *In Re: Amazon* case even more persuasive that it has been considered by the Nevada Supreme Court and cited with approval.

So in the Sixth Circuit case, in *In Re: Amazon*, the Court acknowledged that the Nevada Supreme Court has signaled its willingness to part ways with the FLSA where the language of Nevada statutes has so required. That was the Sixth Circuit citing to the *Terry* case from the Nevada Supreme Court. *Terry* is *Terry v. Sapphire Gentleman's Club* at 336 P.3d 951. That's from

2014. And in *In Re: Amazon*, the Court acknowledged that unlike the FLSA, which draws the distinction between what is work and what is compensable work, Nevada law requires that an employer pay an employee for all work. And that's reflected in NRS 608.016 and specifically in the administrative code that supports that, which refers to the -- to all time worked, specifically, using that language, and acknowledges that all time worked covers work that is outside the scheduled hours of the work of the employee.

I do read that explicit language both in the statute and in the regulation as in conflict with the FLSA provisions on what is compensable work. So I think that Nevada has parted ways, as the Sixth Circuit acknowledged, with the FLSA on this specific point and is broader and thus requires that an employer pay an employee for work, period.

So with that, I just acknowledge that we are not, in this case, in my estimation, dealing with a compensable work issue. We're dealing with an issue of whether this is work.

I don't think any party is suggesting that the definition of work is -- well, it's definitely controlled by the FLSA. It's reaffirmed by *Busk* and other decisions, including *Alvarez* in the Ninth Circuit, but obviously *Busk* from the Supreme Court, that this requires -- that work is activity that is controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.

I don't think there's any dispute here that this activity of the screening was controlled by Amazon. And I do think that while there is a dispute about whether the Amazon -- the screenings were primarily for Amazon, there is a clear indication that they were; that they allowed -- that they were required by law, which is significant, under the *Alvarez* decision, that particularly not only *Alvarez* from the Ninth Circuit, but *Alvarez* went to the Supreme Court. And there's a distinction about work versus compensable work in that scenario, and I think that -- that the required safety checks in *Alvarez* in the meat processing plant are similar to the prescreening -- COVID prescreening procedures here.

They're happening at the beginning of the shift. They are primarily to make sure that the warehouse is safe so that the warehouse can stay open. And even though Amazon might not have been required by law to institute -- to implement this particular COVID screening precaution, they were required to implement some precaution, and they chose to do this. So in that respect, it was required by law, and it's also distinct from the sort of anti- -- post-shift antitheft screenings that were at issue in *Busk*.

So based on that, I do find that this was work. I also find that I don't need to address the integral and indispensable aspect of the test because that is terminology used in the compensable work framework. I don't think that that

applies, based on the statutes and the careful analysis of the Sixth Circuit in *In Re: Amazon*.

I do find that the plaintiffs have plausibly alleged that they -- that during the COVID screening procedures at each shift at the Amazon warehouses that that was work for which they, under Claim 1, should have been paid but were not paid in violation of 608.016; that they were entitled to but did not receive payment under Nevada's Minimum Wage Amendment, which is Nevada Constitution Article 15 Section 16; that the work was -- that they were legally entitled but did not receive overtime compensation in violation of 60 -- NRS 608.018; and the -- that their wages earning and owing upon termination were not paid. That's at least what they allege, and based on those allegations, I find that that's plausible, and that was in violation of the -- the statutes 608 -- NRS 608.020 to .050.

So with that, I appreciate that there are many factual issues that might sort of distinguish -- sort of fine tune the application of laws. I'm really just looking at the allegations in the complaint and whether they plausibly state a claim that survives dismissal, and I find that they do.

So with that, I'm going to deny -- I guess I'm going to deny the motion to dismiss in ECF 22 and view -- find that the motion to dismiss based on ECF 17 is moot.

So that's my ruling. And I thank you again very much for your thoughtful -- your very high quality briefing and your

thoughtful arguments. Thank you.

MR. FOTY: Thank you, Your Honor.

MR. PAEK: Thank you, Your Honor.

COURTROOM ADMINISTRATOR: Please rise.

(*Proceedings adjourned at 12:24 p.m.*)

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COURT REPORTER'S CERTIFICATE

I, Paige M. Christian, Official Court Reporter, United States District Court, District of Nevada, Las Vegas, Nevada, do certify that pursuant to 28 U.S.C. § 753, the foregoing is a true, complete, and correct transcript of the proceedings had in connection with the above-entitled matter.

DATED: March 8, 2023

/s/ Paige M. Christian_____
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DWIGHT MALLOY, on behalf of himself and all others similarly situated;

Plaintiffs,

vs.

AMAZON.COM SERVICES, LLC,

Defendant.

Case No. 2:22-cv-00286-ART-VCF

DEFENDANT'S MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(B) OR, IN THE ALTERNATIVE, MOTION TO CERTIFY QUESTIONS TO THE NEVADA SUPREME COURT

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to 28 U.S.C. § 1292(b), Defendant Amazon.com Services LLC ("Amazon") respectfully requests that this Court certify for interlocutory appeal its March 2, 2023, order (the "Order") denying Amazon's Motion to Dismiss the First Amended Complaint ("Motion to Dismiss"), or, in the alternative, certify questions to the Nevada Supreme Court pursuant to Rule 5 of the Nevada Rules of Appellate Procedure.

This Court's denial of Amazon's motion seeking dismissal of Plaintiff's claim that the time spent in and waiting for pre-shift COVID-19 screenings is compensable under Nevada law presents a clear case for certification of an interlocutory appeal under 28 U.S.C. § 1292(b). The Order involves

three important legal questions that warrant resolution by the Ninth Circuit: (1) whether Nevada law incorporates the Portal-to-Portal Act ("PPA"); (2) whether pre-shift COVID-19 screenings are "integral and indispensable" to Plaintiff and the purported class's principal activities and therefore compensable under the PPA; and (3) whether time spent undergoing those screening constitutes "work" under Nevada law because it is primarily for the benefit of employers. *See* ECF No. 30; Transcript of Proceedings of Hearing on Amazon's Motion to Dismiss attached hereto as **Exhibit 1**.

A "not otherwise appealable" order "shall" be certified for interlocutory appeal by a district court if that court is "of the opinion" that the order "[1] involves a controlling question of law [2] as to which there is substantial ground for difference of opinion, and . . . [3] an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). As set forth below, all three criteria are satisfied here.

First, the questions presented by Plaintiff's claims are controlling, pure questions of law. Whether Nevada law incorporates the PPA is a pure question of law and whether, based on the facts alleged, pre-shift COVID-19 screenings were preliminary to Amazon associates' principal work activities also presents a legal question requiring application of United States Supreme Court precedent in *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27 (2014), to the alleged facts. Indeed, *Busk* itself was decided on a motion to dismiss. Likewise, whether Amazon was the primary beneficiary of the alleged COVID-19 screenings (i.e. whether the screenings were "work") is a legal issue that requires an assessment of the complaint's allegations against the requirements of Nevada law. If resolved in Amazon's favor on appeal, these issues would "necessitate[] dismissal" of Plaintiff's claims. *Bernal v. Zumiez*, Inc., 2017 WL 4542950, at *2 (E.D. Cal. Oct. 11, 2017).

Second, there is a substantial ground for difference of opinion on the questions presented. As to the first proposed question, while the Sixth Circuit Court of Appeals decision *In Re: Amazon.Com, Inc., Fulfillment Center Fair Labor Standards Act (FLSA) and Wage and Hour Litigation*, 905 F.3d 387, 404 (6th Cir. 2018) held that Nevada law did not incorporate the PPA, that decision is non-binding and is contrary to two unpublished Nevada Supreme Court decisions and a wealth of other indicia showing the Nevada Supreme Court would find the PPA has been incorporated, all of which led Judge Batchelder to dissent in that Sixth Circuit decision because he believed Nevada has implicitly

incorporated the PPA. Thus, for each of the foregoing, there is substantial ground for difference of opinion.

As to the second question - whether pre-shift COVID-19 screenings are integral and indispensable to the principal duties warehouse employees perform - "directly conflicting" decisions exist. *Id.* There is a clear conflict between the District Courts in this Circuit, with Courts reaching precisely opposite conclusions about whether pre-shift COVID-19 screenings for employees performing similar duties are preliminary activities under the PPA. Compare the Order and *Boone v. Amazon.com Services, LLC,* No. 1:21-cv-00241-DAD-BAM, 2022 WL 780215 (E.D. Cal. March 11, 2022),[1] with *Pipich v. O'Reilly Auto Enterprises, LLC*, 2022 WL 788671, at *1, 4 (S.D. Cal. Mar. 15, 2022).[2] An order "clearly merits interlocutory review under section 1292(b)" where there is a "split of authorities on the . . . issue among district courts within the . . . Circuit." *Mei Xing Yu v. Hasaki Rest., Inc.*, 874 F.3d 94, 96–97 (2nd Cir. 2017). Furthermore, as to the third question, whether time spend in COVID-19 screening is compensable is plainly "a new legal question" and "is of special consequence." *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009) ("[D]istrict courts should not hesitate to certify an interlocutory appeal" where a question "involves a new legal question or is of special consequence." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009). The COVID-19 pandemic was a once-in-a-century event, one that led to unprecedented governmental mandates and guidance and in response to which Amazon, like employers across the country, took action to keep its associates and the community-at-large safe. In this circumstance, "when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent." *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011).

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[1] Note, Amazon filed a Motion for Certification of Interlocutory Appeal Under 28 U.S.C. § 1292(b) in *Boone*, but as that matter is currently stayed, the Court has not ruled on the motion.

[2] *Pipich* is consistent with decisions from the Court of Federal Claims and the Western District of Missouri. *Adegbite v. United States*, 156 Fed. Cl. 495, 506 (2021) (holding that the "time spent passing through the Covid-19 screening" was not "integral to the Plaintiffs' principal activities as correctional officers"); *Alvarez v. United States*, 2021 WL 6163405, at *4 n.2 (Fed. Cl. Dec. 30, 2021) (same); *Adair v. United States*, 2021 WL 6163407, at *5 n.2 (Fed. Cl. Dec. 30, 2021) (same); *Perez v. Walmart, Inc.*, 2021 WL 5741484, at *2 (W.D. Mo. Oct. 25, 2021) (finding screenings were not primarily for the employer's benefit).

Finally, certification would materially advance the ultimate termination of the litigation by determining whether Plaintiff is able to make out a claim at all. A decision by the Ninth Circuit in Amazon's favor on even one of the questions presented would affect the legal issues that would have to be addressed by summary judgment or trial, thereby potentially reducing discovery and other costs associated with this lawsuit substantially. A decision by the Ninth Circuit in Amazon's favor on either the second or third questions presented would require complete dismissal of Plaintiff's claims, which end the litigation. Certification would thus plainly assist in "avoiding the expenditure of time and resources." *Stoutt v. Travis Credit Union,* 2021 WL 1143612, at *2 (E.D. Cal. Mar. 25, 2021).

This is a paradigmatic case for certification of an interlocutory appeal. The issues are novel and controlling questions of law, there plainly is room for reasonable jurists to disagree, and resolution of the questions would materially advance this litigation. Under these circumstances, the Court should grant Amazon's motion to certify for interlocutory appeal to the Ninth Circuit. Alternatively, this Court should certify the following questions to the Nevada Supreme Court pursuant to Rule 5 of the Nevada Rules of Appellate Procedure: (1) Does Nevada law incorporate the PPA?; (2) Are pre-shift COVID-19 screenings "integral and indispensable" to Plaintiff and the purported class's principal activities and therefore compensable under the PPA?; and (3) Does time spent undergoing pre-shift COVID-19 screening constitute "work" under Nevada law because it is primarily for the benefit of employers?

II. BACKGROUND

Plaintiff filed this purported class action on February 15, 2022, alleging that Nevada law entitles him and the purported class to be paid for time they allegedly spent undergoing pre-shift protective screenings for COVID-19, and based on this allegation asserts claims for: (1) failure to compensate for all hours worked in violation of NRS 608.016; (2) failure to pay minimum wage in violation of the Nevada Constitution; (3) failure to pay overtime in violation of NRS 608.018; and (4) failure to timely pay all wages due and owing in violation of NRS 608.020-.050. ECF No. 1. On April 25, 2022, in response to Amazon's initial motion to dismiss, Plaintiff filed a First Amended Complaint ("FAC") asserting the same claims as set forth above. ECF No. 20.

Plaintiff alleges that he worked for Amazon as an hourly, non-exempt employee from

approximately August 2020 to April 2021. *Id.,* ¶ 14. Plaintiff "normally" worked five days a week, his "normal" shift was ten hours a day on average, and he "normally" worked "approximately" 50 hours a week. *Id.* He was paid an hourly rate between $15.80 - $16.10 per hour. *Id.* Plaintiff worked as a "fulfillment center associate" and "[h]is job duties included moving boxes, stacking packages, and loading boxes." *Id.* As described in the FAC, "the novel Coronavirus has infected over 81 million Americans and caused the death of over 900,000 Americans." *Id.*, ¶ 12. In response to this pandemic, "Amazon implemented a company-wide policy requiring each of its hourly, non-exempt employees to undergo a physical and medical examination to check for symptoms of the Coronavirus each shift." *Id.* Each employee underwent a temperature check and answered questions about his/her health, including follow-up questions if the employee did not "pass" the initial screening. *Id.* ¶¶ 18-19. The examination, which was undertaken on Amazon's premises prior to the start of the employees' shifts and prior to clocking-in, was a requirement to work each shift. *Id*., ¶¶ 12, 16. The examination, inclusive of time waiting in line, took "approximately 10 minutes to 15 minutes on average." *Id.*, ¶ 20. Amazon did not pay the employees for this time. *Id.*, ¶ 12.

As alleged, "Amazon required Plaintiff and Class Members to undergo this screening for the purposes of overall safety in the Amazon facilities and to prevent the Plaintiff and Class Members from inadvertently and unintentionally infecting the Amazon facilities or Amazon products, and in turn, Amazon's customers." *Id.*, ¶ 28. Plaintiff additionally alleged:

> The COVID-19 examinations were necessary to ensure that the virus did not infect the Amazon facilities or customers. The examinations were also necessary to ensure that the virus did not disrupt the work performed by Plaintiff and Class Members or affect the business operations of Amazon. If Amazon did not have the COVID-19 screening, workers could inadvertently or unintentionally bring the virus into the Amazon facilities causing a mass breakout of the virus infecting hundreds to thousands of other workers of Amazon.

Id., ¶ 29.

Importantly, the State of Nevada enlisted employers to assist in inhibiting the spread of COVID-19. As early as April 14, 2020, Nevada's Occupational Safety & Health Administration ("Nevada OSHA") was recommending that essential businesses, such as Amazon, "[c]onduct daily surveys of changes to staff/labor health conditions." Exhibit B to ECF No. 22. Nevada OSHA required employers to "Develop Policies and Procedures for Prompt Identification and Isolation of

Sick People, if Appropriate." *Id.*; Exhibit C to ECF No. 22. On May 7, 2020, the Governor of Nevada issued Declaration of Emergency Directive #018 which stated "All businesses must adopt measures that meet or exceed the standards promulgated by NV OSHA to minimize the risk of spread of COVID-19. *Id.* The following day, Nevada OSHA took it a step further, and instructed that employers were to "implement COVID-19 Prevention Programs", noting that the "most effective" would include "adopting measures to ensure that workers who are infected or potentially infected are separated and sent home from the workplace." *Id.*

On May 9, 2023, Amazon moved to dismiss Plaintiffs' claims in the FAC. ECF No. 22. In relevant part, Amazon asserted that the time that Plaintiff claims he and others spent undergoing COVID-19 screenings is not compensable as it does not constitute "hours worked" under Nevada law because it was not spent primarily for Amazon's benefit. Amazon further moved as the time spent in screening was not indispensable and integral to the employees' primary duties and, thus, not compensable time under the PPA. Because all of Plaintiff's claims were predicated on this time being compensable, Amazon asserted that each claim in the FAC fails.

On March 2, 2023, after hearing oral argument, the Court denied the Motion to Dismiss. *See* ECF No. 30. In relevant part, the Court held that Nevada "has not incorporated the Portal-to-Portal Act" and that "Nevada law requires that an employer pay an employee for all work." **Exhibit 1**, p. 54-55. The Court further held that the time spent in and waiting for COVID-19 screenings "was work" and stated that the Court did not "need to address the integral and indispensable aspect of the test because that is terminology used in the compensable work framework [and] I don't think that that applies, based on the statutes and the careful analysis of the Sixth Circuit in *In Re: Amazon*." *Id.* at p. 56-57.

III. ARGUMENT

A. This Matter Presents a Clear Case for Certification of Interlocutory Appeal.

This Court should certify its order denying Amazon's Motion to Dismiss for immediate appeal to the Ninth Circuit under 28 U.S.C. § 1292(b). Section 1292(b) sets forth three requirements for certifying an order for interlocutory appeal: (1) the "order involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) "an immediate appeal from

the order may materially advance the ultimate termination of the litigation." This Court's order denying Amazon's Motion to Dismiss satisfies each of these requirements.

1. The Order Decided Controlling Questions of Law.

"[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement*, 673 F.2d at 1026. A quintessential example of a controlling question of law is one that affects the Court's ability to "render a binding decision," such as a ruling on the merits of a plaintiff's claim. *Id.* at 1027. Each of the issues presented readily satisfy that test because they are "pure legal question[s] presented by the pleadings"; "an affirmative answer results in the survival of" the claims, while "a contrary one necessitates dismissal." *Bernal v. Zumiez, Inc.*, No. 2:16-cv-01802-SB, 2017 WL 4542950, at *2 (E.D. Cal. Oct. 11, 2017). Notably, there is no requirement that a question or questions entirely dispose of the case, as "§ 1292 does not require such." *Id.; see also In re Prewitt*, 2020 WL 2121430, at *2 (C.D. Cal. Jan. 9, 2020) (To constitute a controlling question of law, "resolution of the issue need not dispose of the case entirely.").

a. Whether Nevada Law Incorporates the PPA is a Controlling Question of Law.

As the Court held, "all of the arguments here turn on the definition of work under Nevada law … and there is an argument made that … what we should be looking at is whether this screening time is compensable work … that rests on the premise that Nevada has incorporated the [PPA] .. [a]nd I find that it has not done so." **Exhibit 1**, p. 53-54. The PPA was passed by Congress in 1947 to address the "flood of litigation" that the Supreme Court's definition of work in *Tennesssee Coal* and its progeny had spawned; litigation which Congress deemed could "bring about the financial ruin of many employers." *Busk,* 574 U.S. at 32 (quoting 29 U.S.C. § 251(a)–(b)). Thus, the PPA "exempted employers from liability for . . . 'activities which are preliminary to or postliminary to [the employee's] principal activity or activities.'" *Id.* at 32-33 (quoting 29 U.S.C. § 254(a)).

The Court's determination that Nevada law does not incorporate the PPA is plainly a conclusion of law. That it is a controlling question of law cannot be seriously questioned given that the Court, having come to its conclusion, held "I don't need to address the integral and indispensable

aspect of the test … I don't think that that applies." **Exhibit 1** at 56-57. "[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement*, 673 F.2d at 1026. If the PPA is incorporated into Nevada law and Amazon meets its terms, it would prevail on this case in its entirety. The Court's legal conclusion that the PPA is not incorporated in Nevada law, therefore, "materially affect(s) the outcome of [this] litigation." *Id.* at 1026.

b. Whether Time Spent in COVID-19 Screening Is Preliminary to Plaintiff's Principal Activities Is a Controlling Question of Law.

Whether the alleged COVID-19 screenings were integral and indispensable to Plaintiff's stated work duties is also a legal question that, if answered in Amazon's favor, would require dismissal of his claims. Under the PPA, "activities which are preliminary to . . . principal activity or activities" are not compensable. 29 U.S.C. § 254(a)(2). The Supreme Court made clear in *Busk* that, even if an activity is work-related, it is not compensable unless it is either a principal activity the employee is employed to perform or "integral and indispensable to" principal activities, meaning it is "an intrinsic element of those [principal] activities and one with which the employee cannot dispense if he is to perform those activities." 574 U.S. at 35. In *Busk*, the Supreme Court unanimously held that the plaintiffs had failed to state a claim under Fair Labor Standards Act ("FLSA"), because security screenings performed at Amazon warehouses "were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment" and "time spent waiting to undergo and undergoing" those screenings was thus not compensable. *Id.* at 35-36. Whether the screening of employees at Amazon warehouses alleged by plaintiffs in *Busk* was integral and indispensable to their principal work duties was a dispositive legal question decided on a motion to dismiss.

In *Pipich and Perez*, the court addressed the same question presented here in granting the defendant's motions to dismiss. In *Pipich*, the Court applied *Busk* and explained that COVID-19 "screening was not an intrinsic element of the loading and transporting of products to the stores"; they "were not indispensable to the employees' duties because O'Reilly could eliminate them completely without hindering the employees' ability to perform their duties." 2022 WL 788671, at *4. Similarly, in *Perez*, the court applied *Busk* and held "the medical screenings are not integral and indispensable

because they are not the principal activities which plaintiff was employed to perform." 2021 WL 5741484, at *4. Thus, the FLSA claim failed as a matter of law in both *Pipich and Perez*. Plaintiff's claims in this case necessarily fail for similar reasons.

c. Whether Time Spent in COVID-19 Screening Primarily Benefits the Employer Is a Controlling Question of Law.

Under the FLSA, which Nevada law follows, work is defined as any activity "controlled or required by the employer and pursued *necessarily and primarily for the benefit of the employer* and his business." *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 31 (2014) (quotation omitted) (emphasis added); *Terry v. Sapphire Gentlemen's Club*, 130 Nev. 879 (2014) (in deciding wage-and-hour issues, Nevada courts look to the FLSA unless Nevada's statutory language is materially different from or inconsistent with it). Whether pre-shift COVID-19 screenings, as alleged, primarily benefit Amazon (or other similar companies in the warehousing and delivery industries) is a legal question that, if answered in the negative, would foreclose each of Plaintiff's claims – if none of his time in the screenings was work, he is owed nothing.

The primary beneficiary question is a legal issue in this context, as for purposes of the Motion to Dismiss, the facts are not in dispute. Plaintiff has alleged that a COVID-19 outbreak at an Amazon fulfillment center would be disruptive to business operations. ECF No. 20, ¶ 30. In response, Amazon has pointed to federal, state, and local authorities that recommended or required COVID-19 screening as part of a national public health response. ECF No. 22 at 3-5, 6-8. Whether an employer is the primary beneficiary of its efforts taken to protect employees and the public is a question that is regularly decided as a matter of law. For example, in *Bonilla v. Baker Concrete Construction, Inc.*, 487 F.3d 1340 (11th Cir. 2007), the court held that construction workers at Miami International Airport were not engaging in compensable work when they went through security screenings mandated by the Federal Aviation Administration.

Whether Amazon was the primary beneficiary of the COVID-19 screenings is also controlling. If Amazon was not the primary beneficiary of the screenings, then the screenings are not compensable "work." Since Plaintiff's claim hinges entirely on the contention that time spent in and waiting for COVID-19 screenings should have been paid, a win for Amazon on appeal "necessitates dismissal."

Bernal, 2017 WL 4542950, at *2.

2. There Are Substantial Grounds for Difference of Opinion on Each of the Questions Presented.

"[T]here is substantial ground for difference of opinion" on each of the questions presented for certification. 28 U.S.C. § 1292(b). "A substantial ground for difference of opinion exists where reasonable jurists ***might*** disagree on an issue's resolution, not merely where they have already disagreed." *Reese*, 643 F.3d at 688 (emphasis added). Of course, that standard can be met if there is a case "directly conflicting" with the district court's decision, as is true here. *Id.*; *see also, e.g., Mei Xing Yu*, 874 F.3d at 96–97 (an order "clearly merits interlocutory review under section 1292(b)" where there is a "split of authorities on the . . . issue among district courts within the . . . Circuit"); *McDonnel Grp., LLC v. Starr Surplus Lines Ins. Co*., 2020 WL 1064912, at *3 (E.D. La. Mar. 5, 2020) ("there is substantial ground for disagreement" where district courts have "addressed similar [circumstances] and decided the issue differently"); *McShannock v. JP Morgan Chase Bank N.A.*, 2019 WL 955289, at *1 (N.D. Cal. Feb. 27, 2019) (noting that a conflict among district courts constitutes a substantial ground for disagreement).

Moreover, "when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent." *Reese*, 643 F.3d at 688. As the Supreme Court has explained, "district courts should not hesitate to certify an interlocutory appeal" where a question "involves a new legal question or is of special consequence." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009). "Courts traditionally will find that a substantial ground for difference of opinion exists where novel and difficult questions of first impression exist." *Carr*, 2018 WL 3913810, at *2.

a. Reasonable Jurists Could Disagree on the Question of Whether Nevada Law Incorporates the PPA.

There is no binding precedent holding that Nevada has, or has not, adopted the PPA. It is well-settled under Nevada law that when interpreting a statute, "it is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject." *City of Boulder v. General Sales Drivers*, 101 Nev. 117, 118–19 (1985). The PPA was enacted in 1947 while the relevant Nevada laws, NRS 608.018 and NRS 608.016, were enacted in 1975 and 1985, respectively.

Further, case after case, including two unpublished cases from the Nevada Supreme Court, holds that Nevada law mirrors the FLSA, of which the PPA is a part. *See Rivera v. Pen & Sons Farms, Inc.*, 735 F.3d 892, 900-01 (9th Cir. 2013) (finding that Nevada courts would likely "interpret Nevada law to follow federal law" on wage and hour issues where the state and federal statutes do not "contain materially different language"); *Johnson v. Pink Spot Vapors Inc.*, 2015 WL 433503, *6, Case No. 2-14-cv-1960-JCM-GWF (D. Nev. Feb. 3, 2015) (holding that "analysis of plaintiffs' FLSA claims is also applicable to [plaintiffs'] claim" under NRS 608.250); *Rite of Passage v. Nevada Department of Business and Industry*, 131 Nev. 1338, 2015 WL 9484735, at *1 (Dec. 23, 2015) (deciding the meaning of "work" under NRS 608.016 based on the FLSA and federal case law); *Csomos v. Venetian Casino Resort, LLC*, 128 Nev. 891, 381 P.3d 605, *3 (2012) (finding that NRS 608.018 tracks the FLSA).

Plaintiff proffers that in the absence of a direct incorporation of the PPA into Nevada law, a court should find that it is not incorporated and, further, relies on a non-binding Sixth Circuit case *In Re Amazon* in which the Court found the PPA was not incorporated in Nevada law. ECF No. 23 at 12. The Nevada Supreme Court, however, has clearly indicated that the default is to include the FLSA's provisions in Nevada wage and hour law when Nevada law is silent, not to exclude them. *See Terry v. Sapphire Gentlemen's Club*, 130 Nev. 879 (2014) (in deciding wage-and-hour issues, Nevada courts look to the FLSA unless Nevada's statutory language is materially different from or inconsistent with it). Additionally, Judge Batchelder explicitly disagreed with the majority's analysis of the Nevada-law claims in *In Re Amazon*, noting that he "would expect the Nevada Supreme Court to find that Nevada's wage-and-hour statutes do not differ materially from the FLSA, so they implicitly incorporate the Portal-to-Portal Act's exclusions, and therefore time spent undergoing security checks is not compensable." 905 F.3d at 408 (emphasis added). Reasonable jurists could disagree as to whether Nevada law incorporates the PPA and, therefore, a "substantial ground for difference of opinion" exists. 28 U.S.C. § 1292(b).

b. Reasonable Jurists Have Disagreed on the Question of Whether Time Spent in Pre-Shift COVID-19 Screening Is Preliminary to Employee's Principal Activities in the Warehouse and Delivery Industries.

Whether the time spent in pre-shift COVID-19 screenings is preliminary to Plaintiff's principal

activities is a novel question on which reasonable jurists have disagreed. Judges in the Southern District of California and for the Court of Federal Claims have disagreed with this Court about whether pre-shift COVID-19 screenings are integral and indispensable to employees' principal work activities. *See Pipich*, 2022 WL 788671, at *4 (defendant "did not hire [its] employees to undergo health screenings" and, thus, the screenings "do not share the required nexus with Plaintiff's duties . . . to make the screening a compensable activity"); *Adegbite*, 156 Fed. Cl. at 506; *Alvarez*, 2021 WL 6163405, at *4 n.2 (holding that the "time spent passing through the Covid-19 screening" was not "integral to the Plaintiffs' principal activities as correctional officers"); *Adair*, 2021 WL 6163407, at *5 n.2 (holding that "Plaintiffs' alleged primary duties do not include preventing the spread of COVID-19 or responsibility for inmate health in general" and thus the "health screenings are not integral to Plaintiffs' alleged principal activity of maintaining safety and security at USP Lee"). And the court in *Perez* also held that pre-shift COVID-19 screenings were not integral and indispensable, applying *Busk* in dismissing a state law claim. 2021 WL 5741484, at *4.

For example, the court in *Pipich* dismissed a suit seeking damages under the FLSA for time spent in COVID-19 screening and held that under *Busk* COVID-19 screening is a non-compensable preliminary activity under the PPA. 2022 WL 788671, at *4. The circumstances presented in *Pipich* are materially indistinguishable from the facts alleged in this case. Plaintiff here alleges that, after he arrived at Amazon facilities but before he could clock in and start work, Amazon associates were asked questions about whether they have recently been exposed to COVID-19 and whether they have any symptoms of COVID-19 and had their temperature taken. FAC ¶¶ 17-19. Similarly, the plaintiffs in *Pipich* alleged that after arriving at their employer's premises but before clocking in, they were "ask[ed] a series of questions related to [their] potential exposure to the virus and present health symptoms" and had their temperature taken. 2022 WL 788671, at *1. Plaintiff in this case alleges that his job duties included "moving boxes, stacking packages, and loading boxes." FAC ¶ 14. The job duties of the plaintiffs in *Pipich* were quite similar: "storing inventory, reviewing and selecting orders, pulling specific parts according to retailers' needs, packing orders, and loading and delivering orders." 2022 WL 788671, at *1.

Considering the facts alleged by plaintiffs in *Pipich*, Judge Lorenz concluded that "pre-shift

COVID screenings [are] not 'integral and indispensable' to the employees' duties because the screening [is] not an intrinsic element of the loading and transporting of products to the stores. The screenings [are] not indispensable to the employees' duties because [the defendant] could eliminate them completely without hindering the employees' ability to perform their duties." *Id.* at *4. Judge Lorenz rejected plaintiffs' argument that COVID-19 "screenings are indispensable because they cannot be eliminated without jeopardizing employee safety and creating business risks." *Id.* at *3.

Similarly, in *Adegbite*, Judge Meyers of the Court of Federal Claims held that correctional workers at a federal prison in Oregon had not stated an FLSA claim for time spent in COVID-19 screenings. "Plaintiffs argue[d] that passing through the health screening that is necessitated by the COVID-19 pandemic is part of their primary activity of 'maintain[ing] the of [sic] the safety and security of the Institution.'" *Adegbite*, 156 Fed. Cl. at 506 (citation omitted). The *Adegbite* Court disagreed, explaining that "preventing the coronavirus from getting into and/or spreading within the Institution is not integral to Plaintiffs' principal activities." *Id.* Another judge on that court agreed in separate cases concerning other federal correctional officers. *See Alvarez*, 2021 WL 6163405, at *4 n.2 (concluding that COVID-19 "health screenings are not integral to Plaintiffs' alleged principal activity of maintaining safety and security at [the prison], and, consequently, are non-compensable"); *Adair*, 2021 WL 6163407, at *5 n.2 (same).

Moreover, in *Perez*, Judge Sachs of the Western District of Missouri also considered whether COVID-19 screenings were integral and indispensable under state law to the job of an employee whose work included, among other things, "stocking and unloading [merchandise]." *Perez*, 2021 WL 5741484, at *4. Like the courts in *Pipich*, *Adegbite*, *Alvarez*, and *Adair*, Judge Sachs concluded that they are not. *Id.* at *4.

These decisions "directly conflict" with this Court's order. *Reese*, 643 F.3d at 688. It is clear, therefore, that reasonable jurists could disagree with this Court's holding because multiple judges in fact have come to the opposite conclusion. Where, as here, district courts have "addressed similar [circumstances] and decided the issue differently," "there is substantial ground for disagreement" to warrant certification. *McDonnel Grp.*, 2020 WL 1064912, at *3.

/ / /

c. Reasonable Jurists Have Disagreed on the Question of Whether Time Spent in COVID-19 Screening Primarily Benefits the Employer.

Likewise, whether time spent in and waiting for COVID-19 screening time is work undoubtedly presents novel legal questions on which reasonable jurists have disagreed; COVID-19 screening simply did not exist before spring 2020. There is no binding authority that directly addresses whether a pervasive, public health measure like COVID-19 screenings - implemented under temporary, emergency conditions - constitutes "work" because it primarily benefits employers. *See Perez*, 2021 WL 5741484, at *1 ("[T]he court has been unable to locate case law precisely on th[e] issue [of whether COVID-19 screenings are compensable]. While a number of courts have ruled on claims of pre-shift and/or post-shift unpaid compensable work to change clothes or prepare equipment, these complaints have not arisen in the context of the present pandemic.").

In particular, reasonable jurists could agree with Amazon's argument that the fact that COVID-19 screenings are conducted in accordance with regulations and guidelines issued by federal, state, and local authorities underscores that these screenings benefit Amazon associates and the public at large and are not undertaken primarily for Amazon's benefit. Such requirements and guidance from government agencies demonstrate that, while Amazon benefits from measures to reduce the spread of COVID-19, it does so in the same way all members of the public benefit from responsible precautions to slow the spread of the virus. At a minimum, then, the question presented is a "novel and difficult question" on which "substantial ground for difference of opinion exists." *Carr*, 2018 WL 3913810, at *2.

Moreover, several courts have found that similar screenings were not done primarily for the benefit of the employer. For example, in *Perez*, the plaintiff sued her employer for compensation for time spent in COVID-19 screenings, which consisted of a "physical and medical examination to check for symptoms of COVID-19 each shift," on a theory of unjust enrichment under Missouri law. *Id.* at *1. Much like here, the plaintiff's job duties included: "stocking and unloading [merchandise]; assist customers find products; perform cashier and front-end services; and acknowledge and greet customers" in a retail store (Walmart). *Id.* at *4. She argued that her employer had been unjustly enriched because it did not pay her for the screening time. *Id.* at *1.

The court granted the employer's motion to dismiss, recognizing that "the benefits of a healthy and safe working environment have been conferred on both parties," and that "there is little doubt that plaintiff, defendants, and their consumers, contractors, and all persons entering the stores were the beneficiaries of the early detection health and safety protocols." *Id.* at *2-3. Because "the facts demonstrate[d] mutual benefits to the parties . . . [the] plaintiff fail[ed] to show that defendants were or unjustly enriched." *Id.* This kind of "split of authorities" "clearly merits interlocutory review under section 1292(b)." *Mei Xing Yu*, 874 F.3d at 96–97.

3. Immediate Appeal Will Materially Advance the Termination of This Litigation

Certification would "materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), because resolution of the questions presented in Amazon's favor would "appreciably shorten the time, effort, or expense of conducting" the district court proceedings. *In re Cement*, 673 F.2d at 1027. The questions presented, if answered in Amazon's favor, are dispositive of the claims; indeed, if Amazon wins the appeal on either the second or third issue, Plaintiff's claims would necessarily be dismissed. The potential dismissal of the Plaintiff's claims is especially significant here where the continuation of a class action carries the additional costs and burdens of classwide discovery, class certification motion practice, and classwide summary judgment and trial issues. Thus, certification would plainly assist in "avoiding the expenditure of time and resources." *Stoutt*, 2021 WL 1143612, at *2; *see also, e.g.*, *Avrahami v. Clark*, 2021 WL 1022542, at *2 (D. Ariz. Feb. 12, 2021) (finding third prong of the section 1292(b) test satisfied where "less discovery may result and the termination of the case will be advanced.").

B. Alternatively, This Matter Meets the Criteria for Certification of Questions to the Nevada Supreme Court.

Rule 5 of the Nevada Rules of Appellate Procedure ("NRAP") provides that the Nevada Supreme Court can answer questions of law certified to it by a United States District Court where the questions of law "may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decision of the supreme court of this state." *See also Life Ins. Co. v. Wollett*, 104 Nev. 687, 688, 766 P.2d 893 (1988). Ultimately, "the decision to certify a question to a state supreme court rests in the sound discretion of

the district court." *Eckard Brandes, Inc. v. Riley*, 338 F.3d 1082, 1087 (9th Cir. 2003) (internal citations and quotation marks omitted).

As set forth by the Nevada Supreme Court, certified questions of law "may be determinative" within the meaning of NRAP 5 if the answer may be determinative of the case in whole or in part, there is not controlling Nevada precedent, and the answer will help settle important questions of law. *Volvo Cars of North America, Inc. v. Ricci*, 122 Nev. 746, 750-51, 138 P.3d 1161 (2006). The Ninth Circuit casts the test similarly, stating that "[i]n deciding whether to exercise [its] discretion [to certify a question under NRAP 5], [the Court] consider[s]: (1) whether the question presents important public policy ramifications yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court's caseload; and (4) the spirit of comity and federalism." *High Country Paving, Inc. v. United Fire & Casualty Co.*, 14 F.4th 976, 978 (9th Cir. 2021) (citation and quotations omitted).

Here, Amazon requests this Court to certify three questions of law to the Nevada Supreme Court: (1) Does Nevada law incorporates the PPA?; (2) Are pre-shift COVID-19 screenings "integral and indispensable" to Plaintiff and the purported class's principal activities and therefore compensable under the PPA?; and (3) Does time spent undergoing pre-shift COVID-19 screening constitute "work" under Nevada law because it is primarily for the benefit of employers?

These questions are of significant importance to the State of Nevada, as they are "issue[s] of first impression and ha[ve] significant implications for Nevada's wage protection law." *Boucher v. Shaw*, 483 F.3d 613, 616 (9th Cir. 2007), certified question answered, 124 Nev. 1164, 196 P.3d 959 (2008). The answers to the presented questions are determinative of Plaintiff's claims, and are important questions of law, as the answer to each affects the wages that are legally required to be paid to virtually all, if not all, non-exempt employees in the state of Nevada.

COVID-19 screenings arose in the course of a once-in-a-century pandemic and there is simply no binding precedent in the state of Nevada that controls the questions of whether the PPA applies, whether such screenings are work, or whether they are integral and indispensable to Plaintiff's – indeed to any employee's – principal activities. The issues surrounding these screenings are plainly new and substantial. Given the mandates and guidelines with respect to combatting COVID-19 that the State

of Nevada set out for essential businesses such as Amazon, the questions surrounding the compensability of these screenings have broad application. Considerations of comity and federalism also support permitting the Nevada Supreme Court to determine Nevada law in this arena.

Notably, courts have repeatedly certified questions related to wage and hour issues to the Nevada Supreme Court, showing their importance. *E.g. Hanks v. Briad Rest. Grp., LLC.,* No. 2:14-cv-00786-GMN-PAL, 2015 WL 11121588 (D. Nev. Sept. 15, 2015) (certifying question of "[w]hether an employee must actually enroll in health benefits offered by an employer before the employer may pay that employee at the lower-tier wage under the Minimum Wage Amendment"); *Boucher v. Shaw*, 483 F.3d 613, 616 (9th Cir. 2007) (certifying the issue of the meaning of "employer" under wage and hour law); *Castillo v. Western Range Assoc.*, 3:16-cv-00237-RCJ-CLB, 2022 WL 4466184 at * 7 (D. Nev. Sept. 26, 2022) (certifying the question of what constitutes work, specifically whether "Nevada law require[s] [defendant] to pay [plaintiff] 24 hours of wages for every day worked [as a sheepherder]… [where he was not allowed to leave and] was always performing some job duties."); *Echeverria v. Nevada*, No. 3:14-cv-00320-MMD-WGC, 2020 WL 3893594 at *3-4 (D. Nev. Jul. 10, 2020) (certifying question of whether Nevada has consented to suit under the FLSA or analogous state law). This Court should follow suit.

IV. CONCLUSION

For the foregoing reasons, Amazon respectfully request the Court to grant its Motion for Certification of Interlocutory Appeal under 28 U.S.C. § 1292(b) or, in the alternative, Motion to Certify Questions to the Nevada Supreme Court.

Dated: April 3, 2023

Respectfully submitted,

Diana Dickinson

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PROOF OF SERVICE

I am a resident of the State of Nevada over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, NV 89169.5937 On April 3, 2023, I served the within document(s):

DEFENDANT'S MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(B) OR, IN THE ALTERNATIVE, MOTION TO CERTIFY QUESTIONS TO THE NEVADA SUPREME COURT

☒ By **CM/ECF Filing** – Pursuant to FRCP 5(b)(3) and LR 5-1, the above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing (CM/ECF) system:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 3, 2023, at Las Vegas, Nevada.

/s/ Joanne Conti
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DWIGHT MALLOY, on behalf of himself and all others similarly situated;

Plaintiffs,

vs.

AMAZON.COM SERVICES, LLC,

Defendant.

Case No. 2:22-cv-00286-ART-VCF

ANSWER TO PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT AND JURY DEMAND

AMAZON.COM SERVICES LLC ("Amazon") ("Defendant") by and through its counsel of record, Littler Mendelson, P.C., hereby answers Plaintiff's First Amended Complaint ("FAC") as follows:

INTRODUCTION

1. Answering Paragraph 1 of the FAC, Defendant denies each and every allegation therein.

2. Answering Paragraph 2 of the FAC, Defendant denies each and every allegation set forth therein.

JURISDICTION AND VENUE

3. Answering Paragraph 3 of the FAC, Defendant admits that this Court has jurisdiction over the subject matter of this action pursuant to the Class Action Fairness Act.

4. Answering Paragraph 4 of the FAC, Defendant admits that venue is proper. Defendant admits that it employed Plaintiff in Las Vegas, Nevada. Defendant denies each and every remaining allegation set forth therein.

5. Answering Paragraph 5 of the FAC, Defendant admits that it is subject to this Court's personal jurisdiction. Defendant denies any violations of law forming the basis of Plaintiff's lawsuit.

6. Answering Paragraph 6 of the FAC, Defendant admits that the Court has the power so identified but denies Plaintiff and/or the putative class is entitled to any declaratory or other relief.

PARTIES AND PERSONAL JURISDICTION

7. Answering Paragraph 7 of the FAC, Defendant is informed and believes that Plaintiff resides in, and is a citizen of, Nevada.

8. Answering Paragraph 8 of the FAC, Defendant admits that Paragraph 8 alleges to define the purported Class Members but denies that class treatment is appropriate as to any purported class defined therein.

9. Answering Paragraph 9 of the FAC, Defendant admits that it is a Delaware limited liability company with its principal place of business located in Seattle, Washington, admits that it has been properly served, and admits that is has made an appearance in this case. Defendant denies each and every remaining allegation set forth therein.

10. Answering Paragraph 10 of the FAC, Defendant admits it employed Plaintiff and putative class members, as defined by Plaintiff. As to the remaining allegations, Defendant denies each and every remaining allegation set forth therein.

11. Answering Paragraph 11 of the FAC, Defendant admits it employed Plaintiff and putative class members, as defined by Plaintiff. As to the remaining allegations, Defendant denies each and every remaining allegation set forth therein.

/ / /

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FACTS

12. Answering Paragraph 12 of the FAC, Defendant lacks knowledge or information sufficient to admit or deny the allegations in the first sentence of it. Defendant admits that persons entering certain Amazon facilities at certain times during the COVID-19 pandemic were required to submit to COVID-19 screening, which included temperature screening. To the extent the remainder of this paragraph sets forth conclusions of law, no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

13. Answering Paragraph 13 of the FAC, Defendant admits that it operates fulfillment centers and distribution centers in Nevada and other parts of the country, that those fulfillment centers are warehouses which store packages that are delivered to customers, that at least some warehouses operate 24 hours per day, that it employs individuals to work at these centers, and that more than 10,000 Nevadans have been employed at these centers. As to the remaining allegations, Defendant denies each and every remaining allegation set forth therein.

14. Answering Paragraph 14 of the FAC, Defendant admits that Plaintiff was employed by Defendant from April 27, 2020 to March 29, 2021 and December 29, 2021 to February 11, 2022 as an hourly non-exempt employee. As to the remaining allegations, Defendant denies each and every remaining allegation set forth therein.

15. Answering Paragraph 15 of the FAC, Defendant denies each and every allegation set forth therein.

COVID-19 SCREENING

16. Answering Paragraph 16 of the FAC, Defendant admits that Plaintiff clocked in and clocked out each day and sometimes underwent a COVID screening. Defendant admits that persons entering certain Amazon facilities at certain times during the COVID-19 pandemic were required to submit to COVID-19 temperature screening. As to the remaining allegations, Defendant denies each and every remaining allegation set forth therein.

17. Answering Paragraph 17 of the FAC, Defendant admits that persons entering certain Amazon facilities at certain times during the COVID-19 pandemic were required to submit to COVID-

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19 temperature screening. As to the remaining allegations, Defendant denies each and every remaining allegation set forth therein.

18. Answering Paragraph 18 of the FAC, Defendant admits that persons entering certain Amazon facilities at certain times during the COVID-19 pandemic were required to have their temperature taken, and that Defendant has provided face masks to employees during the pandemic. As to the remaining allegations, Defendant denies each and every remaining allegation set forth therein.

19. Answering Paragraph 19 of the FAC, Defendant denies each and every allegation set forth therein.

20. Answering Paragraph 20 of the FAC, Defendant denies each and every allegation set forth therein.

21. Answering Paragraph 21 of the FAC, Defendant admits it required some employees to undergo certain screenings at times during the COVID-19 pandemic. As to the remaining allegations, Defendant denies each and every remaining allegation set forth therein.

22. Answering Paragraph 22 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

23. Answering Paragraph 23 of the FAC, Defendant denies each and every allegation set forth therein.

24. Answering Paragraph 24 of the FAC, Defendant denies each and every allegation set forth therein.

25. Answering Paragraph 25 of the FAC, Defendant denies each and every allegation set forth therein.

26. Answering Paragraph 26 of the FAC, Defendant denies each and every allegation set forth therein.

27. Answering Paragraph 27 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. Defendant admits that COVID-19 screenings were undertaken on Defendant's premises. To the extent that the remainder of this paragraph contains any factual

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allegations, Defendant denies each and every remaining allegation set forth therein.

28. Answering Paragraph 28 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. Defendant admits that, in accordance with recommendations of public health authorities and in compliance with all applicable regulations, it required COVID-19 temperature screenings to help prevent the spread of COVID-19 to others, including but not limited to employees. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

29. Answering Paragraph 29 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. Defendant admits that, in accordance with recommendations of public health authorities and in compliance with all applicable regulations, it required COVID-19 temperature screenings to help prevent the spread of COVID-19 to others, including but not limited to employees. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

30. Answering Paragraph 30 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. Defendant admits that, in accordance with recommendations of public health authorities and in compliance with all applicable regulations, it required COVID-19 temperature screenings to help prevent the spread of COVID-19 to others, including but not limited to employees. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

31. Answering Paragraph 31 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. Defendant admits that, in accordance with recommendations of public health authorities and in compliance with all applicable regulations, it required COVID-19 temperature screenings to help prevent the spread of COVID-19 to others, including but not limited to employees. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

32. Answering Paragraph 32 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. Defendant admits that, in accordance with recommendations of public health authorities and in compliance with all applicable regulations, it required COVID-19 temperature

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screenings to help prevent the spread of COVID-19 to others, including but not limited to employees. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

33. Answering Paragraph 33 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. Defendant admits that, in accordance with recommendations of public health authorities and in compliance with all applicable regulations, it required COVID-19 temperature screenings to help prevent the spread of COVID-19 to others, including but not limited to employees. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

34. Answering Paragraph 34 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. Defendant admits that, in accordance with recommendations of public health authorities and in compliance with all applicable regulations, it required COVID-19 temperature screenings to help prevent the spread of COVID-19 to others, including but not limited to employees. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

35. Answering Paragraph 35 of the FAC, Defendant denies each and every allegation set forth therein.

36. Answering Paragraph 36 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

37. Answering Paragraph 37 of the FAC, Defendant denies each and every allegation set forth therein.

38. Answering Paragraph 38 of the FAC, Defendant admits that Plaintiff, and the putative class members as defined by Plaintiff, are and were non-exempt employees.

39. Answering Paragraph 39 of the FAC, Defendant admits that Plaintiff, and the putative class members as defined by Plaintiff, are and were paid on an hourly rate basis.

40. Answering Paragraph 40 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. To the extent that the remainder of this paragraph contains any factual

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allegations, Defendant admits that some non-exempt employees in Nevada are entitled to overtime pay.

41. Answering Paragraph 41 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

42. Answering Paragraph 42 of the FAC, Defendant denies each and every allegation set forth therein.

43. Answering Paragraph 43 of the FAC, Defendant denies each and every allegation set forth therein.

44. Answering Paragraph 44 of the FAC, Defendant denies each and every allegation set forth therein.

RULE 23 CLASS ACTION ALLEGATIONS

45. Answering Paragraph 45 of the FAC, Defendant admits that Plaintiff has filed what purports to be a class action and defined a proposed Nevada Class. Defendant denies that class treatment is appropriate as to any purported class defined therein and denies any alleged facts stated therein.

46. Answering Paragraph 46 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies that class treatment is appropriate as to any purported class defined therein and denies any alleged facts stated therein.

47. Answering Paragraph 47 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies that class treatment is appropriate as to any purported class defined therein and denies any alleged facts stated therein.

48. Answering Paragraph 48 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies that class treatment is appropriate as to any purported class defined therein and denies any alleged facts stated therein.

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49. Answering Paragraph 49 of the FAC and its subsections (a) through (i), this paragraph asserts conclusions of law to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies that class treatment is appropriate as to any purported class defined therein and denies any alleged facts stated therein.

50. Answering Paragraph 50 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies that class treatment is appropriate as to any purported class defined therein and denies any alleged facts stated therein.

51. Answering Paragraph 51 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies that class treatment is appropriate as to any purported class defined therein and denies any alleged facts stated therein.

52. Answering Paragraph 52 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies that class treatment is appropriate as to any purported class defined therein and denies any alleged facts stated therein.

VII. CAUSES OF ACTION [1]

FIRST CLAIM FOR RELIEF
Failure to Pay for All Hours Worked
Violation of NRS 608.140 and 608.016
On Behalf of Plaintiff and the Class

53. Answering Paragraph 53 of the FAC, Defendant incorporates by reference its responses to the previous allegations set forth in Paragraphs 1 through 52 as though set forth fully herein.

54. Answering Paragraph 54 of the FAC, this paragraph asserts conclusions of law to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

55. Answering Paragraph 55 of the FAC, Plaintiff purports to characterize Nevada law. To the extent a response is required, Defendant denies the allegations in Paragraph 55 of the Complaint

[1] Incorrectly styled as section "VII" in Plaintiff's FAC.

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to the extent that they are inconsistent with Nevada law.

56. Answering Paragraph 56 of the FAC, Plaintiff purports to characterize Nevada law. To the extent a response is required, Defendant denies the allegations in Paragraph 56 of the Complaint to the extent that they are inconsistent with Nevada law.

57. Answering Paragraph 57 of the FAC, Defendant denies each and every allegation set forth therein.

58. Answering Paragraph 58 of the FAC, Defendant denies each and every allegation set forth therein.

59. Answering Paragraph 59 of the FAC, Defendant denies each and every allegation set forth therein.

60. Answering Paragraph 60 of the FAC, Defendant denies each and every allegation set forth therein.

61. Answering Paragraph 61 of the FAC, this paragraph asserts Plaintiff's demands, to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

62. Answering Paragraph 62 of the FAC, this paragraph asserts Plaintiff's demands, to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

SECOND CLAIM FOR RELIEF
Failure to Pay Minimum Wages
Violation of the Nevada Constitution
On Behalf of Plaintiff and the Class

63. Answering Paragraph 63 of the FAC, Defendant incorporates by reference its responses to the previous allegations set forth in Paragraphs 1 through 62 as though set forth fully herein.

64. Answering Paragraph 64 of the FAC, Plaintiff purports to characterize Nevada law. To the extent a response is required, Defendant denies the allegations in Paragraph 64 of the Complaint to the extent that they are inconsistent with Nevada law.

65. Answering Paragraph 65 of the FAC, Defendant denies each and every allegation set forth therein.

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66. Answering Paragraph 66 of the FAC, this paragraph asserts Plaintiff's demands, to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

67. Answering Paragraph 67 of the FAC, this paragraph asserts Plaintiff's demands, to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

THIRD CLAIM FOR RELIEF
Failure to Pay Overtime Wages
Violation of NRS 608.140 and 608.018
On Behalf of Plaintiff and the Class

68. Answering Paragraph 68 of the FAC, Defendant incorporates by reference its responses to the previous allegations set forth in Paragraphs 1 through 67 as though set forth fully herein.

69. Answering Paragraph 69 of the FAC, Plaintiff purports to characterize Nevada law. To the extent a response is required, Defendant denies the allegations in Paragraph 69 of the Complaint to the extent that they are inconsistent with Nevada law.

70. Answering Paragraph 70 of the FAC, Defendant admits it was required to compensate its employees for hours worked, including overtime as required by law. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

71. Answering Paragraph 71 of the FAC, Defendant denies each and every allegation set forth therein.

72. Answering Paragraph 72 of the FAC, Defendant denies each and every allegation set forth therein.

73. Answering Paragraph 73 of the FAC, Defendant denies each and every allegation set forth therein.

74. Answering Paragraph 74 of the FAC, Plaintiff purports to characterize Nevada law. To the extent a response is required, Defendant denies the allegations in Paragraph 74 of the Complaint to the extent that they are inconsistent with Nevada law.

75. Answering Paragraph 75 of the FAC, Defendant denies each and every allegation set

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forth therein.

76. Answering Paragraph 76 of the FAC, Defendant denies each and every allegation set forth therein.

77. Answering Paragraph 77 of the FAC, this paragraph asserts Plaintiff's demands, to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

78. Answering Paragraph 78 of the FAC, this paragraph asserts Plaintiff's demands, to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

FOURTH CLAIM FOR RELIEF
Failure to Pay All Wages Due and Owing Upon Termination
Violation of NRS 608.140 and 608.020-.050
On Behalf of Plaintiff and the Class

79. Answering Paragraph 79 of the FAC, Defendant incorporates by reference its responses to the previous allegations set forth in Paragraphs 1 through 78 as though set forth fully herein.

80. Answering Paragraph 80 of the FAC, Plaintiff purports to characterize Nevada law. To the extent a response is required, Defendant denies the allegations in Paragraph 80 of the Complaint to the extent that they are inconsistent with Nevada law.

81. Answering Paragraph 81 of the FAC, Defendant denies each and every allegation set forth therein.

82. Answering Paragraph 82 of the FAC, Defendant denies each and every allegation set forth therein.

83. Answering Paragraph 83 of the FAC, Plaintiff purports to characterize Nevada law. To the extent a response is required, Defendant denies the allegations in Paragraph 83 of the Complaint to the extent that they are inconsistent with Nevada law.

84. Answering Paragraph 84 of the FAC, Plaintiff purports to characterize Nevada law. To the extent a response is required, Defendant denies the allegations in Paragraph 84 of the Complaint to the extent that they are inconsistent with Nevada law.

85. Answering Paragraph 85 of the FAC, Defendant denies each and every allegation set

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forth therein.

86. Answering Paragraph 86 of the FAC, Defendant denies each and every allegation set forth therein.

87. Answering Paragraph 87 of the FAC, this paragraph asserts Plaintiff's demands, to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

88. Answering Paragraph 88 of the FAC, this paragraph asserts Plaintiff's demands, to which no response is necessary. To the extent that the remainder of this paragraph contains any factual allegations, Defendant denies each and every remaining allegation set forth therein.

VIII. JURY DEMAND

89. Answering Paragraph 89 of the FAC, Defendant admits that Plaintiff demands a jury trial.

IX. PRAYER FOR RELIEF

Defendant is not required to respond to Plaintiff's Prayer for Relief. However, to the extent Plaintiff's Prayer for Relief asserts any factual allegations, Defendant denies each and every allegation set forth in Plaintiff's Prayer for Relief.

AFFIRMATIVE AND OTHER DEFENSES

AS A FIRST DEFENSE, Defendant alleges that Plaintiff's FAC fails to state a claim upon which relief can be granted.

AS A SECOND DEFENSE, Defendant alleges that some or all of Plaintiff's claims are barred by the applicable statute of limitations.

AS A THIRD DEFENSE, Defendant alleges that some or all of the claims asserted in the FAC are barred by the equitable doctrines of laches, waiver, estoppel, release, and/or unclean hands.

AS A FOURTH DEFENSE, Defendant alleges that Plaintiff has failed to mitigate his damages.

AS A FIFTH DEFENSE, Defendant alleges that the FAC is barred to the extent Plaintiff or any member of the alleged class which Plaintiff purports to represent, the existence of which is expressly denied, have executed a compromise and release of any claims asserted in this lawsuit.

AS A SIXTH DEFENSE, Defendant alleges that the FAC and each cause of action asserted

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therein, are subject to the doctrine of accord and satisfaction and therefore, any remedy or recovery to which Plaintiff and/or any putative class member might have been entitled must be denied or reduced accordingly.

AS A SEVENTH DEFENSE, Defendant alleges that Plaintiff or any member of the alleged class which Plaintiff purports to represent have already been fully compensated for all hours worked.

AS AN EIGHTH DEFENSE, Defendant alleges that with respect to some or all of the claims brought by Plaintiff that any act(s) and/or omissions which may be found to be in violation of state law, occurred in conformity with and in reliance on a written administrative regulation, order, ruling, approval, and/or interpretation by the Nevada Labor Commissioner, with respect to the class of employers to which Defendant belong.

AS A NINTH DEFENSE, Defendant alleges that Plaintiff has failed to timely make a demand in writing for wages due and payable.

AS A TENTH DEFENSE, Defendant alleges that Defendant acted under the belief that Defendant was in compliance with all applicable statutes, law, and regulations concerning payment of wages and any other compensation owed to Plaintiff.

AS AN ELEVENTH DEFENSE, Defendant alleges that the FAC is barred to the extent that Plaintiff lacks standing to raise some or all of the claims of the alleged class of persons whom Plaintiff purports to represent, the existence of which is expressly denied.

AS A TWELFTH DEFENSE, Defendant alleges any duty or obligation, contractual or otherwise, which Plaintiff claims is owed by Defendant has been fully performed, satisfied, and/or discharged.

AS A THIRTEENTH DEFENSE, Defendant alleges that the FAC is barred to the extent that the claims alleged by Plaintiff are neither common to nor typical of those, if any, of the alleged class of persons whom he purports to represent, the existence of which is expressly denied.

AS A FOURTEENTH DEFENSE, Defendant alleges that the FAC is barred to the extent that Plaintiff is an inadequate representative of the alleged class of persons whom he purports to represent, the existence of which is expressly denied.

AS A FIFTEENTH DEFENSE, Defendant alleges that the types of claims alleged by Plaintiff

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on behalf of himself and the class of persons whom Plaintiff purports to represent, the existence of which is expressly denied, are matters in which individual questions predominate and are not appropriate for class treatment.

AS A SIXTEENTH DEFENSE, Defendant alleges that because liability may not be determined by a single jury on a class-wide basis, allowing this action to proceed as a class action would violate Defendant's rights under the Seventh Amendment.

AS A SEVENTEENTH DEFENSE, Defendant alleges that there are no owed wages or compensation to Plaintiff under NRS 608.020-050.

AS AN EIGHTEENTH DEFENSE, Defendant alleges that Plaintiff is not entitled to an award of attorneys' fees.

AS A NINETEENTH DEFENSE, Defendant alleges that Plaintiff's claims, and each of them, brought on behalf of himself and the putative members of the purported class as set forth in the Complaint, cannot and should not be maintained on a class-action, collective action, or representative action because: those claims, and each of them, fail to meet the necessary requirements for class certification, including but not limited to, class similarity, ascertainability, typicality, commonality, numerosity, manageability, superiority, and adequacy of the class representative; lack of a community of interest among the putative class; and because class certification is inappropriate due to Defendant's lawful policies, failure to identify unlawful decisions, policies, or plans the purported class was subjected to, and because individual determinations would be necessary to demonstrate Nevada statutory violations.

AS A TWENTIETH DEFENSE, Plaintiff's claims are barred, in whole or in part, to the extent that the work performed falls within the exemptions, exclusions, exceptions, or credits arising under federal or Nevada law.

AS A TWENTY-FIRST DEFENSE, Plaintiff's claims are barred, in whole or in part, to the extent that the work performed falls within the exemptions of NRS 608.018.

AS A TWENTY-SECOND DEFENSE, Plaintiff's claims are barred in whole or in part to the extent that NRS 608.016 claims are not gap or straight time claims.

AS A TWENTY-THRID DEFENSE, the waiting time penalties Plaintiff seeks on behalf of

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himself and the putative class are unconstitutional pursuant to the Due Process Clause of the U.S. and Nevada Constitutions.

AS A TWENTY-FOURTH DEFENSE, Defendant alleges that the FAC does not describe the claims or facts being alleged to sufficient particularity to ascertain what other defenses may exist. Defendant will rely on any and all further defenses that become available or appear during discovery in this action and specifically reserve the right to amend this Answer for purposes of asserting such additional defenses.

AS A TWENTY-FIFTH DEFENSE, Defendant alleges that because the FAC is couched in conclusory and vague terms, Defendant cannot fully anticipate all affirmative defenses that may be applicable to this case. Accordingly, Defendant hereby reserves the right to assert additional affirmative defenses.

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by reason of his FAC, and that judgment be entered in favor of Defendant;

2. That Defendant be awarded its reasonable attorneys' fees and costs of suit incurred in defense of this action; and

3. For such other and further relief as the court may deem just and proper.

Dated: April 17, 2023

Respectfully submitted,

Diana Dickinson

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AMY L. THOMPSON, ESQ.
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PROOF OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169.5937. On April 17, 2023, I served the within document(s):

ANSWER TO PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT AND JURY DEMAND

☒ By **CM/ECF Filing** – Pursuant to FRCP 5(b)(3) and LR 5-1, the above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing (CM/ECF) system:

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Attorneys for Plaintiff Dwight Malloy

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 17, 2023, at Las Vegas, Nevada.

/s/ Joanne Conti
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Littler Mendelson

4877-3425-5890.3 / 096748-1009

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

DWIGHT MALLOY, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

AMAZON.COM SERVICES, LLC,

Defendant.

Case No. 2:22-CV-286-ART-VCF

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(B) OR, IN THE ALTERNATIVE, MOTION TO CERTIFY QUESTIONS TO THE NEVADA SUPREME COURT

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

For months, this Court evaluated Amazon's Motion to Dismiss. On March 2, 2023, the Court denied Amazon's Motion to Dismiss after conducting a lengthy hearing with the parties. Being unhappy with the result, Amazon has now sought an interlocutory appeal on the denial of its Motion to Dismiss Plaintiff's claims. Unfortunately, 28 U.S.C. § 1292(b) does not allow for the type of relief that Amazon seeks.

Certification of an order for an interlocutory appeal is only appropriate where: (1) the order involves a controlling question of law; (2) as to which there is substantial ground for difference of opinion; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. *Id*. Here, none of the elements have been met.

First, an interlocutory appeal is not warranted because there is no substantial ground for difference of opinion. To date, every court to have considered whether Amazon workers are entitled to compensation for the time spent in COVID-19 screenings has rejected Amazon's argument that such time is not compensable as a matter of law. Similarly, the only circuit court decision addressing whether the Portal-to-Portal Act was incorporated into Nevada law has held that it was not incorporated into Nevada law. There is no decision that conflicts with this Court's Order denying Amazon's Motion to Dismiss.

Second, Amazon does not seek an interlocutory appeal regarding a "controlling question of law." The Ninth Circuit has explained that a "controlling question" is one that relates to a "fundamental" inquiry regarding the case, such as "who are necessary and proper parties, whether a court to which a cause has been transferred has jurisdiction, or whether state or federal law should be applied." *In re Cement Litig.*, 673 F.2d 1020, 1026-27 (9th Cir. 1982). Amazon does not present such a fundamental question in its request for certification.

Third, an interlocutory appeal will not materially advance the ultimate termination of the litigation. An interlocutory appeal materially advances the termination of the litigation where it "promises to advance the time for trial or to shorten the time required for trial." *Dukes v. Wal-Mart Stores, Inc.*, No. C 01–02252 CRB, 2012 WL 6115536, at *5 (N.D. Cal. Dec. 10, 2012). Here,

Amazon's proposed appeal would only delay this case, not shorten the time for resolution.

Further, there is no basis to certify any question to the Nevada Supreme Court. The statutory language is clear that the Portal-to-Portal Act was not incorporated into Nevada law. Additionally, the case law that exists has held that the Portal-to-Portal Act was not incorporated into Nevada law. Therefore, Amazon's request to certify that question to the Nevada Supreme Court should be denied.

Ultimately, this Court's decision properly applied the law; Amazon simply does not like the result. Despite Amazon's arguments, there is no error in the Court's Order denying Amazon's Motion to Dismiss. Amazon's Motion for Certification of Interlocutory Appeal should now be denied as well.

II. ARGUMENTS AND AUTHORITIES

As a general rule, a party may seek review of a district court's rulings only after the entry of final judgment. *In re Cement Litig.*, 673 F.2d 1020, 1027 (9th Cir. 1982). However, a district court may under "exceptional" circumstances certify an order for interlocutory review pursuant to 28 U.S.C. § 1292(b). *Id.* at 1026 (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)). Certification may be appropriate where: (1) the order involves a controlling question of law; (2) as to which there is substantial ground for difference of opinion; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

"The decision to certify an order for interlocutory appeal is committed to the sound discretion of the district court." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 47 (1995). As such, "[e]ven when all three statutory criteria are satisfied, district court judges have unfettered discretion to deny certification." *Ambrosio v. Cogent Comm's, Inc.*, No. 14-CV-2182-RS, 2016 WL 777775, at *2 (N.D. Cal. Feb. 29, 2016) (internal citations omitted). "The party seeking certification has the burden of showing that exceptional circumstances justify a departure from the 'basic policy of postponing appellate review until after the entry of a final judgment.'" *Fukuda v. Cnty. of Los Angeles*, 630 F. Supp. 228, 229 (C.D. Cal. 1986) (quoting *Coopers*, 437 U.S. at 475). As explained below, Amazon has not met its burden to justify the extraordinary remedy it seeks.

A. Amazon's Motion should be denied because there is no substantial ground for difference of opinion. Thus far, every case that has been brought against Amazon for compensation for the time spent in COVID-19 screenings has allowed the cases to proceed.

The party pursuing the interlocutory appeal bears the burden of demonstrating that the requirements established by section 1292(b) are satisfied. *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (dismissing consolidated interlocutory appeals for lack of appellate jurisdiction in light of the fact that there was not a substantial ground for difference of opinion). Section 1292(b) must be construed narrowly and applied sparingly. *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002). That is because an interlocutory appeal under section 1292(b) is a departure from the normal rule that only final judgments are appealable. *See id.* at 1068. Here, Amazon's Motion should be denied because Amazon has failed to demonstrate that there is a "substantial ground for difference of opinion."

To begin, this lawsuit is not the only case that has been brought by workers against Amazon who seek compensation for the time they spent in COVID-19 screenings. In addition to this case, there are four other cases pending against Amazon where Amazon warehouse workers have sued for compensation for the time they spent in COVID-19 screenings. *See Vaccaro v. Amazon.com.dedc, LLC*, No. Civ. A. 18-CV-11852 (D.N.J. 2021); *Boone v. Amazon.com Services, LLC*, No. 1:21-CV-0241-ADA-BAM; *Vincenzetti v. Amazon.com Services, LLC*, No. 1:21-CV-02681-RM-NRN (D. Col. 2021); *Johnson v. Amazon.com Services, LLC*, No. Civ. A. 1:23-CV-0685 (N.D. Ill. 2023). Amazon's argument that the time spent in COVID-19 screenings is not compensable as a matter of law has been rejected by *every* court to have considered it. *See, e.g.*, *Boone v. Amazon.com Services, LLC,* 562 F. Supp. 3d 1103 (E.D. Cal. 2022); and *Vaccaro v. Amazon.com.dedc, LLC*, No Civ. A. 18-11852, 2021 WL 1022699 (D.N.J. March 17, 2021). Regardless of this fact, the standard to establish a "substantial ground for difference of opinion" is an exacting one. The Ninth Circuit in *Couch v. Telescope, Inc.*, 611 F.3d 629, 633 (9th Cir. 2010), stated as follows:

> To determine if a "substantial ground for difference of opinion" exists under § 1292(b), courts must examine to what extent the controlling law is unclear. Courts traditionally will find that a substantial ground for difference of opinion exists

> where "**the circuits are in dispute on the question** and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." 3 Federal Procedure, Lawyers Edition § 3:212 (2010) (footnotes omitted). However, "**just because a court is the first to rule on a particular question or just because counsel contends that one precedent rather than another is controlling does not mean there is such a substantial difference of opinion as will support an interlocutory appeal**." *Id.* (footnotes omitted).

Id. (emphasis added).

Here, there is no substantial ground for difference of opinion because there is no dispute amongst the courts. Amazon claims that there are substantial grounds for difference of opinions on each of the three questions it raised. (Dkt. 34 at p. 10). Amazon is wrong. The following explains in detail why there is no substantial ground for difference of opinion on each issue that Amazon has sought to appeal.

1. There is no substantial ground for difference of opinion that the Portal-to-Portal Act was not incorporated into Nevada law.

Amazon argues that "[r]easonable jurists could disagree as to whether Nevada law incorporates the PPA." (Dkt. 34 at p. 11). This argument is without merit. First, Nevada's wage-hour statute is to be liberally construed in favor of employees. *See Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 956 (2014); *see also Intl Game Tech., Inc. v. Second Judicial Dist. Court ex rel. Cnty. of Washoe*, 179 P.3d 556, 560-61 (2008) ("[R]emedial statutes. . . should be liberally construed to effectuate the intended benefit.").

Second, there is not one decision from any Nevada state court or federal court finding that the federal Portal-to-Portal Act was incorporated into Nevada law. To the contrary, the Sixth Circuit addressed this precise issue and held that Nevada law does not incorporate the Portal-to-Portal Act. *In re: Amazon.Com Fulfillment Center FLSA and Wage and Hour Litig.*, 905 F.3d 387, 404 (6th Cir. 2018). The Sixth Circuit stated as follows:

> Furthermore, despite the apocalyptic implications that Defendants seem to believe rejecting the Portal-to-Portal Act in the state of Nevada would have, both California and Washington have declined to incorporate it into their state codes and they seem to be doing fine. *See, e.g.*, *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 94 Cal.Rptr.2d 3, 995 P.2d 139 (2000) (finding that state labor codes and wage orders "do not contain an express exemption for travel time similar to that of the Portal-

> to-Portal Act" and holding that "[a]bsent convincing evidence of the [Industrial Wage Commission]'s intent to adopt the federal standard of determining whether time spent traveling is compensable under state law, we decline to import any federal standard, which expressly eliminates substantial protections to employees, by implication"); *Anderson v. State, Dep't of Soc. & Health Servs.*, 115 Wash.App. 452, 63 P.3d 134, 136 (2003) ("We are not persuaded that the Legislature intended to adopt the Portal to Portal Act; and we do not hold that it was adopted.").
>
> **In sum, because there is no reason to believe that the Nevada legislature intended to adopt the Portal-to-Portal Act, we are reluctant to infer an entirely unsupported legislative intent.**

Id. (emphasis added).

Amazon has not identified any case to the contrary.

In *Couch v. Telescope, Inc*., the Ninth Circuit determined that when there is not a single case that conflicts with the district court's opinion, an appeal under section 1292(b) is not permitted. *Couch v. Telescope, Inc*., 611 F.3d 629, 633-34 (9th Cir. 2010). In *Couch*, the Ninth Circuit vacated an appeal under 1292(b) because the "defendants had failed to demonstrate a substantial ground for difference of opinion." *Id*. at 634. The Ninth Circuit further stated as follows:

> Significantly, defendants have not provided a single case that conflicts with the district court's construction or application of California Penal Code § 319. *See Union County,* 525 F.3d at 647 (" 'While identification of a sufficient number of conflicting and contradictory opinions would provide substantial ground for disagreement,' the County offered no such Iowa opinions, statutes or rules, and 'a dearth of cases' does not constitute 'substantial ground for difference of opinion.' " (quoting *White v. Nix,* 43 F.3d 374, 378 (8th Cir.1994))).

Id. at 633-34.

The facts in *Couch* are essentially the same as the facts in this case. Here, Amazon has argued that there is substantial ground for difference of opinion. However, there is not one case that conflicts with this Court's decision to deny Amazon's Motion to Dismiss. The only the case that has addressed whether the Portal-to-Portal Act was incorporated into Nevada law supports this Court's decision to deny Amazon's Motion to Dismiss. Like in *Couch*, the Court should not

permit an appeal under section 1292(b) because there is no substantial ground for difference of opinion.

2. There is no substantial ground for difference of opinion that Amazon primarily benefited from the COVID-19 screenings.

Amazon claims that there is substantial ground for difference of opinion as to whether Amazon primarily benefited from the COVID-19 screenings. Again, there is no decision that has reached the conclusion that Amazon's employees were the primary beneficiary of the COVID-19 screenings. *See Boone v. Amazon.com Services, LLC,* 562 F. Supp. 3d 1103 (E.D. Cal. 2022); *Vaccaro v. Amazon.com.dedc, LLC*, No. Civ. A. 18-11852, 2021 WL 1022699 (D.N.J. Mar. 17, 2021).

In *Boone v. Amazon.com Services, LLC*, a group of Amazon warehouse employees in California brought a lawsuit seeking compensation for the time they spent completing the COVID-19 screenings before they clocked-in each day. *Boone,* 562 F. Supp. 3d 1103 at 1108-09. The plaintiffs in *Boone* brought their claims for unpaid wages under both the FLSA and California Labor Code. *Id*. Amazon filed a similar motion to dismiss. *Id*. at 1110. Just like in this case, Amazon argued that the time spent in the COVID-19 screenings is not "work" because the COVID-19 screenings were not primarily for Amazon's benefit. *Id*. at 1112-13. The *Boone* Court rejected Amazon's arguments and held as follows:

> **The court is not persuaded by defendant's argument that it is only an incidental beneficiary of the screenings because every other member of the community likewise benefits from the prevention of infection**…According to the allegations of the SAC, absent the screenings, "workers could inadvertently or unintentionally bring the virus into the Amazon facilities causing a mass breakout of the virus infecting hundreds to thousands of other workers of Amazon." (*Id.*) If Amazon facilities suffered an infection outbreak, defendant would potentially have to find new employees or shut down its warehouse until it was safe to open again. Such an outbreak would harm defendant Amazon directly and to a greater extent than the general public. **Given this alleged substantial risk to defendant and its business operations, it is plausibly alleged that it is defendant who primarily benefits from its decision to mitigate that risk by implementing the mandatory COVID-19 screening policy.**

Id. at 1117 (emphasis added).

A similar conclusion was reached in in *Vaccaro v. Amazon.com.dedc, LLC*, No. Civ. A. 18-11852, 2021 WL 1022699 (D.J.J. Mar. 17, 2021). In *Vaccaro*, Amazon argued that the "COVID screenings are not compensable." *Id*. at *1. The District of New Jersey rejected Amazon's arguments. *Id*. at *4. The facts in *Boone* and *Vaccaro* are identical to the facts in this case. There is no contrary authority.

Nevertheless, Amazon argues that "whether the time spent in and waiting for COVID-19 screening time is work undoubtedly presents novel legal questions on which reasonable jurists have disagreed." (Dkt. 34 at p. 14). However, the Ninth Circuit in *Couch* rejected this argument. Specifically, the Ninth Circuit stated: "just because a court is the first to rule on a particular question…does not mean there is such a substantial difference of opinion as will support an interlocutory appeal." *Couch,* 611 F.3d at 633.

Moreover, Amazon claims "that the fact that COVID-19 screenings are conducted in accordance with regulations and guidelines issued by federal, state, and local authorities underscores that these screenings benefit Amazon associates and the public at large and are not undertaken primarily for Amazon's benefit." (Dkt. 34 at p. 14). Like Amazon's other arguments, this argument was rejected by the Ninth Circuit. *See Alvarez v. IBP, Inc*., 339 F.3d 894, 903 (9th Cir. 2003). In *Alvarez*, the Ninth Circuit held that the time spent by meat packing employees donning, doffing, and washing their protective gear primarily benefited the employer. *Id*. In reaching this conclusion, the Ninth Circuit found that the donning and doffing of the protective gear was "required by law." *Id*. Accordingly, the time spent donning, doffing, and washing the protective gear was primarily for the employer's benefit so that the employer could comply with the law. *Id*. The Ninth Circuit stated as follows:

> it is beyond cavil that the donning, doffing, washing, and retrieving of protective gear is, at both broad and basic levels, done for the benefit of IBP. See generally United Transp. Union Local 1745 v. City of Albuquerque, 178 F.3d 1109, 1116 (10th Cir.1999). **These plaintiff-performed activities allow IBP to satisfy its requirements under the law**, see 9 C.F.R. § 308.3 (1999); 29 C.F.R. § 1910.132(a) (1999), and these activities prevent unnecessary workplace injury and contamination, both of which would inevitably impede IBP's "disassembly" process. Under Steiner, plaintiffs' donning, doffing, and cleaning activities are "integral and indispensable" to Pasco's "principal" activity.

Id. (emphasis added).

Again, there is no Ninth Circuit case or other circuit court decision that conflicts with this Court's Order denying Amazon's Motion to Dismiss.

Amazon claims that "several courts have found that similar screenings were not done primarily for the benefit of the employer." (Dkt. 34 at p. 14). To the contrary, every case involving Amazon has rejected Amazon's argument that it was not the primary beneficiary. Indeed, rather than discuss the *Boone* and *Vaccaro* decisions, Amazon cites to *Perez v. Walmart, Inc.*, No. Civ. A. 4:21-CV-120-HFS, 2021 WL 5741484 (W.D. Mo. Oct. 25, 2021). However, in *Perez*, the plaintiff brought a claim under Missouri common law for unjust enrichment. *See id*. The claim raised in *Perez* was not brought under the FLSA or any wage and hour statute. *See id*. *Perez* provides no guidance for the Court because the facts and legal claims are materially distinct from those in this case. Moreover, *Perez* was a district court decision, not a circuit court decision. There is no circuit court decision that is contrary to this Court's Order denying Amazon's Motion to Dismiss. Based upon the Ninth Circuit's decision in *Couch*, Amazon's request for an appeal under section 1292(b) should be denied.

3. There is no substantial ground for difference of opinion that the COVID-19 screenings were integral and indispensable to the Plaintiff's principal activities.

Amazon claims that other courts "have disagreed with this Court about whether pre-shift COVID-19 screenings are integral and indispensable to employees' principal work activities." (Dkt. 34 at p. 12). Amazon's argument is baseless. First, the only other court to have addressed whether the time spent in the COVID-19 screenings is "integral and indispensable" to the principal activities of Amazon warehouse workers is the *Boone* decision which rejected Amazon's arguments.

Second, in *Carrillo v. Schneider Logistics Trans-Loading and Distribution, Inc*., No. 2:11-CV-8557-CAS, 2014 WL 1155403, at *3 (C.D. Cal. Mar. 21, 2014), the court denied a motion brought by Walmart under section 1292(b). Walmart was sued as a joint employer under the FLSA and the California Labor Code. *Id*. at *3-*4. After being sued, Walmart moved for summary judgment arguing that it was not liable as a joint employer as a matter of law. *Id*. The court denied

Walmart's motion for summary judgment. *Id*. at *2. Walmart then sought an appeal under section 1292(b) arguing that an interlocutory appeal was warranted because multiple other courts had reached a contrary decision. *Id*. at *3-*4. However, the *Carrillo* Court rejected Walmart's argument and stated as follows:

> Walmart argues that *Gonzalez v. Sterling Builders,* 2010 WL 1875620, at *5 (D.Ore. May 6, 2010) and *Adams v. U.S. Airways, Inc.,* 2013 WL 1345509, at *2 (D.Ariz. Mar.29, 2013) demonstrate a substantial basis for a difference of opinion. In both of these cases, the district court granted summary judgment to a defendant company, finding that the company was not a joint employer of the plaintiff employees. The plaintiff employees were directly employed by a subcontractor of the defendant company's contractor. According to Walmart, these recent cases demonstrate substantial grounds for a difference of opinion about the question Walmart poses in the present motion, because the cases support the proposition that a company cannot be a joint employer of an individual separated by two intermediate layers of contractors.
>
> **This argument lacks merit.**

Id. (emphasis added).

The *Carrillo* Court reiterated that "the fact that other courts have applied the same law and reached different results does not demonstrate substantial grounds for a difference of opinion about a controlling question of law." *Id*. at *4. The facts in *Carrillo* are essentially the same as the facts in the present case. Like in *Carrillo*, there is no dispute regarding the legal standard to determine whether an activity constitutes "work" under the FLSA. Similarly, there is no dispute regarding the standard to determine whether an activity is "integral and indispensable" under the FLSA. Therefore, the fact that other courts may have applied the same legal standards but reached different results does not demonstrate a substantial ground for a difference of opinion. *See id*.

Nevertheless, no reasonable jurist could find that the time spent in COVID-19 screenings is not integral and indispensable to the Plaintiff's principal activities. The seminal case explaining which activities are compensable under the FLSA is *Steiner v. Mitchell*, 350 U.S. 247 (1956). In *Steiner*, the Supreme Court held that time spent by battery plant workers showering at the end of each shift was compensable. In *Steiner*, the employer operated a plant where batteries were manufactured. *Id*. at 249. During the manufacturing process, chemicals used in the plant spilled, dropped, or became part of the dust in the air. *Id*. These dangerous chemical attached to the skin,

clothing, and hair of the employees. *Id*. at 250. To protect the workers and their families, the workers were required to shower at the end of their shifts. *Id*. The Supreme Court held that the time spent showering by the workers at the end of their shifts directly benefited the employer by making the "plant as safe a place as is possible under the circumstances and thereby increase the efficiency of its operation." *Id*. at 251-252. The Supreme Court then held that the time spent showering at the end of the shifts was compensable under the FLSA. *Id*. at 256. The Supreme Court stated as follows:

> We find no difficulty in fitting the facts of this case to that conclusion because it would be difficult to conjure up an instance where changing clothes and showering are more **clearly an integral and indispensable part of the principal activity** of the employment than in the case of these employees.

Id. (emphasis added).

Similarly, in *Alvarez v. IBP*, the Ninth Circuit held that the time spent by meat packing employees donning, doffing, and washing their protective gear was compensable under the FLSA because these activities prevented "unnecessary workplace injury and contamination." *Alvarez*, 339 F.3d at 903. The Ninth Circuit stated as follows:

> it is beyond cavil that the donning, doffing, washing, and retrieving of protective gear is, at both broad and basic levels, done for the benefit of IBP. *See generally United Transp. Union Local 1745 v. City of Albuquerque,* 178 F.3d 1109, 1116 (10th Cir.1999). These plaintiff-performed activities allow IBP to satisfy its requirements under the law, *see* 9 C.F.R. § 308.3 (1999); 29 C.F.R. § 1910.132(a) (1999), and these activities **prevent unnecessary workplace injury and contamination, both of which would inevitably impede IBP's "disassembly" process. Under *Steiner,* plaintiffs' donning, doffing, and cleaning activities are "integral and indispensable" to Pasco's "principal" activity.**

Id. (emphasis added).

The facts in *Steiner* and *Alvarez* are very similar to the facts in this case. Just like in *Steiner* and *Alvarez*, the COVID-19 screenings were "integral and indispensable" because the screenings were for the safety of the workers and their families and to ensure that the workplace was as safe as possible.

Moreover, regulatory guidance from the United States Department of Labor ("DOL") provides that the time spent in physical, medical, and health examinations, like the COVID-19 screenings, is compensable work time. *See, e.g.,* 29 CFR § 785.43. Indeed, the DOL has issued multiple opinion letters providing that physical and health examinations required by an employer as a condition to work are compensable under the FLSA. *See, e.g.*, Wage & Hour Div. Opinion Letter, 1989 WL 1595239 (Aug. 2, 1989); Wage & Hour Div. Opinion Letter, 1997 WL 998042 (Oct. 7, 1997); Wage & Hour Div. Opinion Letter, 1997 WL 998039 (Dec. 15, 1997); Wage & Hour Div. Opinion Letter, 1998 WL 852652 (Jan. 26, 1998); Wage & Hour Div. Opinion Letter, 2001 WL 1558768 (Feb. 16, 2001).[1]

Significantly, the 1989 Opinion Letter states that "whenever an employer imposes special requirements or conditions that an employee must meet before commencing productive work, the time spent in fulfilling such special conditions is regarded as indispensable to the performance of the principal activity the employee is hired to perform." 1989 WL 1595239, at *1 (emphasis added). There can be no reasonable dispute that the COVID-19 screenings satisfy this requirement.

The DOL has further explained:

> Time spent undergoing a physical examination is time during which the employee's freedom of movement is restricted for the purpose of serving the employer and time during which the employee is subject to the employer's discretion and control. It is immaterial whether the time spent in undergoing the required physical examination is during the employee's normal working hours or during nonworking hours. The physical examination is an essential requirement of the job and thus primarily for the benefit of the employer. **Therefore, it is our opinion that the time so spent must be counted as hours worked under the FLSA.**

1998 WL 852652, at *1 (emphasis added).

Amazon has largely ignored this authority. Instead, Amazon cites to cases that are distinguishable on the facts. First, Amazon cites a trio of decisions from the Federal Court of Claims where correctional officers employed by the federal government sought compensation for

[1] Courts have relied upon this guidance and found that medical examinations required by the employer constitute compensable time. *See, e.g., Scott v. Raudin McCormick, Inc.*, No. Civ. A. 08-4045-EFM, 2009 WL 3561301, at *12 (D. Kan. Oct. 30, 2009); *In Borne v. AAY Sec. LLC*, No. Civ. A. 1:17-CV-510, 2019 WL 5394010, at *5 (E.D. Tex. Oct. 21, 2019).

the time spent going through security screenings each morning. *See Adegbite v. U.S.*, 156 Fed. Cl. 495 (2021); *Adair v. U.S.*, No. Civ. A. 20-1148C, 2021 WL 6163407 (Fed. Cl. Dec. 30, 2021); *Alvarez v. U.S.*, No. Civ. A. 20-1533C, 2021 WL 6163405 (Fed. Cl. Dec. 2021). These cases are not on point because it appears that the plaintiffs simply abandoned their claims for compensation for the COVID-19 screenings because their primary claim was for compensation for the time spent in security screenings. *See id*. If anything, these cases hurt Amazon's argument because in each case, the court held that there was a viable claim for the time spent going through the pre-shift security screenings, which was largely akin to walking through a metal detector. *See id*.

Second, Amazon cites to *Pipich v. O'Reilly Auto Enterprises, LLC*, No. Civ. A. 12-CV-1120-L-LL, 2022 WL 788671 (S.D. Cal. Mar. 15, 2022), however, Amazon's reliance on this decision is misleading. In *Pipich*, the plaintiff failed to plead sufficient facts explaining how the COVID-19 screenings were integral and indispensable to his principal activity. The plaintiff did not describe any set of facts that would lead to the conclusion that if the COVID-19 screenings were eliminated, the plaintiff's ability to do his job would be affected. Also, the plaintiff's job was different than the work performed by Amazon employees in warehouses that have hundreds of employees in close proximity to one another. Moreover, the legal analysis employed by the Court in *Pipich* was simply wrong. Accordingly, the *Pipich* case is distinguishable.

Third, Amazon's reliance on *Perez v. Walmart, Inc*., No. Civ. A. 4:21-CV-120-HFS, 2021 WL 5741484 (E.D. Mo. Oct. 25, 2021) is misplaced because, as noted earlier, the plaintiffs did not bring a claim under the FLSA, they brought a claim under the Missouri common law for unjust enrichment. Amazon also failed to disclose that there is another case against Walmart seeking compensation for COVID-19 screening time. That case is *Haro v. Walmart* pending before this Court and the plaintiffs in *Haro* recently obtained certification of a national class against Walmart under the FLSA. *See Haro v. Walmart, Inc*., No. Civ. A. 1:21-CV-239-ADA-SKO, 2023 WL 2239333 (E.D. Cal. Feb. 27, 2023) (granting conditional certification under FLSA for COVID-19 screening claim).

Finally, Amazon's Motion relies on *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27 (2014). However, that reliance is misplaced. In *Busk*, the plaintiffs were warehouse workers who

retrieved packages from shelves. *Busk*, 574 U.S. at 29-30. After their shifts had concluded, the workers underwent an exit screening so the employer could identify if any theft occurred. *Id*. Although the Supreme Court held that the time spent in the exit screening was not compensable, the Supreme Court did not state that such a screening can never be compensable. Instead, the Court made clear that the screening must be tied to the "productive work that the employee is employed to perform." *Id*. at 36. In *Busk*, the exit screening did not have anything to do with the workers' ability to do their jobs and the workers were able to do their jobs even if the screenings were eliminated. *See id*. The Court stated that the company "could have eliminated the screenings altogether without impairing the employees' ability to complete their work." *Id*. at 35. In this case, however, the COVID-19 screenings were necessary for Plaintiff to perform his work for Amazon and had the screenings been eliminated, Plaintiff's ability to perform his jobs would have been compromised.

It is also important to note that since the *Busk* decision was issued numerous courts have found various pre-shift activities to be compensable under the FLSA. For instance, in *Aguilar v. Mgmt. & Training Corp*., 948 F.3d 1270 (10th Cir. 2020), the court held that pre-shift security screenings were compensable under the FLSA. In *Aguilar*, a group of correctional officers brought a claim for unpaid wages. *Id*. at 1274. The plaintiffs argued that the time spent completing mandatory security screenings (prior to clocking in) was compensable. *Id*. at 1274-75. The Tenth Circuit agreed and found that this time was "integral and indispensable" to the correctional officers' principal activities in ensuring the safety of the prisons. *Id*. at 1278-79. Specifically, the *Aguilar* Court found the security screenings to be an intrinsic element of the correctional officers' principal activities in providing safety and security at the prisons and was directly tied to the "productive work that the employee is employed to perform." *Id*. at 1277-78. The Tenth Circuit further explained that if the security screenings were eliminated entirely, the correctional officers' work would be impaired. *Id*. at 1279. This demonstrated that the security screenings were indispensable to the correctional officers' principal activity. *Id*.

The facts in *Aguilar* support Plaintiff's position that the time spent in COVID-19 screenings is compensable. Here, the COVID-19 screenings were necessary to ensure that the

Plaintiff could perform his work. If Amazon eliminated the COVID-19 screenings, the work of the Plaintiff would be greatly impaired because workers could inadvertently or unintentionally bring the virus into the Amazon facilities causing a mass breakout and infecting other workers. This would lead to a disruption in the operations and would prevent Plaintiff from performing his work.

Ultimately, Amazon's arguments simply raise a disagreement with this Court's decision. However, "[a] party's strong disagreement with the Court's ruling is not sufficient for there to be a 'substantial ground for difference.'" *Couch,* 611 F.3d at 633. "That settled law might be applied differently does not establish a substantial ground for difference of opinion." *Id*. Accordingly, Amazon's Motion should be denied.

B. Amazon's Motion should be denied because the legal standards to determine "work" and whether an activity is "integral and indispensable" are well settled. Amazon's appeal does not challenge those legal standards and accordingly, Amazon's Motion does not involve a controlling question of law.

Section 1292(b) "was intended primarily as a means of expediting litigation by permitting appellate consideration during the early stages of litigation of legal questions which, if decided in favor of the appellant, would end the lawsuit." *United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959). Indeed, a question is controlling if "resolution of the issue on appeal could materially affect the outcome of the litigation in the district court." *Cement Litig.*, 673 F.2d at 1026.

Amazon argues that an interlocutory appeal is appropriate because (1) whether the pre-shift COVID-19 screenings primarily benefitted Amazon, and (2) whether the pre-shift COVID-19 screenings were integral and indispensable to Plaintiff's principal work activities are pure legal questions. (Dkt. 34 at p. 8-9). Amazon is wrong. Neither issue presents a pure legal question. Instead, both issues involve complicated factual issues that require discovery.

A similar issue was addressed in *Vaccaro v. Amazon.com.dedc, LLC*, No. Civ. A. 18-11852, 2021 WL 1022699 (D.N.J. Mar. 17, 2021). In *Vaccaro*, the plaintiff sought leave to amend her complaint to bring a claim for compensation for the time she spent in "pre-shift COVID-19 screenings at Defendant's warehouses or 'fulfillment centers.'" *Id*. at *1. The plaintiff's claim was brought under the New Jersey Wage and Hour Law. *Id*. New Jersey law is similar to Nevada law

because an activity is to be paid "where the following two prongs are met: (1) an activity is performed that is *controlled or required* by the employer; and (2) such activity serves to *primarily benefit* the employer." *Id*. at *2 (emphasis in original).

After the plaintiff in *Vaccaro* moved for leave to add the claim for compensation for the time spent in the COVID-19 screenings, Amazon opposed the motion for leave. *Id*. The District of New Jersey rejected Amazon's arguments. *Id*. at *4. The District of New Jersey stated that the issue of whether an activity is primarily for the employer's benefit or the employee's benefit requires discovery. *Id*. Accordingly, the *Vaccaro* Court granted the plaintiff's motion for leave and allowed the COVID-19 screening claim to continue because discovery was necessary to decide whether Amazon was the primary beneficiary of the COVID-19 screenings. *Id*. The same facts exist in this case.

This is fatal to Amazon's Motion. For an appeal under section 1292(b), "[t]he legal question must be stated at a high enough level of abstraction to lift the question out of the details of the evidence or facts of a particular case." *McFarlin v. Conseco Serv's, LLC,* 381 F.3d 1251, 1259 (11th Cir. 2004); *see also Kuehner v. Dickinson & Co.,* 84 F.3d 316, 319 (9th Cir.1996). "The antithesis of a proper § 1292(b) appeal is one that turns on" the application of the facts. *McFarlin,* 381 F.3d at 1259. Here, Plaintiff's claim turns on the application of the facts to an established legal standard.

The Ninth Circuit has further explained that a "controlling question" is one that relates to a "fundamental" inquiry regarding the case, such as "who are necessary and proper parties, whether a court to which a cause has been transferred has jurisdiction, or whether state or federal law should be applied." *Cement Litig.*, 673 F.2d at 1026-27. Amazon does not present such a fundamental question in its request for certification. To the contrary, the law regarding the definition of "work" and the definition of "integral and indispensable" are well defined and not at issue in this case. Therefore, these do not present a "controlling question" under section 1292(b).

In *Ambrosio v. Cogent Comm's*, No. 14-CV-02182-RS, 2016 WL 777775 (N.D. Cal. Feb. 29, 2016), the court denied the defendant's request for an interlocutory appeal under section 1292(b) even when the defendant sought to appeal a pure legal issue. The defendant sought to

certify the legal issue of the proper standard that district courts should apply when deciding whether to authorize a collective action under the FLSA. *Id*. at *1-*2. The *Ambrosio* Court explained that even though the defendant sought to appeal a legal issue, it was not seeking to appeal a "controlling question of law." *Id*. at "3 (stating "Cogent has not shown the conditional certification standard presents a controlling question of law."). The same facts exist in this case.

Amazon suggests that an appeal would shorten the time and expense of this case. However, while "[s]ome courts have adopted the view that a question is controlling if it is one the resolution of which may appreciably shorten the time, effort, or expense of conducting a lawsuit," the Ninth Circuit flatly "reject[ed] this approach." *Cement Litig.*, 673 F.2d at 1027. Instead, a question of law under section 1292(b) must be "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *Carrillo v. Schneider Logistics Trans-Loading and Distribution, Inc*., No. 2:11-CV-8557-CAS, 2014 WL 1155403, at *3 (C.D. Cal. Mar. 21, 2014) (citing *Ahrenholz v. Bd. of Trustees of the Univ. of Ill.,* 219 F.3d 674, 676 (7th Cir.2000)). Here, the law regarding the meaning of "work" has been well settled and is not in dispute. Likewise, the law regarding the test to determine whether an activity is "integral and indispensable" is settled.

In *Carrillo*, 2014 WL 1155403 (C.D. Cal. Mar. 21, 2014), the court found that Walmart did not raise a controlling question of law. *Id*. at *3. The court held that the issue raised by Walmart was not one of the proper standard to apply to determine joint employer status, but how the facts of the case apply to that established joint employer standard. *Id*. As a result, no controlling question of law was at issue. *Id*.

The facts in *Carrillo* are very similar to the facts in the present case. Like in *Carrillo*, Amazon does not challenge a controlling question of law. Indeed, Amazon does not claim that the standard to determine "work" varies amongst the circuits. Similarly, Amazon does not claim that the standard to determine whether an activity is "integral and indispensable" varies amongst the circuits. Thus, there is no controlling question of law presented in Amazon's Motion.

Ultimately, "[t]he standard to certify a question of law is high and a district court generally should not permit such an appeal where 'it would prolong litigation rather than advance its

resolution.'" *Fenters v. Yosemite Chevron,* 761 F.Supp.2d 957, 1005 (E.D. Cal. 2010). In *Luchini v. Carmax, Inc*., No. 12-0417-LFO-DLB, 2012 WL 3862150 (E.D. Cal. Sept. 5, 2012), the court denied a motion for an interlocutory appeal under section 1292(b) because the court determined that an "interlocutory appeal would promote overall delay of resolution of [the] claims." *Id*. at *4. The same facts exist in this case. An interlocutory appeal would only delay resolution of the Plaintiff's claims and would not materially advance the outcome of this lawsuit. *See Association of Irritated Residents v. Fred Schakel Dairy,* 634 F. Supp. 2d 1081, 1087 (E.D. Cal. 2008) (noting that there is a "policy in the ordinary case of discouraging piecemeal appeals."). Therefore, the Court should deny Amazon's Motion.

C. Amazon's Motion should be denied because an immediate appeal would not materially advance the ultimate termination of the litigation.

An interlocutory appeal materially advances the termination of the litigation where it "promises to advance the time for trial or to shorten the time required for trial." *Dukes v. Wal-Mart Stores, Inc.*, No. C 01–02252 CRB, 2012 WL 6115536, at *5 (N.D. Cal. Dec. 10, 2012) (quoting 16 Federal Practice & Procedure § 3930 at n. 39 (2d ed.)). The key consideration for this factor is whether permitting an interlocutory appeal would "minimiz[e] the total burdens of litigation on parties and the judicial system by accelerating or at least simplifying trial court proceedings." *Carrillo*, 2014 WL 1155403, at *4 (internal citations omitted).

Amazon argues that "resolution of the questions presented in Amazon's favor would 'appreciably shorten the time, effort, or expense of conducting' the district court proceedings." (Dkt. 34 at p. 15). In *Carrillo*, Walmart made a very similar argument as Amazon. *Carrillo*, 2014 WL 1155403, at *4. The *Carrillo* Court rejected Walmart's argument and stated as follows:

> Thus, while an immediate appeal of this Court's order denying summary judgment might result in a determination that Walmart is not a joint employer of plaintiffs, it is unclear that such a determination would markedly reduce the number of claims to be litigated against Walmart or significantly streamline the trial proceedings, thereby "materially advanc[ing] the ultimate termination of the litigation." *See* 28 U.S.C. § 1292(b).

Id.

Again, the facts in the present case are similar to the facts in *Carrillo*.

Moreover, an "immediate appeal may be inappropriate where there is a good prospect that the certified question may be mooted by further proceedings." *Ambrosio,* 2016 WL 777775, at *3. Here, a resolution of Plaintiff's claims can be decided at the summary judgment phase of the case. Therefore, there is no need to proceed with an interlocutory appeal. The total burdens of litigation and the judicial system will not be lessened by an interlocutory appeal, they will be worsened by doing so. *See, e.g.*, *M.G. v. Metropolitan Interpreters and Translators, Inc*., 85 F. Supp. 3d 1195 (S.D. Cal. 2015) (denying request for an interlocutory appeal under section 1292(b)); *Ward v. Costco Wholesale Corp*., No. 2:08-CV-2013-FMC-JWJx, 2009 WL 10672998 (C.D. Cal. July 10, 2009) (same); *Barnett v. Washington Mutual Bank*, No. 03-00753-CRB, 2004 WL 2852627 (N.D. Cal. Sept. 17, 2004) (same). Accordingly, Amazon's Motion should be denied.

D. The Court should deny Amazon's request for certification to the Nevada Supreme Court.

Federal courts have discretion to certify questions of state law. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). However, "certification is not mandatory where state law is unclear on a particular issue." *Carolina Cas. Ins. Co. v. McGhan*, 572 F. Supp. 2d 1222, 1225 (D. Nev. 2008) (citing *Lehman Bros.*, 416 U.S. at 390–91). Generally, "[w]hen a decision turns on applicable state law and the state's highest court has not adjudicated the issue, a federal court must make a reasonable determination of the result the highest state court would reach if it were deciding the case." *Aetna Cas. & Sur. Co. v. Sheft*, 989 F.2d 1105, 1108 (9th Cir. 1993). District courts are properly able to evaluate and predict how the state's highest court would decide the issue without certifying every question. *See, e.g., U.S. Bank, N.A., Tr. for Banc of Am. Funding Corp. Mortg. Pass-Through Certificates, Series 2005-F v. White Horse Estates Homeowners Ass'n*, 987 F.3d 858, 863 (9th Cir. 2021). In fact, when there is controlling precedent, there is no basis to certify the question to a state's highest court. *See id*.

Here, there is controlling precedent. The plain text of Nevada law establishes that the Portal-to-Portal Act was not incorporated into it. Not only has Nevada chosen not to enact any "Portal-to-Portal like" limits on the compensability of certain work, Nevada has affirmatively

passed laws that are in direct conflict with the Portal-to-Portal Act. Indeed, there is express statutory language that provides that Nevada law is broader than the FLSA regarding the activities that must be paid by an employer. NRS § 608.016 provides that "an employer shall pay to the employee wages for each hour the employee works." (emphasis added). Nevada's administrative regulations further provide that "[a]n employer shall pay an employee for all time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee." NAC § 608.115 (emphasis added). This express language of Nevada law is materially different and much broader than federal law.

Under federal law, an employer is not required to pay for "all the hours worked" whereas under Nevada law an employer is required to do so. This clear and material distinction in language demonstrates that the Portal-to-Portal Act was not incorporated into Nevada law. Given the clear text of Nevada law, it would be inappropriate to certify this question to the Nevada Supreme Court. *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1041 (9th Cir. 2014); *see also Kehoe v. Aurora Loan Servs., LLC*, No. 3:10–cv–256–RCJ–RAM; 2010 WL 4286331, at *11 (D. Nev. Oct. 20, 2010) (declining to certify question to Nevada Supreme Court where statutory language was sufficiently clear for the court to apply).

Amazon claims that "courts have repeatedly certified questions related to wage and hour issues to the Nevada Supreme Court, showing their importance." (Dkt. 34 at p. 17). Amazon is wrong. *See, e.g., Greene v. Executive Coach & Carriage*, No. Civ. A. 2:09-CV-466-RCJ-RJJ, 2010 WL 11578643, at *5 (D. Nev. Jan. 27, 2010) (declining to certify question in wage and hour case to Nevada Supreme Court).

Moreover, where the question does not impact the merits of a claim, the question should not be certified to the Supreme Court. *See* Nev. R. App. P. 5(a) (requiring that certified question be "determinative"). Here, even if the Nevada Supreme Court reaches a different result and finds that the Portal-to-Portal Act was incorporated into Nevada law, that decision would not be determinative. That is because the Plaintiff would still have a viable claim under the FLSA.

Finally, a party must show "particularly compelling reasons" for certification when that party first requests it after losing on an issue. *Complaint of McLinn v. F/V Fjord*, 744 F.2d 677,

681 (9th Cir. 1984) ("Ordinarily such a movant should not be allowed a second chance at victory when, as here, the district court employed a reasonable interpretation of state law."). Here, Amazon has failed to present any particularly compelling reason for certification to the Nevada Supreme Court.

CONCLUSION

For these reasons the Court should deny Amazon's Motion.

Date: May 1, 2023

Respectfully submitted,

/s/ Don J. Foty

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CERTIFICATE OF SERVICE

I certify that on May 1, 2023, I filed this document through the Court's CM/ECF system which will serve a true copy on all parties of record via electronic mail.

/s/ Don Foty
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DWIGHT MALLOY, on behalf of himself and all others similarly situated;

Plaintiffs,

vs.

AMAZON.COM SERVICES, LLC,

Defendant.

Case No. 2:22-cv-00286-ART-VCF

DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(B) OR, IN THE ALTERNATIVE, MOTION TO CERTIFY QUESTIONS TO THE NEVADA SUPREME COURT

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In Defendant Amazon.com Services LLC's ("Amazon") Motion for Certification of Interlocutory Appeal Under 28 U.S.C. § 1292(b) or, in the Alternative, Motion to Certify Questions to the Nevada Supreme Court, Amazon requested permission to appeal questions that are completely appropriate for the Ninth Circuit and the Nevada Supreme Court's review. Indeed, the denial of Amazon's Motion to Dismiss Plaintiff's claims that the time spent in and waiting for pre-shift COVID-19 screenings is compensable under Nevada law is a paradigmatic example of an appropriate subject for an interlocutory appeal.

Amazon has demonstrated that the Court should authorize an interlocutory appeal with respect to (1) whether Nevada law incorporates the Portal-to-Portal Act ("PPA"); (2) whether pre-shift COVID-19 screenings are "integral and indispensable" to Plaintiff and the purported class's principal activities and therefore compensable under the PPA; and (3) whether time spent undergoing those screening constitutes "work" under Nevada law because it is primarily for the benefit of employers.

Each of the foregoing addresses a controlling issue of law, upon which reasonable jurists could disagree and have disagreed, and that immediate appeal of this Court's order with respect to them would materially advance the ultimate termination of this matter.

In the alternative, Amazon has demonstrated that this Court should certify the following questions to the Nevada Supreme Court pursuant to Rule 5 of the Nevada Rules of Appellate Procedure ("NRAP 5"): (1) Does Nevada law incorporate the PPA?; (2) Are pre-shift COVID-19 screenings "integral and indispensable" to Plaintiff and the purported class's principal activities and therefore compensable under the PPA?; and (3) Does time spent undergoing pre-shift COVID-19 screening constitute "work" under Nevada law because it is primarily for the benefit of employers?

Plaintiff, in opposing certification, relies on an erroneously narrow conception of § 1292(b) that is contrary to Ninth Circuit precedent and unpersuasively attempts to distinguish district court decisions that have ruled that COVID-19 screenings are not compensable under the PPA. The Court should reject Plaintiff's arguments as they rest on a combination of deliberately narrow readings and misrepresentations of the case law. Because an immediate appeal is warranted under the circumstances, the Court should certify its March 2, 2023, order (the "Order") denying Amazon's Motion to Dismiss the First Amended Complaint for review under § 1292(b) or, in the alternative, pursuant to NRAP 5.

II. ARGUMENT

A. This Matter Presents a Clear Case for Certification of Interlocutory Appeal.

1. The Questions Presented Have Already Generated Substantial Disagreement.

The parties do not dispute that under 28 U.S.C. §1292(b), the Court should certify its Order if it (1) involves a "controlling question of law," (2) for which there is "substantial ground for difference of opinion," where (3) the appeal may "materially advance the ultimate termination of the litigation" if taken immediately. As to the second requirement for interlocutory appeal, Plaintiff proposes that there is only a substantial difference of opinion if courts have actually treated the same defendant differently with respect to the same issue; specifically, Plaintiff opens with the assertion this prong has not been met by looking only to cases involving Amazon and not cases addressing COVID-19 screenings. ECF No. 40 at 4. That proposal leads to the absurd result that any party that had not been

previously sued on an issue, with a contrary result, could never show disagreement in the case law, regardless of what the trial court held and how contrary to the prevailing case law it was, because as to *that* defendant there would be no disagreement. Plaintiff's proposed test would effectively eliminate interlocutory appeals. That is not, and cannot be, the test.

In fact, it is well-settled that the test is met "where reasonable jurists ***might*** disagree on an issue's resolution, ***not merely where they have already disagreed***." *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (emphasis added). Moreover, while sufficient, the existence of conflicting caselaw is not even a necessary precondition for certification under section 1292(b). "When novel legal issues are presented, on which jurists may reach contradictory conclusions, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent." *Carr v. AutoNation, Inc.,* 2018 WL 3913810, at *2 (E.D. Cal. Aug. 15, 2018); *see also Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 687 (9th Cir. 2011) ("A substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue's resolution, not merely where they have already disagreed."). The Ninth Circuit has expressly "decline[d] to adopt [a] rigid approach towards § 1292(b)" that would require "that adverse authority develop around an issue before [it] review[s] it on interlocutory appeal [as that] could lead to unnecessary, protracted litigation and a considerable waste of judicial resources."[1] *Reese*, 643 F.3d at fn. 5.

a. Reasonable Jurists Could Disagree *and Have Disagreed* on the Question of Whether Nevada Law Incorporates the Portal-to-Portal Act.

Contrary to Plaintiff's assertion in the Response, reasonable jurists not only can but have disagreed as to whether Nevada has, or has not, adopted the Portal-to-Portal Act ("PPA"); to wit, Judge Batchelder in her dissent in *In re: Amazon.Com Fulfillment Center FLSA and Wage and Hour Litig.*, 905 F.3d 387, 408 (6th Cir. 2018) (asserting she "would expect the Nevada Supreme Court to find that Nevada's wage-and-hour statutes do not differ materially from the FLSA, so they implicitly incorporate the Portal-to-Portal Act's exclusions"). Judge Batchelder's view was grounded in her

[1] Plaintiff's citation to the earlier decision in *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir.2010), adding emphasis to suggest that there must be a circuit court disagreement, clearly misrepresents the law as later set forth in *Reese*.

analysis of Nevada wage and hour law, Nevada Attorney General opinions, and case law, including two unpublished cases from the Nevada Supreme Court. *Id.* at 408-09. That Judge Batchelder's view did not prevail does not render it, or her, unreasonable. Without question, her dissent proves that a reasonable jurist might disagree which is what the *Reese* court requires.[2]

b. Reasonable Jurists Have Disagreed as to Whether Time Spent in COVID-19 Screening Primarily Benefits the Employer.

As noted, Plaintiff's effort to restrict interlocutory appeals to cases involving the same defendant, on the same issue, with multiple lawsuits reaching contrary decisions, is not the law. The *Reese* court's admonition that even a requirement of contrary decisions generally should not be adopted because it "could lead to unnecessary, protracted litigation and a considerable waste of judicial resources, *see Reese* 643 F.3d at fn.5, is particularly apt here. As this Court is well aware, this matter purports to be a class action covering thousands of employees, with the commensurate cost and burden on the parties and the Court. Not granting interlocutory appeal because of an unduly cramped reading of a contrary District Court decision and the paucity of decisions in the novel arena of a pandemic, which is what Plaintiff is effectively asking this Court to do, would lead to what very well may prove to be unnecessary, protracted litigation and the waste of judicial resources.

Plaintiff asks this Court to decide that the District Court decision in *Perez v. Walmart, Inc.*, 2021 WL 5741484, at *2 (W.D. Mo. Oct. 25, 2021) does not mean what it says, because it was not an FLSA claim or, clinging to his misuse of *Couch*, a circuit court decision. ECF No. 40 at 9. However, the *Perez* court, while applying Missouri law, expressly looked to FLSA caselaw for guidance. *See id.* at *3–*4. The *Perez court* expressly held that "the benefits of a healthy and safe working environment have been conferred on both parties," and that "there is little doubt that plaintiff, defendants, and their consumers, contractors, and all persons entering the stores were the beneficiaries of the early detection health and safety protocols." *Id.* at *2-3. The *Perez* court's understanding of the FLSA cannot be reconciled with this Court's ruling.

Plaintiff is correct that the courts in *Vaccaro* and *Boone v. Amazon.com Services, LLC*,

[2] It is simply not true, as Plaintiff asserts on p. 6 of the Response, that under Ninth Circuit precedent, "when there is no case that conflicts with the district court's opinion, an appeal under section 1292(b) is not permitted."

determined that the plaintiffs plausibly alleged that COVID-19 screenings primarily benefited Amazon. But the plaintiff in *Vaccaro* later dropped her COVID-19 screening claim, *see Vaccaro v. Amazon.com.dedc, LLC*, No. 3:18-cv-11852-GC-TJB, ECF No. 74 (Jan. 11, 2022), and Amazon has a pending motion for certification of interlocutory appeal in *Boone*, No. 1:21-cv-0241-ADA-BAM, ECF No. 44 (E.D. Cal. April 11, 2022). Plaintiffs also invoke cases against Amazon seeking damages for uncompensated COVID-19 screening in Illinois and Colorado, but the court has yet to rule on Amazon's motion to dismiss in *Johnson v. Amazon.com Services, LLC*, No. 1:23-cv-0685 (N.D. Ill. 2023), and in *Vincenzetti v. Amazon.com Services, LLC*, No. 1:21-cv-02681-RM-NRN (D. Col. 2021), the plaintiffs did not bring FLSA claims, and Amazon did not file a motion to dismiss.

c. At Least Six Courts Have Concluded COVID-19 Screenings Were Not Integral and Indispensable, Demonstrating Reasonable Jurists Not Only Can, but Have Disagreed.

Once again, Plaintiff leads his argument with strategic narrowing of the question at hand, focusing on a single Amazon decision (in a case his counsel handles) to suggest it alone prevents a finding there is reasonable disagreement. ECF No. 40 at 9. Expanding beyond that case, as Ninth Circuit precedent requires, unquestionably shows that reasonable jurists can and have disagreed as to whether COVID-19 screenings are integral and indispensable. At least six courts have held that pre-shift COVID-19 screenings are not integral and indispensable to the principal work activities performed by employees, and two of those cases addressed employees in the warehouse and delivery industries. *See* ECF No. 34 at 9-13.[3]

As *Pipich* is a case within this Circuit directly conflicting with the holding in this matter, it alone is sufficient grounds for interlocutory appeal. *Reese*, 643 F.3d at 388; *see also, e.g., Mei Xing Yu v. Hasaki Rest., Inc.,* 874 F.3d 94, 96–97 (2nd Cir. 2017) (an order "clearly merits interlocutory review under section 1292(b)" where there is a "split of authorities on the . . . issue among district courts within the . . . Circuit"); *McDonnel Grp., LLC v. Starr Surplus Lines Ins. Co*., 2020 WL

[3] Citing to *Busk*, 574 U.S. 27; *Pipich v. O'Reilly Auto Enterprises, LLC*, 2022 WL 788671, at 4 (S.D. Cal. Mar. 15, 2022); *Adegbite v. United States*, 156 Fed. Cl. 495, 506 (2021); *Alvarez v. United States*, 2021 WL 6163405, at *4 n.2 (Fed. Cl. Dec. 30, 2021); *Adair v. United States*, 2021 WL 6163407, at *5 n.2 (Fed. Cl. Dec. 30, 2021); and *Bonilla v. Baker Concrete Construction, Inc.*, 487 F.3d 1340 (11th Cir. 2007).

1064912, at *3 (E.D. La. Mar. 5, 2020) ("there is substantial ground for disagreement" where district courts have "addressed similar [circumstances] and decided the issue differently"); *McShannock v. JP Morgan Chase Bank N.A.*, 2019 WL 955289, at *1 (N.D. Cal. Feb. 27, 2019) (noting that a conflict among district courts constitutes a substantial ground for disagreement). Recognizing how damaging the *Pipich* case is to his position, Plaintiff seeks to distinguish by casting aspersions on plaintiff's counsel and the judge, asserting the claim was not pled properly and the "legal analysis … was simply wrong." ECF No. 40 at 13. Plaintiff's disagreement with *Pipich* cannot take away the fact that it shows reasonable jurists can and have disagreed with the decision in this matter with regard to the integral and indispensable test.

In *Pipich*, the court dismissed a suit seeking damages under the FLSA for time spent in COVID-19 screening and held that under COVID-19 screening is a non-compensable preliminary activity under the PPA. 2022 WL 788671, at *4. The circumstances presented in *Pipich* are materially indistinguishable from the facts alleged in this case. Plaintiff here alleges that, after he arrived at Amazon facilities but before he could clock in and start work, Amazon associates were asked questions about whether they have recently been exposed to COVID-19 and whether they have any symptoms of COVID-19 and had their temperature taken. FAC ¶¶ 17-19. Similarly, the plaintiffs in *Pipich* alleged that after arriving at their employer's premises but before clocking in, they were "ask[ed] a series of questions related to [their] potential exposure to the virus and present health symptoms" and had their temperature taken. 2022 WL 788671, at *1. Plaintiff in this case alleges that his job duties included "moving boxes, stacking packages, and loading boxes." FAC ¶ 14. The job duties of the plaintiffs in *Pipich* were quite similar: "storing inventory, reviewing and selecting orders, pulling specific parts according to retailers' needs, packing orders, and loading and delivering orders." 2022 WL 788671, at *1.

Considering the facts alleged in *Pipich*, Judge Lorenz concluded "pre-shift COVID screenings [are] not 'integral and indispensable' to the employees' duties because the screening [is] not an intrinsic element of the loading and transporting of products to the stores. The screenings [are] not indispensable to the employees' duties because [the defendant] could eliminate them completely without hindering the employees' ability to perform their duties." *Id.* at *4. Judge Lorenz rejected

plaintiffs' argument that COVID-19 "screenings are indispensable because they cannot be eliminated without jeopardizing employee safety and creating business risks." *Id.* at *3.

Plaintiff's attempts to distinguish the other cases cited by Amazon are equally unavailing. As to *Perez*, Plaintiff adds nothing to his earlier concerns with that Court's determination; instead, he states Amazon "failed to disclose" that a class was certified against WalMart for COVID-19 screening time. ECF No. 40 at 13. As counsel is aware however, WalMart did not challenge whether the screening time was integral and indispensable to the associates' duties and, thus, the certification order tells us nothing about the wisdom of the *Perez* decision, much less indicate the *Perez* decision was unreasonable; i.e. does not show that a reasonable jurist could not disagree with this Court's holding. *See Haro v. Walmart, Inc*., No. Civ. A. 1:21-CV-239-ADA-SKO, 2023 WL 2239333 (E.D. Cal. Feb. 27, 2023).

As respects the *Adegbite*, *Alvarez*, and *Adair* decisions, Plaintiff incorrectly asserts the plaintiffs there "abandoned" their claims for time spent in COVID-19 screening. ECF No.40 at 13. Plaintiffs in *Adegbite* did no such thing and, while those in *Adair* and *Alvarez* did, Judge Smith expressly stated if they had not, she would have dismissed those claims for the same reasons that Judge Meyers had dismissed them in *Adegbite*. *Adair*, 2021 WL 6163407 at *5 n.2; *Alvarez*, 2021 WL 6163405, at *4 n.2. These three cases, decided by two different judges, along with *Pipich* and *Perez,* make clear that a reasonable jurist could hold that COVID-19 screenings are not integral and indispensable; i.e. come to a contrary decision to that of this Court, which is sufficient to permit an interlocutory appeal. *Reese*, 643 F.3d at 688.

Finally, Plaintiff's extended discussion of the *Carillo* matter, the *Steiner v. Mitchell* case, the *Alvarez v. IBP* case, and Department of Labor guidance, *see* ECF No. 40 at 9-12, is irrelevant as it *does not go to whether a reasonable jurist could disagree* with this Court's holding, which is the test under *Reese*. Plaintiff's citation to informal, non-binding Department of Labor guidance documents, addressing certain physical or mental examinations and drug and alcohol testing, by definition are not entitled to deference. *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) ("[O]pinion letters . . . do not warrant Chevron-style deference."). Those decades-old opinion letters are conclusory and inconsistent with the Supreme Court's binding ruling in *Integrity Staffing Solutions, Inc. v. Busk*, 574

U.S. 27, 35-36 (2014). If anything, *Busk* demonstrates that COVID-19 screening is not integral and indispensable to Plaintiffs' primary work activities because COVID-19 screening is not "tied to the productive work that the employee is *employed to perform*." 574 U.S. at 36 (emphasis in original).

Regardless, for purposes of whether a "substantial ground for difference of opinion" exists to support certification under § 1292(b), the key fact is that at least six courts already have agreed with Amazon that COVID-19 screening is not compensable. The question presented is clearly one which reasonable jurists can and do disagree, particularly because there is a "split of authorities on the . . . issue among district courts within the . . . Circuit." *Mei Xing Yu v. Hasaki Rest.*, Inc., 874 F.3d 94, 96–97 (2d Cir. 2017).

2. The Order Decided Controlling Questions of Law.

Plaintiff concedes, by omission, that whether the question of whether Nevada law incorporates the PPA presents a controlling issue of law. Plaintiff simply does not contest the question.[4]

As to what constitutes a 'controlling issue of law,' "all that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). A quintessential example of a controlling question of law is one that affects the Court's ability to "render a binding decision," such as a ruling on the merits of a plaintiff's claim. *Id.* at 1027. Each of the issues presented readily satisfy that test because they are "pure legal question[s] presented by the pleadings"; "an affirmative answer results in the survival of" the claims, while "a contrary one necessitates dismissal." *Bernal v. Zumiez, Inc.*, No. 2:16-cv-01802-SB, 2017 WL 4542950, at *2 (E.D. Cal. Oct. 11, 2017). Notably, there is no requirement that a question or questions entirely dispose of the case, as "§ 1292 does not require such." *Id.; see also In re Prewitt*, 2020 WL 2121430, at *2 (C.D. Cal. Jan. 9, 2020) (To constitute a controlling question of law, "resolution of the issue need not dispose of the case entirely.").

Plaintiff's counterarguments miss the mark. Plaintiff first argues that the issues are not "pure

[4] *Kaiser v. Banc of Am. Inv. Servs., Inc.*, 296 F. Supp. 2d 1219, 1221 (D. Nev. 2003) (holding the failure to provide any legal authorities to support the propositions made in his opposition "constitutes consent to the granting of the motion") (citing Local Rule 7-2).

legal question[s]," but rather "complicated factual issues that require discovery." ECF No. 40 at 15. But there can be no factual dispute at this stage, because the facts as pled in the complaint must be taken as true. Because there is "no dispute over the nature of the activities involved" as alleged in the complaint, "the question here is one of law." *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 910 (9th Cir. 2004).

Plaintiff points to *Vaccaro v. Amazon.com.dedc, LLC*, 2021 WL 1022699, *4 (D.N.J. Mar. 17, 2021), in which a court concluded the plaintiff stated a claim for time spent in COVID-19 screenings under New Jersey law. Like the decision on Amazon's motion to dismiss, that is a legal conclusion—and one that did not even reach whether COVID-19 screenings are integral and indispensable because the court there ruled that New Jersey law does not incorporate the PPA. Plaintiffs also cite *Carrillo v. Schneider Logistics*, 2014 WL 1155403 (C.D. Cal. Mar. 21, 2014), but the defendant there sought certification of the denial of its summary judgment motion, which was based on "sharply disputed" facts. *Id.* at *3. That is not the procedural posture here, where the alleged facts must be taken as true, which leaves only the legal question of whether those facts state a violation of Nevada law. In any event, "the Ninth Circuit Court of Appeals has never embraced the rule that only pure legal questions are controlling questions of law under § 1292(b)." *Dalie v. Pulte Home Corp.*, 636 F. Supp. 2d 1025, 1028 (E.D. Cal. 2009) (emphasis added).

Plaintiff also attempts to manufacture a new standard under which only "fundamental" questions can be certified. ECF No. 40 at 16. But the case he cites for that proposition actually reasoned that a controlling question of law is one that would "materially affect the outcome of the litigation in the district court." *In re Cement Antitrust Litigation*, 673 F.2d at 1027. The question presented need not "determine[] who will win on the merits." *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996). Of course, even if Plaintiff's standard were correct, it would be satisfied here because a decision in Amazon's favor on the second or third question presented would wipe out Plaintiff's claims entirely - it is hard to conceive of more "fundamental" questions than that.

Not surprisingly, Plaintiff entirely ignores *Busk* which decided *on a motion to dismiss* that Amazon's security screenings were not integral and indispensable and, thus, were not compensable under the PPA. 574 U.S. at 35-36. Whether the screenings in this matter constitute work or were

integral and indispensable are, likewise, questions of law.

In *Pipich and Perez*, the court addressed the same question presented here in granting the defendant's motions to dismiss. In *Pipich*, the Court applied *Busk* and explained that COVID-19 "screening was not an intrinsic element of the loading and transporting of products to the stores"; they "were not indispensable to the employees' duties because O'Reilly could eliminate them completely without hindering the employees' ability to perform their duties." 2022 WL 788671, at *4. Similarly, in *Perez*, the court applied *Busk* and held "the medical screenings are not integral and indispensable because they are not the principal activities which plaintiff was employed to perform." 2021 WL 5741484, at *4. Thus, the FLSA claim failed as a matter of law in both *Pipich and Perez*. Plaintiff's claims in this case necessarily fail for similar reasons.

The primary beneficiary question is likewise a legal issue in this context, as for purposes of the Motion to Dismiss, the facts are not in dispute. Plaintiff has alleged that a COVID-19 outbreak at an Amazon fulfillment center would be disruptive to business operations. ECF No. 20, ¶ 30. In response, Amazon has pointed to federal, state, and local authorities that recommended or required COVID-19 screening as part of a national public health response. ECF No. 22 at 3-5, 6-8. Whether an employer is the primary beneficiary of its efforts taken to protect employees and the public is a question that is regularly decided as a matter of law. For example, in *Bonilla v. Baker Concrete Construction, Inc.*, 487 F.3d 1340 (11th Cir. 2007), the court held that construction workers at Miami International Airport were not engaging in compensable work when they went through security screenings mandated by the Federal Aviation Administration.

Whether Amazon was the primary beneficiary of the COVID-19 screenings is also controlling. If Amazon was not the primary beneficiary of the screenings, then the screenings are not compensable "work." Since Plaintiff's claim hinges entirely on the contention that time spent in and waiting for COVID-19 screenings should have been paid, a win for Amazon on appeal "necessitates dismissal." *Bernal*, 2017 WL 4542950, at *2.

3. An Appeal Will Materially Advance the Termination of This Litigation.

Plaintiff's assertion that certification would not "materially advance the ultimate termination of the litigation" as required under 28 U.S.C. § 1292(b), is specious as it is wholly dependent on the

notion that Plaintiff will prevail on appeal. However, if Amazon wins the appeal on either the second or third issue, Plaintiff's claims would necessarily be dismissed in their entirety. This matter is not at all similar to *Carillo*, cited by Plaintiff. The resolution of the joint employment issue in WalMart's favor in that case would have had no effect because Plaintiff would still be able to proceed on a series of alternate theories pursuant to which it could still hold WalMart liable. *Carrillo v. Schneider Logistics Trans-Loading and Distribution, Inc*., No. 2:11-CV-8557-CAS, 2014 WL 1155403, at *4 (C.D. Cal. Mar. 21, 2014).

Indeed, were Amazon to prevail only on the first issue, with the remaining two left for the jury, such would *still* materially advance the termination of this matter. Assuming, *arguendo*, Amazon were to lose at trial, it will surely appeal and, central to that appeal, will be whether Nevada law incorporates the PPA. If Amazon prevails on such an appeal post-trial, such would necessitate a new trial. Were Amazon to prevail on that issue before trial, the trial would proceed on that basis, obviating that potential basis for a second trial. Likewise, the potential for settlement would be enhanced as Amazon would be aware that an appeal on this issue is not available, further advancing the termination of this matter.[5]

B. This Matter Meets the Criteria for Certification of Questions to the Nevada Supreme Court.

Having no reasonable basis for arguing against certifying the questions Amazon has proposed be certified to the Nevada Supreme Court, Plaintiff is left to a combination of misrepresentation and evasion. Plaintiff's assertion that "there is controlling precedent" saying that Nevada law does not incorporate the PPA is flatly false; notably, Plaintiff makes that assertion without any citation at all. ECF No.40 at 19.

[5] The Court should summarily reject Plaintiff's straw man argument that the Ninth Circuit has "rejected" consideration of whether granting the appeal will shorten the matter. *See* ECF No. 40 at 17. Plaintiff once again misuses precedent for his argument. What the *In Re Cement* court was rejecting was the argument that an issue is controlling solely if determination of it shortens the matter, noting that such a rule is "essentially reading the 'controlling question of law' requirement out of Section 1292(b)." 673 F.3d at 1027. The Court so held because section 1292(b) specifically references needing *both* a controlling issue of law and a determination that appeal of the order would materially advance the termination of the litigation. Amazon's assertion that granting an appeal will shorten this matter goes solely to the latter and Amazon stands on its demonstration that there are controlling issues of law otherwise.

Plaintiff also misrepresents the test for whether a proposed question is determinative, asserting Amazon's proposed questions are not determinative because supposedly they do not dispose of the case in its entirety; i.e. because "Plaintiff would still have a viable claim under the FLSA." *Id.* at 20. In making that assertion, Plaintiff misrepresents his own complaint as *he has not brought a claim under the FLSA*; instead, he only brings state-law claims. ECF No. 20, *passim*. In fact, if the Court answers Questions 2 and 3 in Amazon's favor, Plaintiff's case will be dismissed in its entirety. Moreover, even if he had an FLSA claim, he misrepresents the standard as the Nevada Supreme Court has specifically held that certified questions of law "may be determinative" within the meaning of NRAP 5 if the answer "may be determinative *of part* of the federal case." *Volvo Cars of North America, Inc. v. Ricci*, 122 Nev. 746, 750-51, 138 P.3d 1161 (2006) (emphasis added).

Plaintiff entirely evades the Ninth Circuit's test, which asserts that "[i]n deciding whether to exercise [its] discretion [to certify a question under NRAP 5], [the Court] consider[s]: (1) whether the question presents important public policy ramifications yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court's caseload; and (4) the spirit of comity and federalism." *High Country Paving, Inc. v. United Fire & Casualty Co.*, 14 F.4th 976, 978 (9th Cir. 2021) (citation and quotations omitted). Plaintiff does not address this test or any of the factors under it. As set forth in the Motion, there are tremendous public policy ramifications in this case, with determination of the issue affecting all or nearly all non-exempt employees in Nevada and, as this arises from a Global pandemic, this is an unprecedented situation. *See* ECF No. 34 at 16.

III. CONCLUSION

For the foregoing reasons, Amazon respectfully request the Court to grant its Motion for Certification of Interlocutory Appeal under 28 U.S.C. § 1292(b) or, in the alternative, Motion to Certify Questions to the Nevada Supreme Court.

Dated: May 22, 2023

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PROOF OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, NV 89169.5937. On May 22, 2023, I served the within document(s):

DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(B) OR, IN THE ALTERNATIVE, MOTION TO CERTIFY QUESTIONS TO THE NEVADA SUPREME COURT

☒ By **CM/ECF Filing** – Pursuant to FRCP 5(b)(3) and LR 5-1, the above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing (CM/ECF) system:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on May 22, 2023, at Las Vegas, Nevada.

/s/ Joanne Conti
Joanne Conti
Littler Mendelson

4891-0270-1408.1 / 096748-1009

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DWIGHT MALLOY, individually and on behalf of all others similarly situated, Plaintiffs, v. AMAZON.COM SERVICES, LLC, Defendants.	Case No. 2:22-cv-00286-ART-MDC ORDER

Pending before the Court is Defendant Amazon.com Services LLC's ("Amazon") Motion for Certification of Interlocutory Appeal Under 28 U.S.C. § 1292(b) or, in the Alternative, Motion to Certify Questions to the Nevada Supreme Court. (ECF No. 34.) Also pending is Defendant's Motion for Leave to File Document (ECF No. 50) related to its Motion for Certification. For the reasons stated, the Court will grant Defendant's Motion for Certification in part and deny it in part, deny its Motion for Leave to File Document as moot, and certify a question to the Nevada Supreme Court.

I. BACKGROUND

Plaintiff Dwight Malloy filed this purported class action alleging that Nevada law entitles him and the purported class to be paid for time they allegedly spent undergoing pre-shift protective screenings for COVID-19. Plaintiff asserts claims for: (1) failure to compensate for all hours worked in violation of NRS 608.016; (2) failure to pay minimum wage in violation of the Nevada Constitution; (3) failure to pay overtime in violation of NRS 608.018; and (4) failure to timely pay all wages due and owing in violation of NRS 608.020-.050. (ECF No. 1.) In response to Defendant's initial motion to dismiss, Plaintiff filed a First Amended Complaint ("FAC") asserting the same claims. (ECF No. 20.)

Plaintiff alleges that he worked for Amazon as an hourly, non-exempt employee from approximately August 2020 to April 2021. (*Id.* at ¶ 14.) Plaintiff worked as a "fulfillment center associate" and "[h]is job duties included moving boxes, stacking packages, and loading boxes." (*Id.*) In response to the Covid-19 pandemic, "Amazon implemented a company-wide policy requiring each of its hourly, non-exempt employees to undergo a physical and medical examination to check for symptoms of the Coronavirus each shift." (*Id.* at ¶ 12.) The examination, which was undertaken on Amazon's premises prior to the start of the employees' shifts and prior to clocking-in, was a requirement to work each shift. (*Id.* at ¶¶ 12, 16.) The examination, including the time spent waiting in line, took "approximately 10 minutes to 15 minutes on average." (*Id.* at ¶ 20.) Amazon did not pay the employees for this time. (*Id.* at ¶ 12.)

Plaintiff alleges that "Amazon required Plaintiff and Class Members to undergo this screening for the purposes of overall safety in the Amazon facilities and to prevent the Plaintiff and Class Members from inadvertently and unintentionally infecting the Amazon facilities or Amazon products, and in turn, Amazon's customers." (*Id.* at ¶ 28.) Plaintiff also alleges that "[t]he COVID-19 examinations were necessary to ensure that the virus did not infect the Amazon facilities or customers" and "to ensure that the virus did not disrupt the work performed by Plaintiff and Class Members or affect the business operations of Amazon." (*Id.* at ¶ 29.) Plaintiff further alleges that the screenings were "integral and indispensable to the principal activity and primary job duty performed by Plaintiff and Class Members", (*Id.* at ¶¶ 30, 31), "for the benefit of Amazon and its customers," (*Id.* at ¶ 33), and "primarily for the benefit of Amazon," (*Id.* at ¶ 34).

Defendant moved for dismissal of the claims in Plaintiff's FAC, arguing that Covid-19 screening do not constitute "hours worked" under Nevada law because the screenings are not spent primarily for Amazon's benefit. (ECF No.

22.) Defendant further argued that time spent screening for Covid-19 was not indispensable and integral to the employees' primary duties and therefore not compensable under the Portal-to Portal Act ("PPA"), 29 U.S.C. § 251 *et. seq.* (*Id.*)

After briefing from both parties and oral argument, this Court denied the Motion to Dismiss, holding that Nevada "has not incorporated the Portal-to-Portal Act," that "Nevada law requires that an employer pay an employee for all work," and that the time spent in and waiting for Covid-19 screenings "was work." (ECF No. 34, Ex. 1 at p. 54-55.) This Court further held that it need not "address the integral and indispensable aspect of the test because that is terminology used in the compensable work framework [and] I don't think that that applies, based on the statutes and the careful analysis of the Sixth Circuit in *In re: Amazon*." (*Id.* at 56-57.)

Following the denial of its Motion to Dismiss, Defendant filed its Motion for Certification of Interlocutory Appeal Under 28 U.S.C. § 1292(b) or, in the Alternative, Motion to Certify Questions to the Nevada Supreme Court. (ECF No. 34.) Plaintiff responded (ECF No. 40), and Defendant replied (ECF No. 43). Defendant later moved for leave to file supplemental authority. (ECF No. 50.) Plaintiff responded (ECF No. 51), and Defendant replied (ECF No. 52).

II. DISCUSSION

The pending motion requests that this Court either grant Defendant certification for an interlocutory appeal under 28 U.S.C. § 1292(b) or certify questions to the Nevada Supreme Court.

Under 28 U.S.C. § 1292(b), an order "shall" be certified for interlocutory appeal by a district court if that court is "of the opinion" that the order "[1] involves a controlling question of law [2] as to which there is substantial ground for difference of opinion, and . . . [3] an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28

U.S.C. § 1292(b). The Ninth Circuit has stated that this section should only be used "in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *In re Cement Litig.*, 673 F.2d 1020, 1027 (9th Cir. 1982). "The precedent in this circuit has recognized the congressional directive that section 1292(b) is to be applied sparingly and only in exceptional cases." *Id.*

Under Nev. R. App. P. 5(a), the Nevada Supreme Court may answer questions of law certified to it by a United States District Court "which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court or Court of Appeals of this state." Generally, "[i]f the state's highest appellate court has not decided the question presented, [a federal court] must predict how the state's highest court would decide the question." *High Country Paving, Inc. v. United Fire & Cas. Co.*, 14 F.4th 976, 978 (9th Cir. 2021). "However, if state law permits, [a federal court] may exercise [its] discretion to certify a question to the state's highest court." *Id.* In deciding whether to certify a question to a state's highest court, a federal court should consider: "(1) whether the question presents 'important public policy ramifications' yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court's caseload; and (4) 'the spirit of comity and federalism.'" *Id.* (quoting *Kremen v. Cohen*, 325 F.3d 1035, 1037–38 (9th Cir. 2003)).

Here, the Court finds that an unsettled question of state law is at least partially dispositive in this case. *In re: Amazon.Com, Inc. Fulfillment Ctr. Fair Lab. Standards Act (FLSA) & Wage & Hour Litig.*, 905 F.3d 387, 402–04 (6th Cir. 2018) held that Nevada does not incorporate the federal PPA into its wage-hour statutes. Whether Nevada incorporates the PPA into its wage-hour statutes is dispositive on Plaintiff's claims. The Court will therefore certify the

following question to the Nevada Supreme Court: Does Nevada law incorporate the PPA?

Given the public policy ramifications and broad application of a determination on this question to Nevada workers and employers, the Court finds that certification of this question to the Nevada Supreme Court is appropriate.

Rule 5 also provides that a certification order must specifically address the following requirements:

> (1) The questions of law to be answered;
> (2) A statement of all facts relevant to the questions certified, identifying any facts that are in dispute;
> (3) The nature of the controversy in which the questions arose;
> (4) A designation of the party or parties who will be the appellant(s) and the party or parties who will be the respondent(s) in the Supreme Court;
> (5) The names and addresses of counsel for the appellant and respondent; and
> (6) A brief statement explaining how the certified question of law may be determinative of the cause then pending in the certifying court;
> (7) A brief statement setting forth relevant decisions, if any, of the Supreme Court and the Court of Appeals and the reasons why such decisions are not controlling; and
> (8) Any other matters that the certifying court deems relevant to a determination of the questions certified.

Nev. R. App. P. 5(c).[1] The Court will address each of these requirements below.

First, the question of law to be answered is: "Does Nevada law incorporate the PPA?"

Second, all relevant facts are set forth above, and no relevant facts are in dispute because all allegations are to be taken as true at this stage of the litigation.

Third, the nature of the controversy is set forth above.

[1] The Court is applying an amended version of the Rule that goes into effect in August of 2024.

Fourth, the moving Defendant is designated as the Appellant, and Plaintiff is designated as the Respondent.

Fifth, the names and addresses of counsel are as follows:

Counsel for the moving Defendant

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Co-Counsel for the Plaintiff

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Sixth, whether the PPA is incorporated into Nevada law is dispositive on Plaintiff's claims, as it likely determines whether time spent in Covid-19 screenings is compensable "work" in Nevada.

Seventh, neither the parties nor this Court have identified any decisions from the Nevada Supreme Court or the Nevada Court of Appeals that have addressed this question.

Eighth, all other elaboration upon the certified question is included in this Order.

III. CONCLUSION

IT IS HEREBY ORDERED that Defendant's Motion for Certification of Interlocutory Appeal Under 28 U.S.C. § 1292(b) or, in the Alternative, Motion to Certify Questions to the Nevada Supreme Court (ECF No. 34) is GRANTED IN PART and DENIED IN PART. As described in this Order, the Court CERTIFIES a question of law to the Nevada Supreme Court pursuant to Rule 5 of the Nevada Rules of Appellate Procedure.

IT IS FURTHER ORDERED that the Clerk of the Court shall forward a copy of this Order to the Clerk of the Nevada Supreme Court under the official seal of the United States District Court for the District of Nevada. *See* Nev. R. App. P. 5(d).

IT IS FURTHER ORDERED that Defendant's Motion for Leave to File Document (ECF No. 50) is DENIED as moot.

DATED THIS 1st day of July 2024.

ANNE R. TRAUM
UNITED STATES DISTRICT JUDGE

Respectfully submitted,

/s/ Montgomery Y. Paek

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CERTIFICATE OF SERVICE

This is to certify that on December 23, 2024, a true and correct copy of the foregoing **JOINT APPENDIX VOL. 2** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

/s/ Erin J. Melwak
Erin J. Melwak
An employee at Littler Mendelson, P.C.