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Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT
OF THE STATE OF NEVADA

AMAZON.COM SERVICES INC.

Appellant,

vs.

DWIGHT MALLOY,

Respondent.

NEVADA JUSTICE ASSOCIATION AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT URGING THE COURT TO ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE

Christian Gabroy, Esq. NSB 8805
Gabroy Messer Law Offices
The District at Green Valley Ranch
170 S. Green Valley Pkwy, Ste 280
Henderson, NV 89012
Tel (702) 259-7777
Attorney for Proposed Amicus Curiae
Nevada Justice Association

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NRAP 26.1 DISCLOSURE

Undersigned counsel of record for proposed amicus curiae the Nevada Justice Association hereby certifies that there are no parent corporations or publicly held companies owning ten percent (10%) or more of any such amici. Amici is a non-profit organization.

The law office of Gabroy Messer is the only law firm that has appeared on behalf of the amicus Nevada Justice Association which is not using a pseudonym.

Date: February 27, 2025

/s/ Christian Gabroy
CHRISTIAN GABROY, ESQ., SBN 8805
Gabroy | Messer
170 S. Green Valley Parkway - Suite 280
Henderson Nevada 89012
Tel (702) 259-7777

STATEMENT OF INTEREST OF AMICI

Proposed amici Nevada Justice Association ("NJA") is a non-profit educational organization committed to improving the civil justice system and protecting the civil justice rights of Nevada's citizens.

The NJA believes a finding by the Court on the certified question presented in the manner requested by petitioner would improperly deny important civil justice rights secured to Nevada's citizens by statute. Most working Nevadans are

hourly compensated employees with wages in Nevada averaging $21.63 per hour[1] or about $45,000 per year for full time, 40 hours a week, employment. A yearly income of $45,000 for a family of four, while above the official United States poverty level of $32,150 for such a family in the 48 contiguous states, would still qualify such a Nevada family for a bevy of low-income government funded assistance programs. [2] That yearly income is also acutely inadequate to provide basic shelter to most Nevadans, with a yearly household income of $70,000 being needed in 2024 to rent a two-bedroom apartment in Clark County in 2024.[3]

The respondent and real party in interest in this case, Malloy, and the class of wage-earners he proposes to represent, earned wages of between $15.80 and $16.10 an hour. JA0004. To protect such wage earners from penury the Nevada Wage and Hour Laws (the "NWHL") of NRS Chapter 608 provides such workers

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[1] As stated at https://www.ziprecruiter.com/Salaries/Hour-Salary--in-Nevada#:~:text=How%20much%20does%20an%20Hour,Hour%20category%20on%20ZipRecruiter%20today when viewed on February 11, 2025.

[2] Nevada children in such a household would qualify for the State of Nevada's taxpayer supported Children's Health Insurance Program. https://www.nevadahealthlink.com/start-here/medicaid/ as viewed on February 11, 2025.

[3] As reported in the Las Vegas Review Journal on February 15, 2024, https://www.reviewjournal.com/business/housing/how-much-do-las-vegas-residents-need-to-make-to-afford-rent-3001608/#:~:text=Zillow%20statistics%20show%20the%20average

,on%20housing%20costs%20per%20month. when viewed on February 11, 2025.

with specific civil legal protections. The petitioner, Amazon, is urging this Court to find Nevada has imposed severe limitation on those civil legal protections by adopting the Federal Portal to Portal Act (the "PTPA").

The NJA disagrees with the petitioner's assertion the PTPA has been adopted by Nevada and limits the rights otherwise held by Nevada wage earners under the NWHL. Nevada's legislature has never adopted the PTPA as part of the NWHL and the legal protections afforded to Nevada's citizens by those laws should not be limited by the PTPA.

SUMMARY OF ARGUMENT

The underlying dispute involves Malloy's claim Amazon failed to pay him wages, as required by the NWHL for certain periods of time that he worked. JA 004-7. Amazon argues that because Nevada adopted the PTPA Malloy can state no claim for such unpaid wages under the NWHL. The federal district court correctly found Nevada has not adopted the PTPA and Malloy has stated a claim for unpaid wages under the NWHL, consistent with *In re: Amazon.com Fulfillment Center Fair Labor Standards Act (FLSA) & Wage & Hour Litigation*, 905 F.3d 387, 399-401, 402-404 (6th Cir. 2018).

Amazon's petition erroneously argues this Court's application of certain holdings under the federal Fair Labor Standards Act (the "FLSA") to the NWHL requires it to apply the PTPA to the NWHL as well. Nothing in this Court's

jurisprudence or its adoption of the FLSA's definition of what constitutes "work" for the purposes of the NWHL would compel, or even support, applying the PTPA to the NWHL. The PTPA did not change the FLSA's definition of "work" — it excludes certain "work" time under the FLSA from the amount of time employers must pay wages otherwise required by the FLSA. The NWHL has never adopted such a "compensable working time" exclusion and imposes an unambiguous obligation to compensate Malloy for all of his working time.

ARGUMENT

I. Nevada's wage and hour laws require compensation for all hours worked; nothing indicates Nevada has sought to limit that obligation by adopting the PTPA.

The people of the State of Nevada have enacted NRS Chapter 608 and the NWHL to provide "safeguards as to hours of work, working conditions and compensation" for Nevada's private sector workers. *See,* NRS 608.005. Consistent with that goal, Nevada provides such workers with minimum wage rights, NRS 608.250, overtime pay rights, NRS 608.018, and as most germane to Malloy's claim a right to "wages for each hour the employee works." NRS 608.016.

This Court should not, and does not, limit the civil claims possessed by Nevada's citizens, absent a clear legislative intent to do so. *Cf., First Fin. Bank v. Lane,* 339 P.3d 1289, 1293 (Nev. Sup. Ct. 2014) (en banc) ("This court will not

read a statute to abrogate the common law without clear legislative instruction to do so.") That the NWHL confers an express right upon Nevada's workers to be paid their wages for all hours they work is not subject to dispute. Nor has Nevada's legislature, subsequent to the enactment of NRS 608.016, indicated an intent to adopt the PTPA, or any similar law, and limit such statute's command that employers pay "wages for each hour the employee works." Amazon does not argue otherwise and the Court should not limit any such civil claim that Malloy asserts.

II. Amazon erroneously argues the PTPA renders Malloy's activities not "work" if this Court applies the FLSA's definition of "work" to the NWHL

Malloy asserts he expended certain amounts of time, at the beginning and end of each workday, performing uncompensated "work" for Amazon. Whether he in fact expended such amounts of time is an issue of fact that NJA, as amicus, offers no position on. It only urges that Malloy, consistent with the NWHL, be granted his right to establish he expended such amounts of time and, if he is successful in doing so, he recover wages for the same.

Amazon cannot, and does not, argue anything in the NWHL excludes any portion of Malloy's "work" from the requirement of NRS 608.016 that employers pay "wages for each hour the employee works." Instead it argues Malloy's

alleged time expenditures did not involve "work" within the meaning of the NWHL because (1) This Court's precedents compel the application of the definition of "work" set forth in the FLSA to the NWHL; and (2) The definition of "work" adopted by the FLSA, as established by controlling and long standing precedents of the United States Supreme Court, has been subsequently modified by the PTPA; and (3) That PTPA modified definition of "work" under the FLSA does not include Malloy's alleged activities. No portion of this convoluted tripartite reasoning is correct.

The FLSA defines "work" as all periods of time an employee spends in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local 123,* 321 U.S. 590, 598 (1944). Time that an employer engages an employee to wait and do nothing besides be available to perform tasks is also "work" for the purposes of the FLSA. *See, Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) ("Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen.") "Work" under the FLSA includes all activities conducted by an employee while required to be present at an employer's premises, including non-productive activities such as merely walking from the entrance of that premises to their workstation. *See,*

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 692-94 (1946). Under the foregoing precedents, the activities alleged by Malloy, performed at the insistence of Amazon and at its business premises, and for Amazon's benefit, are "work" within the meaning of the FLSA. JA 004-7.

Amicus agrees it would be sensible, as suggested by Amazon, to apply the FLSA's definition of "work" to the NWHL, as that definition is consistent with NRS Chapter 608 and the requirements of NRS 608.016. But Amazon also urges the Court to adopt a profoundly erroneous understanding of what constitutes "work" under the FLSA and then err by barring Malloy's NWHL claims. It most incorrectly asserts, contrary to statute and precedent, that the FLSA's "work" definition has been changed by the PTPA. Nothing of the sort has occurred.

The PTPA did not change the definition of "work," as established by the foregoing United States Supreme Court precedents. *See, IBP, Inc. v. Alvarez,* 546 U.S. 21, 26 (2005) ("Like the original FLSA, however, the Portal-to-Portal Act omits any definition of the term "work.") Rather than redefine what was already established as "work" for purposes of the FLSA, the PTPA rendered certain FLSA defined "work" activities non-compensable by narrowing "….the coverage of the FLSA by excepting two activities that had been treated as compensable under our cases: walking on the employer's premises to and from the actual place of

performance of the principal activity of the employee, and activities that are "preliminary or postliminary" to that principal activity." *Id.,* 546 U.S. at 26-27.

Amazon ignores, as established by *IBP*, that the PTPA creates a *compensable working time* exclusion from the FLSA, not a re-definition of what constitutes "work" under the FLSA. Amazon does so because while a basis exists to find the NWHL adopts the FLSA's definition of "work," nothing supports the proposition the NWHL has adopted the PTPA's limitations on what constitutes compensable working time. The opposite is established by NRS 608.016's command that Nevada employers pay "wages for each hour the employee works."

III. The Court should reject Amazon's request it override the intent of Nevada's Legislature.

As correctly analyzed by *In re: Amazon.Com Inc.*, 905 F.3d 399-401, 402-404, the NWHL (as does the FLSA) recognizes as "work" the activities alleged by Malloy and Nevada has not adopted the PTPA. As a result, time spent on such activities must be compensated by Amazon under the NWHL. Such a result is consistent with the intent of Nevada's Legislature and the purpose of the NWHL to advance the well-being of modestly paid hourly workers such as Malloy and the putative class he represents. Payment of such compensation is also required by other states that have, consistent with the NWHL, rejected adopting the PTPA's

limitations on what constitutes compensable working time for the purposes of their wage and hour laws. *See Morillion v. Royal Packing Co.,* 995 P.2d 139, 147-151 (Cal. 2000) (California does not incorporate the PTPA into its wage and hour laws); *In Re Amazon.Com Inc.*, 225 A.3d 191, 201 (Pa. 2021) ("Pennsylvania has never statutorily adopted PTPA's specific classification of certain employee activities as being exempt from compensation"); *Roberts v. State,* 512 P.3d 1007, 1015-16 (Ariz. 2022) (PTPA has not been adopted by Arizona's Legislature and does not limit Arizona's wage and hour laws); *Amaya v. DGS Construction, LLC,* 278 A.3d 1216, 1239-40 (Md. 2022) (PTPA "has not been adopted or incorporated into the MWHL [Maryland Wage and Hour Law]"); *Anderson v. State Dep't of Soc. & Health Services*, 63 P.3d 134, 136 (2003) (Wash. Ct. App) ("We are not persuaded that the Legislature intended to adopt the Portal to Portal Act; and we do not hold that it was adopted."); *Segura v. J.W. Drilling*, *Inc.,* 355 P.3d 845, 848 (N.M. Ct. App. 2015) (New Mexico's minimum wage law contains "no analogue" to the PTPA and the PTPA's exclusions from compensable working time "are completely absent" from the same); *Vaccaro v. Amazon.com.dec., LLC*, 2020 WL 2496973 p. 6 (Dist. N.J. 2020) (New Jersey, like Nevada, has not adopted the PTPA as part of its state wage and hour laws)

CONCLUSION

This Court certified the following question of Nevada Law for resolution in this matter pursuant to NRAP 5(a): Does Nevada law incorporate the PPA [PTPA]? For the reasons stated, Amicus Curie Nevada Justice Association urges this Court to answer the certified question in the negative.

RESPECTFULLY SUBMITTED March 7, 2025

/s/ Christian Gabroy
CHRISTIAN GABROY, ESQ.,
Nevada Bar No. 8805
Attorney for Amicus Curiae Nevada Justice Association

Certificate of Compliance With N.R.A.P Rule 28.2

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14 point Times New Roman typeface in Microsoft Word.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(A)(ii), it is proportionately spaced, has a typeface of 14 points or more and contains 1,958 words.

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the

requirements of the Nevada Rules of Appellate Procedure.

Dated this 7th day of March 2025

/s/ Christian Gabroy
CHRISTIAN GABROY, ESQ., SBN 8805

CERTIFICATE OF SERVICE

I certify that on March 7, 2025, I served a copy of the foregoing AMICUS BRIEF upon all counsel of record by the Court's ECF system which served all parties electronically.

Affirmed this 7th Day of March 2025

/s/ Christian Gabroy
CHRISTIAN GABROY, ESQ., SBN 8805