APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-15691
D.C. No. CV 14-0320 MMD

[Filed December 23, 2019]

DONALD WALDEN, JR.; NATHAN ECHEVERRIA; AARON DICUS; BRENT EVERIST; TRAVIS ZUFELT; TIMOTHY RIDENOUR; DANIEL TRACY, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellees*,	)
v.	)
STATE OF NEVADA; NEVADA DEPARTMENT OF CORRECTIONS, *Defendants-Appellants*.	)

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, Chief District Judge, Presiding

Argued and Submitted March 13, 2019
San Francisco, California

Filed October 16, 2019
Amended December 23, 2019

Before: Eugene E. Siler,[*] A. Wallace Tashima, and M. Margaret McKeown, Circuit Judges.

Order;
Opinion by Judge Tashima

SUMMARY[**]

Sovereign Immunity

The panel filed (1) an order withdrawing its opinion and substituting in its place an amended opinion, denying a petition for panel rehearing, and denying on behalf of the court a petition for rehearing en banc; and (2) an amended opinion affirming the district court's holding that the State of Nevada waived its Eleventh Amendment sovereign immunity as to plaintiffs' Fair Labor Standards Act claims when the State removed the case from state court to federal court.

Extending the holding of *Embury v. King*, 361 F.3d 562 (9th Cir. 2004), the panel held that a State that removes a case to federal court waives its immunity from suit on all federal-law claims in the case,

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[*] The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

including those federal-law claims that Congress failed to apply to the states through unequivocal and valid abrogation of their Eleventh Amendment immunity.

COUNSEL

Richard I. Dreitzer (argued), James T. Tucker, and Sheri Thome, Wilson Elser Moskowitz Edelman & Dicker LLP, Las Vegas, Nevada; Aaron Ford, Attorney General; Heidi Parry Stern, Solicitor General; Steve Shevorski, Ketan D. Bhirud, Theresa M. Haar; Office of the Attorney General, Las Vegas, Nevada; for Defendants-Appellants.

Joshua D. Buck (argued), Mark R. Thierman and Leah L. Jones, Thierman Buck LLP, Reno, Nevada, for Plaintiffs-Appellees.

ORDER

The Opinion filed October 16, 2019, and reported at 941 F.3d 350, is withdrawn and the Amended Opinion filed concurrently with this Order is substituted in its place.

With the filing of the Amended Opinion, the panel has voted to deny the petition for panel rehearing. Judge McKeown votes to deny the petition for rehearing en banc and Judges Siler and Tashima so recommend. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). The petition for panel rehearing and the petition for rehearing en banc are denied. No further petitions for panel rehearing or rehearing en banc will be entertained.

OPINION

TASHIMA, Circuit Judge:

Plaintiffs-Appellees ("Plaintiffs") are a group of correctional officers who allege violations of the Fair Labor Standards Act ("FLSA") by Defendants-Appellants State of Nevada and the Nevada Department of Corrections (together, "Nevada"). Nevada removed the case from state court to federal court, then moved for judgment on the pleadings based on state sovereign immunity from suit. We have previously held that a State's removal of a suit from state to federal court waives state sovereign immunity from suit on certain federal-law claims. *Embury v. King*, 361 F.3d 562 (9th Cir. 2004). But *Embury*'s holding did not cover federal-law claims that Congress did not apply to the states through unequivocal and valid abrogation of their Eleventh Amendment immunity. *Id.* at 566 n.20. We now hold that a State that removes a case to federal court waives its immunity from suit on all federal-law claims in the case, including those federal-law claims that Congress failed to apply to the states through unequivocal and valid abrogation of their Eleventh Amendment immunity.

BACKGROUND

Plaintiffs allege that Nevada has not compensated them for time that they spent working before or after scheduled shifts at state prisons and correctional facilities. Plaintiffs allege wage and overtime claims under the FLSA, failure to pay minimum wages under Nevada's Constitution, failure to pay overtime as

required by Nev. Rev. Stat. § 284.180, and breach of contract.

Plaintiffs filed this action in state court. Nevada removed the case to federal court and then answered the complaint. In its answer, Nevada pleaded the affirmative defense that "Defendant is immune from liability as a matter of law," but did not explicitly mention state sovereign immunity or the Eleventh Amendment. Upon Plaintiffs' motion, the district court granted conditional certification of the FLSA collective action and ordered notice be sent to all current and former non-exempt hourly paid employees who were employed by the Nevada Department of Corrections as correctional officers at any time from May 12, 2011 to the date of the order (March 16, 2015). In total, 542 current and former employees have opted into this action.

On March 1, 2018, the district court *sua sponte* requested supplemental briefing on the issue of whether "the doctrine of state sovereign immunity [applied] to the FLSA claims against the State of Nevada as brought in federal court." This issue had not been raised at all until this point of the litigation, almost four years after the complaint was filed and after significant discovery had been completed, notwithstanding the affirmative defense Nevada raised in its answer, that "Defendant is immune from liability as a matter of law." In that order, the district court noted that although the FLSA confers subject-matter jurisdiction in federal court, the district court might be "barred from adjudicating the FLSA claims and this case should be remanded" because "[u]nder Nev. Rev.

Stat. § 41.031(3), the state of Nevada has explicitly refused to waive its sovereign immunity in suits brought by state citizens in federal court."

After supplemental briefing, the district court held that the State had waived its sovereign immunity as to Plaintiffs' FLSA claims, and denied Nevada's motion to dismiss those claims. The district court's discussion of Nevada's waiver of sovereign immunity was limited to a short paragraph:

> After reviewing the supplemental briefs . . . , the Court is convinced that Nevada has waived its sovereign immunity in this Court. The Supreme Court has held that a state's removal of suit to federal court constitutes a waiver of its Eleventh Amendment immunity. *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 616 (2002). Here, the State of Nevada removed this action from state court. Therefore, it has waived its sovereign immunity.

The district court also denied Nevada's motion to dismiss the FLSA claims, but dismissed Plaintiffs' Nev. Rev. Stat. § 284.180 and breach of contract claims. The parties then stipulated to the dismissal of Plaintiffs' minimum wage claim under Nevada's Constitution, leaving only the FLSA claims which are at issue on this appeal.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under the collateral order doctrine of 28 U.S.C. § 1291. The denial of a State's motion for judgment on the pleadings on the grounds of Eleventh Amendment immunity, although an

interlocutory order, need not await a final judgment to be appealable. *Phiffer v. Columbia River Corr. Inst.*, 384 F.3d 791, 792 (9th Cir. 2004).

Under the collateral order doctrine, we have appellate jurisdiction under § 1291 to consider a State's claims of immunity from suit, but there is no such appellate jurisdiction to consider claims of immunity from liability. *Taylor v. Cty. of Pima*, 913 F.3d 930, 934 (9th Cir. 2019). Under *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), an ordinary claim of Eleventh Amendment immunity encompasses a claim of immunity from suit. But when a State defendant asserting immunity declares that "it was asserting *only* immunity from liability," then the collateral-order doctrine of § 1291 does not apply and there is no appellate jurisdiction. *Taylor*, 913 F.3d at 934. Nevada's briefing is not clear whether it is asserting *only* immunity from liability or also immunity from suit, as Nevada appears to use these terms interchangeably. But Nevada clarified at oral argument that it is in fact asserting both immunity from liability and immunity from suit. Because Nevada asserts both immunity from liability and immunity from suit, we have jurisdiction to hear the appeal.[1] *See id.*

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[1] As explained above, because we have interlocutory appellate jurisdiction only of "claims of immunity from suit," and not of "claims of immunity from liability," the following discussion – and holding – applies only to the former claim of immunity from suit. We express no opinion on the claim of immunity from liability.

The existence of sovereign immunity under the Eleventh Amendment is a question of law reviewed de novo. *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016). Whether immunity has been waived is also a question of law reviewed de novo. *Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001).

DISCUSSION

The Eleventh Amendment grants a State immunity from suit in federal court by citizens of other states, U.S. Const. amend. XI, and by its own citizens as well, *Hans v. Louisiana*, 134 U.S. 1 (1890). The question before us is whether Nevada waived its sovereign immunity by removing Plaintiffs' FLSA claims to federal court.

States can waive their Eleventh Amendment sovereign immunity from suit in state and federal court. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 618–21 (2002). A State's decision voluntarily to invoke the jurisdiction of a federal court by removing an action from state court to federal court can waive Eleventh Amendment immunity, but this general "voluntary invocation" principle does not apply in all circumstances. *Id*. Many states statutorily waive their immunity from suit on state-law claims in state court. *See, e.g.*, Nev. Rev. Stat. § 41.031. The Supreme Court has held that, when a State that has enacted one of these statutes voluntarily removes a suit on state-law claims from state court to federal court, that State waives its Eleventh Amendment immunity from suit. *Lapides*, 535 U.S. at 618–21.

In *Lapides*, a plaintiff brought a § 1983 and state tort law action against the State of Georgia in state court. *Id.* at 616. The Georgia legislature had passed a statute expressly waiving Georgia's sovereign immunity to state law claims filed in state court. *See id.*; Ga. Code Ann. § 50-21-23. Georgia removed the plaintiff's suit to federal court and moved to dismiss on the ground of Eleventh Amendment immunity, even though it conceded that its own state statute had waived its sovereign immunity from state-law claims in state court. *Lapides*, 535 U.S. at 616.

At the outset of its opinion, the Supreme Court determined that the sole federal claim in *Lapides*, which sought monetary damages under 42 U.S.C. § 1983, was invalid because Georgia was "not a 'person' against whom a § 1983 claim for money damages might be asserted." *Id.* at 617. Consequently, the Supreme Court began its opinion by "limit[ing]" its decision to the peculiar procedural circumstances of that case—that is, "to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." *Id.*; *see also id.* at 617–18 (emphasizing that the Court did not "need [to] address the scope of waiver by removal in a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court").

The Court discussed the consequences of Georgia's decision to remove the case:

> It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of

> the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the "Judicial Power of the United States" extends to the case at hand.

Id. at 619. Observing that it had previously held that a "State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity," *id.* (citing *Clark v. Barnard*, 108 U.S. 436, 447 (1883)), the Court reasoned that a State similarly expresses its intent to "voluntarily invoke[ ] the federal court's jurisdiction" by "voluntarily agree[ing] to remove the case to federal court." *Id.* at 620. Unable to discern "something special about removal or about this case," the Court concluded that the "general legal principle requiring waiver" when a State voluntarily invokes judicial authority "ought to apply" in order to prevent states from "achiev[ing] unfair tactical advantages." *Id.* at 620, 621. Therefore, under *Lapides*, a State that statutorily waives its immunity from suit on state-law claims in state court also waives its Eleventh Amendment immunity from suit on the same state-law claims when it voluntarily removes a state-law-claim case to federal court. *Id.* at 624.

The Ninth Circuit built on *Lapides* in *Embury*, holding that a State's removal of a suit from state court to federal court waives Eleventh Amendment immunity from suit for certain federal-law claims. In *Embury*, a physician sued the Regents of the University of California in state court for wrongful discharge, in violation of his due process rights under the federal and state Constitutions and in violation of state labor

law. 361 F.3d at 563. After the State defendants removed the case to federal court, the district court dismissed the case with leave to amend. *Id.* Embury then amended his complaint, and defendants again moved to dismiss, this time asserting Eleventh Amendment immunity. *Id.* We "conclude[d] that the rule in *Lapides* applies to federal claims as well as to state law claims and to claims asserted after removal as well as to those asserted before removal." *Id.* at 564. Noting that the defendants had conceded that they were stuck with federal jurisdiction over Embury's state law claims, we reasoned:

> Nothing in the reasoning of *Lapides* supports limiting the waiver to the claims asserted in the original complaint, or to state law claims only. Indeed, it makes no sense that the State does not object to having state law questions resolved by a federal tribunal—where federal jurisdiction cannot even be obtained but for federal claims asserted in the same case—yet objects to federal jurisdiction over the federal claims.

Id. The *Embury* court stated that it would "instead hold to a straightforward, easy-to-administer rule in accord with *Lapides*: Removal waives Eleventh Amendment immunity." *Id.* at 566.

This case would be definitively controlled by *Embury* were it not for a footnote that contains an important limitation to its holding; *Embury* expressly did "not decide whether a removing State defendant remains immunized from federal claims that Congress failed to apply to the States through unequivocal and valid abrogation of their Eleventh Amendment

immunity." *Id.* at 566 n.20. Congress' enactment of the FLSA did not abrogate a State's sovereign immunity from suit in federal court. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996); *Quillen v. Oregon*, 127 F.3d 1136, 1139 (9th Cir. 1997).[2] Although many FLSA protections apply to state employees, *see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Ninth Circuit has held that federal courts lack jurisdiction over FLSA cases brought against States in the absence of a waiver of immunity. *Quillin*, 127 F.3d at 1139. Therefore, this case falls within the scope of *Embury*'s Footnote 20, meaning that neither *Lapides* nor *Embury* entirely controls the outcome of this issue. Because this case involves a statute that Congress has not applied to the States through unequivocal and valid abrogation, we are faced with an issue of first impression in the Ninth Circuit.[3]

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[2] In *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993) (en banc), we held that "Congress has made unmistakably clear its intention to apply the FLSA to the States," and, thus, had "abrogate[d] the states' Eleventh Amendment immunity." *Id.* at 1391. Subsequently, however, the Supreme Court held in *Seminole Tribe* that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." 517 U.S. at 72–73. Thus, because *Hale* is "clearly irreconcilable" with *Seminole Tribe*, *Hale*'s holding has been abrogated by *Seminole Tribe*. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

[3] Other circuits' approaches to interpreting *Lapides* are not uniform. "As a result of the tension between *Lapides*'s express limitations on its own holding and [its] general language, courts are divided on whether *Lapides* indicates that a State defendant's removal to federal court waives its Eleventh Amendment

Relying on the reasoning of *Lapides* and *Embury*, we now hold that a State defendant that removes a case to federal court waives its immunity from suit on all federal-law claims in the case, including those claims that Congress failed to apply to the States through unequivocal and valid abrogation of their Eleventh Amendment immunity. Essentially, we extend *Embury*'s "removal means waiver" rule to those circumstances left open in Footnote 20. In *Embury*, we indicated a very strong preference for a clear jurisdictional rule. 361 F.3d at 566 ("Allowing a State to waive immunity to remove a case to federal court, then 'unwaive' it to assert that the federal court could not act, would create a new definition of chutzpah. We decline to give the State such unlimited leeway, and instead hold to a straightforward, easy-to-administer rule in accord with *Lapides*: Removal waives Eleventh Amendment immunity."). Even though *Embury*'s footnote expressly left open the question of whether a removing State defendant remains immunized from certain federal claims like those under the FLSA, *Embury*'s strong preference for a straightforward, easy-

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immunity if the State has not waived its immunity to suit in state court." *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1019 (9th Cir. 2016) (discussing *Lapides*, but holding that its waiver-through-removal reasoning does not apply in the context of tribal immunity). Some circuits have simply opted for a narrow reading of *Lapides*. *See, e.g.*, *Bergemann v. R.I. Dep't of Envtl. Mgmt.*, 665 F.3d 336, 341 (1st Cir. 2011). Others have read Lapides to state a more general rule. *See, e.g.*, *Bd. of Regents of Univ. of Wis. Sys. v. Phx. Int'l Software, Inc.*, 653 F.3d 448, 460–71 (7th Cir. 2011); *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 242 (5th Cir. 2005); *Estes v. Wyo. Dep't of Transp.*, 302 F.3d 1200, 1205 n.1, 1206 (10th Cir. 2002).

to-administer rule supports our holding that removal waives Eleventh Amendment immunity for all federal claims.

In the context of waiver of state-law claims in federal court, we have held that, "Eleventh Amendment immunity is an affirmative defense that must be raised early in the proceedings to provide fair warning to the plaintiff." *Aholelei v. Dep't of Pub. Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007) (internal quotation marks omitted). "Express waiver is not required; a state 'waive[s] its Eleventh Amendment immunity by conduct that is incompatible with an intent to preserve that immunity.'" *Id.* (quoting *Ariz. ex rel. Indus. Comm'n v. Bliemeister (In re Bliemeister*), 296 F.3d 858, 861 (9th Cir. 2002)). Here, Nevada only points to one place in the first four years of active litigation where it arguably raised the issue of state sovereign immunity: the line in the Answer that said, "Defendant is immune from liability as a matter of law." This line does not even mention "state sovereignty" or "the Eleventh Amendment." The issue of state sovereign immunity was not raised early enough in the proceedings to provide fair notice to Plaintiffs. Therefore, to allow Nevada to assert Eleventh Amendment immunity now would give Nevada a significant tactical advantage in this litigation and would "generate seriously unfair results." *Lapides*, 535 U.S. at 619.

Furthermore, the reasoning of *Lapides* also supports extending the holding of *Embury* to cover cases like this one. As discussed above, the *Lapides* Court reasoned:

> It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the "Judicial Power of the United States" extends to the case at hand.

Lapides, 535 U.S. at 619. The Court concluded that the "general legal principle requiring waiver" when a State voluntarily invokes judicial authority "ought to apply" in order to prevent states from "achiev[ing] unfair tactical advantages." *Id*. at 620, 621. "A benign motive, however, cannot make the critical difference . . . . Motives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* at 621. Therefore, we conclude that *Lapides*' reasoning supports our holding that removal means waiver for all federal-law claims in the case.

Forcing a State to waive sovereign immunity whenever it removes a case to a federal court might lead to unfair results for the State in some circumstances. *See Bergemann*, 665 F.3d at 342. But these concerns are not strong enough to overcome the need for a clear jurisdictional rule. *See Lapides*, 535 U.S. at 621. A State defendant that removes a case to federal court waives its immunity from suit on all federal-law claims brought by the plaintiff. Here, Nevada waived its Eleventh Amendment immunity from Plaintiffs' FLSA claims by removing the case to federal court.

CONCLUSION

For the foregoing reasons, we affirm the district court's holding that Nevada waived its Eleventh Amendment immunity as to Plaintiffs' FLSA claims when it removed this case to federal court. In doing so, we extend the holding of *Embury* to cover all federal-law claims, even when those federal claims are ones Congress did not apply to the States through unequivocal and valid abrogation of their Eleventh Amendment immunity.[4]

AFFIRMED.

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[4] Because we affirm on the waiver-by-removal ground, we do not address Plaintiffs' alternate argument that Nevada has waived sovereign immunity from FLSA claims by enacting Nev. Rev. Stat. § 41.031.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-15691
D.C. No. CV 14-0320 MMD

[Filed October 16, 2019]

DONALD WALDEN, JR.; NATHAN ECHEVERRIA; AARON DICUS; BRENT EVERIST; TRAVIS ZUFELT; TIMOTHY RIDENOUR; DANIEL TRACY, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellees*,	)
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STATE OF NEVADA; NEVADA DEPARTMENT OF CORRECTIONS, *Defendants-Appellants*.	)

OPINION

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Argued and Submitted March 13, 2019
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Filed October 16, 2019

Before: Eugene E. Siler,[*] A. Wallace Tashima, and M. Margaret McKeown, Circuit Judges.

Opinion by Judge Tashima

SUMMARY[**]

Sovereign Immunity

In an interlocutory appeal in a case in which a group of correctional officers allege, *inter alia*, violations of the Fair Labor Standards Act (FLSA), the panel affirmed the district court's holding that the State waived its Eleventh Amendment sovereign immunity as to the plaintiffs' FLSA claims when it removed the case from state court to federal court.

Extending the holding of *Embury v. King*, 361 F.3d 562 (9th Cir. 2004), the panel held that a State that removes a case to federal court waives its immunity from suit on all federal-law claims in the case, including those federal-law claims that Congress failed to apply to the states through unequivocal and valid abrogation of their Eleventh Amendment immunity.

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COUNSEL

Richard I. Dreitzer (argued) and James T. Tucker, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, Las Vegas, Nevada; Adam Paul Laxalt, Attorney General; Steve Shevorski, Ketan D. Bhirud, and Theresa M. Haar, Office of the Attorney General, Las Vegas, Nevada; for Defendants-Appellants.

Joshua D. Buck (argued), Mark R. Thierman and Leah L. Jones, Thierman Buck LLP, Reno, Nevada, for Plaintiffs-Appellees.

OPINION

TASHIMA, Circuit Judge:

Plaintiffs-Appellees ("Plaintiffs") are a group of correctional officers who allege violations of the Fair Labor Standards Act ("FLSA") by Defendants-Appellants State of Nevada and the Nevada Department of Corrections (together, "Nevada"). Nevada removed the case from state court to federal court, then moved for judgment on the pleadings based on state sovereign immunity from suit. We have previously held that a State's removal of a suit from state to federal court waives state sovereign immunity from suit on certain federal-law claims. *Embury v. King*, 361 F.3d 562 (9th Cir. 2004). But *Embury*'s holding did not cover federal-law claims that Congress did not apply to the states through unequivocal and valid abrogation of their Eleventh Amendment immunity. *Id.* at 566 n.20. We now hold that a State that removes a case to federal court waives its immunity from suit on all federal-law claims in the case, including those federal-law claims that Congress

failed to apply to the states through unequivocal and valid abrogation of their Eleventh Amendment immunity.

BACKGROUND

Plaintiffs allege that Nevada has not compensated them for time that they spent working before or after scheduled shifts at state prisons and correctional facilities. Plaintiffs allege wage and overtime claims under the FLSA, failure to pay minimum wages under Nevada's Constitution, failure to pay overtime as required by Nev. Rev. Stat. § 284.180, and breach of contract.

Plaintiffs filed this action in state court. Nevada removed the case to federal court and then answered the complaint. In its answer, Nevada pleaded the affirmative defense that "Defendant is immune from liability as a matter of law," but did not explicitly mention state sovereign immunity or the Eleventh Amendment. Upon Plaintiffs' motion, the district court granted conditional certification of the FLSA collective action and ordered notice be sent to all current and former non-exempt hourly paid employees who were employed by the Nevada Department of Corrections as correctional officers at any time from May 12, 2011 to the date of the order (March 16, 2015). In total, 542 current and former employees have opted into this action.

On March 1, 2018, the district court *sua sponte* requested supplemental briefing on the issue of whether "the doctrine of state sovereign immunity [applied] to the FLSA claims against the State of

Nevada as brought in federal court." This issue had not been raised at all until this point of the litigation, almost four years after the complaint was filed and after significant discovery had been completed, notwithstanding the affirmative defense Nevada raised in its answer, that "Defendant is immune from liability as a matter of law." In that order, the district court noted that although the FLSA confers subject-matter jurisdiction in federal court, the district court might be "barred from adjudicating the FLSA claims and this case should be remanded" because "[u]nder Nev. Rev. Stat. § 41.031(3), the state of Nevada has explicitly refused to waive its sovereign immunity in suits brought by state citizens in federal court."

After supplemental briefing, the district court held that the State had waived its sovereign immunity as to Plaintiffs' FLSA claims, and denied Nevada's motion to dismiss those claims. The district court's discussion of Nevada's waiver of sovereign immunity was limited to a short paragraph:

> After reviewing the supplemental briefs . . . , the Court is convinced that Nevada has waived its sovereign immunity in this Court. The Supreme Court has held that a state's removal of suit to federal court constitutes a waiver of its Eleventh Amendment immunity. *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 616 (2002). Here, the State of Nevada removed this action from state court. Therefore, it has waived its sovereign immunity.

The district court also denied Nevada's motion to dismiss the FLSA claims, but dismissed Plaintiffs' Nev. Rev. Stat. § 284.180 and breach of contract claims. The parties then stipulated to the dismissal of Plaintiffs' minimum wage claim under Nevada's Constitution, leaving only the FLSA claims which are at issue on this appeal.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under the collateral order doctrine of 28 U.S.C. § 1291. The denial of a State's motion for judgment on the pleadings on the grounds of Eleventh Amendment immunity, although an interlocutory order, need not await a final judgment to be appealable. *Phiffer v. Columbia River Corr. Inst.*, 384 F.3d 791, 792 (9th Cir. 2004).

Under the collateral order doctrine, we have appellate jurisdiction under § 1291 to consider a State's claims of immunity from suit, but there is no such appellate jurisdiction to consider claims of immunity from liability. *Taylor v. Cty. of Pima*, 913 F.3d 930, 934 (9th Cir. 2019). Under *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), an ordinary claim of Eleventh Amendment immunity encompasses a claim of immunity from suit. But when a State defendant asserting immunity declares that "it was asserting *only* immunity from liability," then the collateral-order doctrine of § 1291 does not apply and there is no appellate jurisdiction. *Taylor*, 913 F.3d at 934. Nevada's briefing is not clear whether it is asserting *only* immunity from liability or also immunity from suit, as Nevada appears to use these terms interchangeably. But Nevada clarified at

oral argument that it is in fact asserting both immunity from liability and immunity from suit. Because Nevada asserts both immunity from liability and immunity from suit, we have jurisdiction to hear the appeal. *See id*.

The existence of sovereign immunity under the Eleventh Amendment is a question of law reviewed de novo. *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016). Whether immunity has been waived is also a question of law reviewed de novo. *Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001).

DISCUSSION

The Eleventh Amendment grants a State immunity from suit in federal court by citizens of other states, U.S. Const. amend. XI, and by its own citizens as well, *Hans v. Louisiana*, 134 U.S. 1 (1890). The question before us is whether Nevada waived its sovereign immunity by removing Plaintiffs' FLSA claims to federal court.

States can waive their Eleventh Amendment sovereign immunity from suit in state and federal court. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 618–21 (2002). A State's decision voluntarily to invoke the jurisdiction of a federal court by removing an action from state court to federal court can waive Eleventh Amendment immunity, but this general "voluntary invocation" principle does not apply in all circumstances. *Id*. Many states statutorily waive their immunity from suit on state-law claims in state court. *See, e.g.*, Nev. Rev. Stat. § 41.031. The Supreme

Court has held that, when a State that has enacted one of these statutes voluntarily removes a suit on state-law claims from state court to federal court, that State waives its Eleventh Amendment immunity from suit. *Lapides*, 535 U.S. at 618–21.

In *Lapides*, a plaintiff brought a § 1983 and state tort law action against the State of Georgia in state court. *Id.* at 616. The Georgia legislature had passed a statute expressly waiving Georgia's sovereign immunity to state law claims filed in state court. *See id.*; Ga. Code Ann. § 50-21-23. Georgia removed the plaintiff's suit to federal court and moved to dismiss on the ground of Eleventh Amendment immunity, even though it conceded that its own state statute had waived its sovereign immunity from state-law claims in state court. *Lapides*, 535 U.S. at 616.

At the outset of its opinion, the Supreme Court determined that the sole federal claim in *Lapides*, which sought monetary damages under 42 U.S.C. § 1983, was invalid because Georgia was "not a 'person' against whom a § 1983 claim for money damages might be asserted." *Id.* at 617. Consequently, the Supreme Court began its opinion by "limit[ing]" its decision to the peculiar procedural circumstances of that case—that is, "to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." *Id.*; *see also id.* at 617–18 (emphasizing that the Court did not "need [to] address the scope of waiver by removal in a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court").

The Court discussed the consequences of Georgia's decision to remove the case:

> It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the "Judicial Power of the United States" extends to the case at hand.

Id. at 619. Observing that it had previously held that a "State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity," *id.* (citing *Clark v. Barnard*, 108 U.S. 436, 447 (1883)), the Court reasoned that a State similarly expresses its intent to "voluntarily invoke[ ] the federal court's jurisdiction" by "voluntarily agree[ing] to remove the case to federal court." *Id.* at 620. Unable to discern "something special about removal or about this case," the Court concluded that the "general legal principle requiring waiver" when a State voluntarily invokes judicial authority "ought to apply" in order to prevent states from "achiev[ing] unfair tactical advantages." *Id.* at 620, 621. Therefore, under *Lapides*, a State that statutorily waives its immunity from suit on state-law claims in state court also waives its Eleventh Amendment immunity from suit on the same state-law claims when it voluntarily removes a state-law-claim case to federal court. *Id.* at 624.

The Ninth Circuit built on *Lapides* in *Embury*, holding that a State's removal of a suit from state court to federal court waives Eleventh Amendment immunity

from suit for certain federal-law claims. In *Embury*, a physician sued the Regents of the University of California in state court for wrongful discharge, in violation of his due process rights under the federal and state Constitutions and in violation of state labor law. 361 F.3d at 563. After the State defendants removed the case to federal court, the district court dismissed the case with leave to amend. *Id.* Embury then amended his complaint, and defendants again moved to dismiss, this time asserting Eleventh Amendment immunity. *Id.* We "conclude[d] that the rule in *Lapides* applies to federal claims as well as to state law claims and to claims asserted after removal as well as to those asserted before removal." *Id.* at 564. Noting that the defendants had conceded that they were stuck with federal jurisdiction over Embury's state law claims, we reasoned:

> Nothing in the reasoning of *Lapides* supports limiting the waiver to the claims asserted in the original complaint, or to state law claims only. Indeed, it makes no sense that the State does not object to having state law questions resolved by a federal tribunal—where federal jurisdiction cannot even be obtained but for federal claims asserted in the same case—yet objects to federal jurisdiction over the federal claims.

Id. The *Embury* court stated that it would "instead hold to a straightforward, easy-to-administer rule in accord with *Lapides*: Removal waives Eleventh Amendment immunity." *Id.* at 566.

This case would be definitively controlled by *Embury* were it not for a footnote that contains an

important limitation to its holding; *Embury* expressly did "not decide whether a removing State defendant remains immunized from federal claims that Congress failed to apply to the States through unequivocal and valid abrogation of their Eleventh Amendment immunity." *Id.* at 566 n.20. Congress' enactment of the FLSA did not abrogate a State's sovereign immunity from suit in federal court. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996); *Quillen v. Oregon*, 127 F.3d 1136, 1139 (9th Cir. 1997).[1] Although many FLSA protections apply to state employees, *see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Ninth Circuit has held that federal courts lack jurisdiction over FLSA cases brought against States in the absence of a waiver of immunity. *Quillin*, 127 F.3d at 1139. Therefore, this case falls within the scope of *Embury*'s Footnote 20, meaning that neither *Lapides* nor *Embury* entirely controls the outcome of this issue. Because this case involves a statute that Congress has not applied to the States through

[1] In *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993) (en banc), we held that "Congress has made unmistakably clear its intention to apply the FLSA to the States," and, thus, had "abrogate[d] the states' Eleventh Amendment immunity." *Id.* at 1391. Subsequently, however, the Supreme Court held in *Seminole Tribe* that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." 517 U.S. at 72–73. Thus, because *Hale* is "clearly irreconcilable" with *Seminole Tribe*, *Hale*'s holding has been abrogated by *Seminole Tribe. See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

unequivocal and valid abrogation, we are faced with an issue of first impression in the Ninth Circuit.[2]

Relying on the reasoning of *Lapides* and *Embury*, we now hold that a State defendant that removes a case to federal court waives its immunity from suit on all federal-law claims in the case, including those claims that Congress failed to apply to the States through unequivocal and valid abrogation of their Eleventh Amendment immunity. Essentially, we extend *Embury*'s "removal means waiver" rule to those circumstances left open in Footnote 20. In *Embury*, we indicated a very strong preference for a clear jurisdictional rule. 361 F.3d at 566 ("Allowing a State to waive immunity to remove a case to federal court, then 'unwaive' it to assert that the federal court could not act, would create a new definition of chutzpah. We decline to give the State such unlimited leeway, and

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[2] Other circuits' approaches to interpreting *Lapides* are not uniform. "As a result of the tension between *Lapides*'s express limitations on its own holding and [its] general language, courts are divided on whether *Lapides* indicates that a State defendant's removal to federal court waives its Eleventh Amendment immunity if the State has not waived its immunity to suit in state court." *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1019 (9th Cir. 2016) (discussing *Lapides*, but holding that its waiver-through-removal reasoning does not apply in the context of tribal immunity). Some circuits have simply opted for a narrow reading of *Lapides*. *See, e.g.*, *Bergemann v. R.I. Dep't of Envtl. Mgmt.*, 665 F.3d 336, 341 (1st Cir. 2011). Others have read Lapides to state a more general rule. *See, e.g.*, *Bd. of Regents of Univ. of Wis. Sys. v. Phx. Int'l Software, Inc.*, 653 F.3d 448, 460–71 (7th Cir. 2011); *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 242 (5th Cir. 2005); *Estes v. Wyo. Dep't of Transp.*, 302 F.3d 1200, 1205 n.1, 1206 (10th Cir. 2002).

instead hold to a straightforward, easy-to-administer rule in accord with *Lapides*: Removal waives Eleventh Amendment immunity."). Even though *Embury*'s footnote expressly left open the question of whether a removing State defendant remains immunized from certain federal claims like those under the FLSA, *Embury*'s strong preference for a straightforward, easy-to-administer rule supports our holding that removal waives Eleventh Amendment immunity for all federal claims.

In the context of waiver of state-law claims in federal court, we have held that, "Eleventh Amendment immunity is an affirmative defense that must be raised early in the proceedings to provide fair warning to the plaintiff." *Aholelei v. Dep't of Pub. Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007) (internal quotation marks omitted). "Express waiver is not required; a state 'waive[s] its Eleventh Amendment immunity by conduct that is incompatible with an intent to preserve that immunity.'" *Id.* (quoting *Ariz. ex rel. Indus. Comm'n v. Bliemeister (In re Bliemeister*), 296 F.3d 858, 861 (9th Cir. 2002)). Here, Nevada only points to one place in the first four years of active litigation where it arguably raised the issue of state sovereign immunity: the line in the Answer that said, "Defendant is immune from liability as a matter of law." This line does not even mention "state sovereignty" or "the Eleventh Amendment." The issue of state sovereign immunity was not raised early enough in the proceedings to provide fair notice to Plaintiffs. Therefore, to allow Nevada to assert Eleventh Amendment immunity now would give Nevada a significant tactical advantage in this

litigation and would "generate seriously unfair results." *Lapides*, 535 U.S. at 619.

Furthermore, the reasoning of *Lapides* also supports extending the holding of *Embury* to cover cases like this one. As discussed above, the *Lapides* Court reasoned:

> It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the "Judicial Power of the United States" extends to the case at hand.

Lapides, 535 U.S. at 619. The Court concluded that the "general legal principle requiring waiver" when a State voluntarily invokes judicial authority "ought to apply" in order to prevent states from "achiev[ing] unfair tactical advantages." *Id*. at 620, 621. "A benign motive, however, cannot make the critical difference . . . . Motives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* at 621. Therefore, we conclude that *Lapides*' reasoning supports our holding that removal means waiver for all federal-law claims in the case.

Forcing a State to waive sovereign immunity whenever it removes a case to a federal court might lead to unfair results for the State in some circumstances. *See Bergemann*, 665 F.3d at 342. But these concerns are not strong enough to overcome the need for a clear jurisdictional rule. *See Lapides*, 535

U.S. at 621. A State defendant that removes a case to federal court waives its immunity from suit on all federal-law claims brought by the plaintiff. Here, Nevada waived its Eleventh Amendment immunity from Plaintiffs' FLSA claims by removing the case to federal court.

CONCLUSION

For the foregoing reasons, we affirm the district court's holding that Nevada waived its Eleventh Amendment immunity as to Plaintiffs' FLSA claims when it removed this case to federal court. In doing so, we extend the holding of *Embury* to cover all federal-law claims, even when those federal claims are ones Congress did not apply to the States through unequivocal and valid abrogation of their Eleventh Amendment immunity.[3]

AFFIRMED.

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[3] Because we affirm on the waiver-by-removal ground, we do not address Plaintiffs' alternate argument that Nevada has waived sovereign immunity from FLSA claims by enacting Nev. Rev. Stat. § 41.031.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

*** * ***

Case No. 3:14-cv-00320-MMD-WGC

[Filed March 26, 2018]

DONALD WALDEN JR., *et al.,* Plaintiffs,	)
v.	)
STATE OF NEVADA, *ex rel.* NEVADA DEPARTMENT OF CORRECTIONS, and DOES 1-50, Defendants.	)

ORDER

I. SUMMARY

This action concerns alleged failures to compensate Nevada Department of Corrections ("NDOC") employees under federal and state law. This Order addresses two motions that are currently pending before the Court: (1) Defendant State of Nevada *ex rel.* NDOC's Motion to Strike Plaintiffs' Third, Fourth, and Fifth Causes of Action in the First Amended Complaint ("Motion to Strike") (ECF No. 98); and, (2) Defendant's

Motion to Dismiss Plaintiffs' First Amended Collective and Class Action Complaint ("Motion to Dismiss") (ECF No. 99). Plaintiffs filed responses to both motions (ECF Nos. 104, 105) and Defendant replied (ECF Nos. 111, 112).

For the reasons discussed herein, the Motion to Strike is denied and the Motion to Dismiss is granted in part and denied in part.

II. JURISDICTION

The Court issued an order on March 1, 2018, asking the parties to file supplemental briefs to address whether the State of Nevada has waived its sovereign immunity as to the Fair Labor Standards Act ("FLSA") claims in this action.[1] (ECF No. 147.) After reviewing the supplemental briefs (ECF Nos. 149, 158), the Court is convinced that Nevada has waived its sovereign immunity in this Court. The Supreme Court has held that a state's removal of suit to federal court constitutes a waiver of its Eleventh Amendment immunity. *Lapides v. Bd. Of Regents of Univ. Sys. Of Georgia*, 535 U.S. 613, 616 (2002). Here, the State of Nevada removed this action from state court. Therefore, it has waived its sovereign immunity.

[1] This Court has federal question jurisdiction over those claims and therefore is able to exercise supplemental jurisdiction over the three remaining state law claims.

III. BACKGROUND

A. Relevant Procedural History

This action was initiated May 12, 2014, in the First Judicial District Court of the State of Nevada in and for Carson City. (ECF No. 1 at 7-21 (Exh. A).) It was timely removed on June 17, 2014, on the basis of federal question jurisdiction, 28 U.S.C. § 1331. (ECF No. 1 at 2.) The Court granted conditional certification of the class in March 2015. (ECF No. 45.) On April 13, 2016, Defendant filed a motion for judgment on the pleadings (ECF No. 86), which this Court granted in part on March 20, 2017. (ECF No. 94.) In that order, the Court dismissed the FLSA claims with leave to amend and correct the deficiencies with those claims as identified in light of the Ninth Circuit's recent decision in *Landers v. Quality Commc'n, Inc.*, 771 F.3d 638 (9th Cir. 2014), *as amended* (Jan. 26, 2015), *cert. denied*, 135 S. Ct. 1845 (2015). (ECF No. 94 at 4-5.) In *Landers*, the court stated that "at a minimum, a plaintiff asserting a violation of the FLSA overtime provisions must allege that she worked more than forty hours in a given workweek without being compensated for the hours worked in excess," and may estimate "the length of her average workweek during the applicable period and the average rate at which she was paid, the amount of overtime wages she believes she is owed, or any other facts that will permit the court to find plausibility." 771 F.3d at 645. The Court did not address Defendant's arguments concerning Plaintiff's state law claims in light of the fact that it no longer had jurisdiction to consider those claims once the FLSA claims were dismissed, and so the Court dismissed the

state law claims without prejudice. (*Id*. at 5.) Plaintiffs filed their First Amended Complaint ("FAC") on April 19, 2017. (ECF No. 95)

B. Relevant Facts

The following facts are taken from the FAC (ECF No. 95) unless otherwise indicated.

Plaintiffs are individuals who were or are employed with NDOC as non-exempt hourly correctional officers. Plaintiffs are or have been employed at various NDOC facilities including Southern Desert Correctional Center ("SDCC"), High Desert State Prison ("HDSP"), Northern Nevada Correctional Center ("NNCC"), Ely State Prison ("ESP"), and Women's Correctional Center ("WCC"). For all relevant times, NDOC maintained a time recording system for employees referred to as NEATS, which recorded only exceptions to scheduled work hours as well as any workweeks in which a plaintiff or class member worked less or more than the scheduled work times. (ECF No. 95 at ¶ 16.)

Generally, Plaintiffs were required to and did work a forty-hour workweek. If Plaintiffs worked "an alternative variable workweek schedule," they were required to work and did work eighty hours in a two-week period. (ECF No. 95 at ¶ 15.) As a matter of policy, Plaintiffs were only compensated for regularly scheduled shift times *at their work stations*. However, Plaintiffs were required to perform tasks before and after their shifts (commonly referred to as "preliminary" and "postliminary" activities). They claim that they were not compensated for these activities. As for preliminary activities, Plaintiffs identify the

following activities: (1) reporting to the supervisor or sergeant on duty to check in; (2) receiving assignments for the day; (3) having their uniforms inspected; (4) collecting any and all tools needed for daily assignments, such as radios, keys, weapons, tear gas, handcuffs; (5) proceeding to their designated work stations; and (6) receiving debriefing from the outgoing correctional officer. Plaintiffs refer to the first four activities as "muster." (ECF No. 95 at ¶ 31.) Plaintiffs contend that traveling to their designated work stations could take up to fifteen minutes or more per employee per shift. Plaintiffs also state that only after receiving briefing/instructions from the prior correctional officer at their work stations did a plaintiff's scheduled shift time begins. As to postliminary activities, Plaintiffs were required to conduct mandatory debriefing with the oncoming correctional officer then return to the main office to return various tools they had attained for the day and drop off or complete paperwork.

Plaintiffs estimate that on average they performed "upwards to 30-minutes of compensable work before their regularly scheduled shifts, each and every shift worked, for which they were not paid" and "upwards to 15 minutes of compensable work after their regularly scheduled shifts, each and every shift worked, for which they were not paid." (ECF No. 95 at ¶¶ 20, 22.) The FAC identifies at least one workweek where each Plaintiff worked over forty hours in a workweek or over eighty hours in a work period and were not paid overtime for pre- and post-shift activities. Specifically:

- Walden alleges he worked 3.75 hours of overtime at an average hourly rate of $23.50 and is owed $132.19 for each workweek during the pay period between January 7 through January 20, 2013;
- Echeverria alleges he worked 3.75 hours of overtime at an average hourly rate of $23.50 and is owed $132.19 for each workweek during the pay period between September 30 and October 13, 2013;
- Dicus alleges he worked 3.75 hours of overtime at an average hourly rate of $21.17 and is owed $119.110 for each workweek during the pay period between January 16 and January 29, 2017;
- Everist alleges he worked 3.75 hours of overtime at an average hourly rate of $22.80 and is owed $128.25[2] for each workweek during the pay period between January 20 and February 2, 2014;
- Zufelt alleges he worked 3.75 hours of overtime at an average hourly rate of $22.00 and is owed $123.75 for each workweek during the pay period between March 26 and April 9, 2017;
- Redenour alleges he worked 5.25 hours of overtime at an average hourly rate of $24.00 and

[2] This number appear to be based on an average hourly rate of $25.65. (ECF No. 95 at ¶ 47(e).) It is unclear whether the actual average hourly rate of pay for Everist was $22.80 or $25.65.

is owed $189 for the pay period between November 26 and December 9, 2012; and,

- Tracy alleges he worked 3.75 hours of overtime at an average hourly rate of $26.00 and is owed $146.25 for each workweek during the pay period between March 17 through March 30, 2014.

(ECF No. 95 at ¶¶ 44(c), 45(e), 46(f),[3] 47(e), 48(h), 49(g), 50(g).) Each Plaintiff also identifies how much they believe they are owed in overtime per year worked. Specifically:

- Walden alleges he is owed $6,345.60 per year worked based on .75 hours of overtime per shift and 240 shifts per year;
- Echeverria alleges he is owed $6,345.60 per year worked based on .75 hours of overtime per shift and 240 shifts per year;
- Dicus alleges he is owed $ 5,716.80 per year worked based on .75 hours of overtime per shift and 240 shifts per year;
- Everist alleges he is owed $6,156.00 per year worked based on .75 hours of overtime per shift and 240 shifts per year;
- Zufelt alleges he is owed $5,940.00 per year worked based on .75 hours of overtime per shift and 240 shifts per year;

[3] There are two paragraphs labelled "46(f)" in the FAC.

- Redenour alleges he is owed $6,480.00 per year worked based on .75 hours of overtime per shift and 240 shifts per year; and,
- Tracy alleges he is owed $7,020.00 per year worked based on .75 hours of overtime per shift and 240 shifts per year.

(ECF No. 95 at ¶¶ 44(c), 45(e), 46(f), 47(e), 48(h), 49(g), 50(g).)

The FAC contains five claims for relief: (1) failure to pay wages in violation of FLSA; (2) failure to pay overtime wages in violation of FLSA; (3) failure to pay wages in violation of the Nevada Constitution's Minimum Wage Amendment ("MWA"); (4) failure to pay overtime wages in violation of NRS § 284.180; and (5) breach of contract.

IV. MOTION TO STRIKE (ECF No. 98)

Defendant moves to strike the FAC's state law claims pursuant to Fed. R. Civ. P. 12(f) because the claims are "redundant, immaterial, and impertinent" and because Plaintiffs "provide no basis for ignoring the Court's prior order." (ECF No. 98 at 4.) Plaintiffs respond that the "Court's prior order did not dismiss Plaintiffs' state law claims with prejudice so there is no issue with re-pleading those claims" and that the arguments in the Motion to Strike are redundant based on Defendant's Motion to Dismiss. (ECF No. 104 at 1, 3.) The Court agrees with Plaintiffs.

Under Rule 12(f), the Court may "strike from any pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." While

the Court may strike redundant, immaterial, or impertinent matters in a pleading, it cannot strike a claim for relief. *See Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010) ("were we to read Rule 12(f) in a manner that allowed litigants to use it as a means to dismiss some or all of a pleading . . . , we would be creating redundancies within the Federal Rules of Civil Procedure[] because a Rule 12(b)(6) motion . . . already serves such a purpose.") Thus, generally Rule 12(f) is the improper vehicle for dismissing or removing certain claims from a complaint.

Moreover, Defendant's contention that Plaintiffs did not comply with the Court's prior order is unavailing. In its prior order, the Court specifically dismissed the two state law claims without prejudice because it no longer had jurisdiction to consider Defendant's arguments relating to these claims once the Court dismissed the federal law claims. (*See* ECF No. 94 at 5.) Thus, Plaintiffs were not barred from reasserting their state law claims or asserting new ones, and nothing in the Court's prior order supports Defendant's reading that Plaintiffs were barred from doing so.

The Motion to Strike is therefore denied.

V. MOTION TO DISMISS (ECF No. 99)

Defendant makes five arguments in support of dismissing the FAC: (1) accepting Plaintiffs' allegations as true, each earned more than $7.25 per hour and therefore the FAC fails to state a violation of the FLSA's minimum wage requirement; (2) Plaintiffs failed to plead any facts to establish a nexus between

assertions that they were uncompensated for 45 minutes of pre- and post-shift activities, especially in light of the uniqueness of their jobs, the different size of the NDOC facilities, and the different tools each had to use for their positions; (3) the MWA does not apply to government employees; (4) Plaintiffs' NRS § 284.180 claim lacks merit because Plaintiffs failed to exhaust their administrative remedies prior to filing suit; and (5) Plaintiffs' breach of contract claim should be dismissed because Plaintiffs' employment with NDOC is statutory, not contractual, and no actual contract is identified as having been breached. (ECF No. 99 at 2.)

A. Legal Standard

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555.) "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering

motions to dismiss. First, a district court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id*. at 678-79. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id*. at 678. Second, a district court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint alleges facts that allow a court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged—but it has not show[n]—that the pleader is entitled to relief." *Id.* at 679 (internal quotation marks omitted). When the claims in a complaint have not crossed the line from conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570. A complaint must contain either direct or inferential allegations concerning "all the material elements necessary to sustain recovery under *some* viable legal theory." *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1989) (emphasis in original)).

The Court takes judicial notice of the NDOC Variable Work Schedule Request form. (ECF No. 95-5). The document is incorporated by reference in the FAC and attached to it, and there is no dispute about its authenticity. *See Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) (considering documents outside the pleadings n a motion to dismiss "where the complaint necessarily relies upon [the] document or the

contents of the document are alleged in a complaint, the document's authenticity is not in question and there are no disputed issues as to the document's relevance".

B. Straight Time Claim

In responding to Defendant's contention that the FAC fails to state a violation of the FLSA's minimum wage requirement, Plaintiffs point out that their first claim is not a minimum wage claim; rather, it is a straight time claim. (ECF No. 105 a 17.) Defendant does not address whether a "straight time" claim should be dismissed in its reply and instead states that "Plaintiffs are improperly seeking to amend their complaint via their opposition," as the Court's prior order granting leave to amend did not include language permitting a new "straight time claim." (ECF No. 112 at 4.) However, in light of Plaintiffs' clarification that they are asserting a failure to pay wages claim, the Court will permit the claim to proceed.[4] Defendant's Motion to Dismiss is therefore denied as to Plaintiffs' first claim.

C. Overtime Claim

As to the overtime claim, Defendant makes two independent arguments: first, the FAC's allegations regarding Defendant's failure to pay overtime does not

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[4] To the extent the parties argue about whether this failure to pay wages claim encompasses a gap time claim (*see* ECF No. 105 at 18-20; *see also* ECF No. 112 at 8-9), this requires the Court to assess the actual evidence in this case, which it will not do at the motion to dismiss stage.

meet the specificity requirements of *Landers*; and second, the facts as alleged are insufficient to demonstrate that the pre- and post-shift tasks are compensable under the FLSA. (ECF No. 99 at 9-15.) The Court disagrees and finds that this claim should proceed.

1. *Landers*

In *Landers*, the Ninth Circuit stated that "at a minimum, a plaintiff asserting a violation of the FLSA overtime provisions must allege that she worked more than forty hours in a given workweek without being compensated for the hours worked in excess of forty during that week," and that a "plaintiff may establish a plausible claim by estimating the length of her average workweek during the applicable period and the average rate at which she was paid, the amount of overtime wages she believes she is owed, or any other facts that will permit the court to find plausibility." *Landers*, 771 F.3d at 645. Defendant states that "not one individual plaintiff [in this action] pled any facts to satisfy *Landers*," yet goes on to argue about the plausibility of the factual allegations in the FAC. For example, Defendant states that "plaintiffs unjustifiably ask this Court to assume it takes the same amount of time for each person to . . . pick up their tools[] and report to their post . . . regardless of profession, facility, location or other factors." (ECF No. 99 at 10.) However, at the motion to dismiss stage, the Court is required to accept all well-pled factual allegations as true. Thus, to the extent any of those factual allegations appear to lack plausibility, Defendants are asking this Court to

look beyond the pleadings,[5] which it will not do at this stage.[6] Plaintiffs remedied the previous deficiencies in their complaint by identifying the applicable time period, identifying a given workweek with the hours above forty hours for which each Plaintiff was not compensated, and the amount each Plaintiff believes they are owed in overtime wages for each year worked. This is sufficient to satisfy *Landers*.

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[5] In fact, Defendant attached various exhibits to its motion to dismiss in support of its contention that the alleged facts are not accurate or plausible. The Court need not consider these exhibits at the dismissal stage unless it is able to take judicial notice of them.

[6] Therefore, despite the fact that two of the exhibits attached to the FAC deal with specific prisons (ECF Nos. 95-3, 95-4), the FAC appears to use them as examples or as support in an attempt to buttress the factual allegations in the FAC. For instance, Operational Procedure 320, which applies to SDCC, appears to be used as an example (ECF No. 95 at ¶ 39), while the testimony of Warden Williams appears to have been used to support the contention that, in order to complete preliminary tasks, correctional officers would need more than ten minutes if not thirty minutes to do so (*id*. at ¶ 34). Defendant takes issue with the use of Williams' testimony as a misrepresentation in the FAC since he was the warden of SDCC only (*see* ECF No. 99 at 6); however, the Court does not assume the veracity of Williams' statements or assume their applicability to all class representatives in this case. Moreover, Williams' own observation does not establish that these activities were required; rather, the FAC's mere contention that these activities were required by NDOC and must be completed before the start of Plaintiffs' shifts (see, e.g., ECF No. 95 at ¶¶ 14, 18) is a factual allegation the Court must assume to be true for purposes of ruling on Defendant's Motion to Dismiss.

The Motion to Dismiss is therefore denied as to Plaintiff's claim for failure to pay wages in violation of the FLSA.

2. Pre- and Post-Shift Activities as Compensable Work

"It is axiomatic, under the FLSA, that employers must pay employees for all hours worked." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003), *aff'd on other grounds sub nom. IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (citations and internal quotation marks omitted). The Ninth Circuit requires a "three-stage inquiry" to determine if certain activities are compensable under the FLSA. *Bamonte v. City of Mesa*, 598 F.3d 1217, 1224 (9th Cir. 2010). First, the activity must be considered "work" second, the activity must be "integral and indispensable" to the principal work performed; and, third, the activity must not be *de minimus*. *Id.* (citing to *Alvarez*, 339 F.3d at 902-03). The Portal-to-Portal Act "narrowed the coverage of the FLSA slightly by excepting two activities that had been treated as compensable under [prior Supreme Court] 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." *IBP*, 546 U.S. at 27. However, the Supreme Court has held that a preliminary or postliminary activity is compensable if it is integral and indispensable to an employee's principal activities, meaning "if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his

principal activities." *Integrity Staffing Sol., Inc. v. Busk*, 135 S. Ct. 513, 517 (2014).

Defendant first argues that the FAC's allegations fail to show that Plaintiffs' pre-and post-shift activities are "work" under the FLSA. While the FLSA does not define the term "work," the Supreme Court has defined work as "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." *See Armour & Co. v. Wantock,* 323 U.S. 126, 132 (1944). Defendant argues that Plaintiffs: "do not allege that NDOC requires *when* each officer is required to perform" the identified activities or that NDOC required them to do these activities "off-the-clock"; do not allege in the FAC that there are "differences in the time when Plaintiffs are required to report to the prison [versus] when they are required to report to their assigned posts for the day"; "arrive early for their own convenience or the convenience of fellow employees"; and fail to allege sufficient facts to show that NDOC derives any benefits from these activities because "[p]resumably, NDOC's respective prisons still have officers on duty." (ECF No. 99 at 12-14.) However, the Court is able to reasonably infer from the allegations in the FAC that NDOC required these activities to be performed "without compensation" and therefore off the clock; that these activities were required to be performed before the start of regularly scheduled shifts and after the end of regularly scheduled shifts; and that Plaintiffs arrived early to complete these preliminary tasks because NDOC required them to do so. (*See, e.g.*, ECF No. 95 at ¶¶ 19-22.) Moreover, if the Court assumes as true that

NDOC requires Plaintiffs to perform these tasks, it is reasonable to infer that NDOC derives some benefit from these activities, ostensibly by ensuring that incoming correctional officers are prepared to deal with any safety or security issues that may arise during their shifts.[7] (*See* ECF No. 95 at ¶31 ("Officers were required to report to their shift supervisor because correctional officers' assignments can change from day to day based on the needs of the institution" and other things "such as security issues, lockdown situations, changes in rules, and inmate problems"); *see also id*. at ¶ 33 (both supervisor and outgoing officer briefings were necessary because they were the source for security information for both the entire facility and the specific post); *see also* ECF No. 99 at 14 (Defendant admitting that the "benefit NDOC derives from its officers is the safety and security of the prison").)

Defendant next argues that the FAC fails to identify how the pre- and post-shift activities are intrinsic to the job of guarding a prison and that the Court may not "presume the facts necessary to establish the sufficiency of Plaintiffs' allegations." (ECF No. 99 at 15.) However, the Court is able to reasonably infer from the factual allegations in the FAC as well as from common sense why these activities are "an intrinsic element" of a correctional officer's principal activities and "ones with which the employee cannot dispense if

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[7] For example, by briefing an incoming officer so that he is aware of any inmates on the officer's block that have been having behavioral or disciplinary issues, or by ensuring that incoming officers have proper tools to communicate with other officers and protect the prison during their shift.

he is to perform his principal activities." *See Busk*, 135 S. Ct. at 517. As to the purported requisite preliminary activities of check-in and receipt of assignments, "a law enforcement entity cannot ensure the safety of the population it oversees without (1) knowing who is present at a given time and (2) dispatching those that are present to attend to the greatest need." (ECF No. 105 at 12.) Moreover, "a correctional officer simply cannot perform his required job duties without first knowing where to go (whether to the exercise yard or to transport an inmate) nor can he perform his job effectively without knowing whether there is any potential dangerous situation developing amongst the inmates (such as a gang related issue or hunger strike)." (ECF No. 105 at 14.) The activities of check-in and receipt of assignments are therefore necessary to perform the officer's principal duties of safeguarding the prison during his shift.

As to the preliminary activity of retrieving tools and gear, correctional officers need specific items in order to perform assigned duties, for instance, handcuffs to transport inmates or tear gas to quell a potential riot. (*See* ECF No. 105 at 14.) Retrieving tools and gear, as described in the FAC (ECF No. 95 at ¶ 32), is distinguishable from the example Defendant identifies in its motion of "polishing shoes, boots and duty belts, cleaning radios and traffics vests, and oiling handcuffs." (ECF No. 99 at 15 (citing *Musticchi v. City of Little Rock*, *Ark.*, 734 F. Supp. 2d 621, 630-32 (E.D. Ark. 2010)).) As alleged, Plaintiffs are not cleaning gear; they are retrieving gear that is "necessary and required to complete their daily job tasks"—tasks which they are informed of only once they arrive at the

prison and receive a work assignment from their supervisor. (*See* ECF No. 95 at ¶ 32.) As alleged, this activity is therefore indispensable to the officer's principal duties.

As to the preliminary activity of uniform inspection, the FAC contends that "if [a correctional officer's] uniform was not up to standards" then the officer "could not proceed to their post[]."(ECF No. 95 at ¶ 31(b).) Defendant argues that because a uniform can be put on at home, this activity is not compensable under FLSA. (ECF No. 112 at 7 (citing *Balestrieri v. Menlo Park Fire Protection Dist.*, 800 F.3d 1094, 1100 (9th Cir. 2015)).) However, Plaintiffs do not contend that it is putting on a uniform at work that is compensable; rather, they state that uniform inspection by an officer's shift supervisor is a component of "muster"and is therefore compensable because it is required. (*See* ECF No. 95 at ¶ 31(b).) While the time spent by a supervisor visually inspecting an officer's uniform may itself be *de minimus*, it is a purported component of "muster" and therefore part of a continuous workday activity that is integral to the officer's principal duty of ensuring the safety of the prison and monitoring its inmates.

As to the preliminary activity of walking from check-in, receipt of assignment, and tool collection to an officer's assigned post for the day, this activity is compensable under the "continuous workday doctrine." *See IBP, Inc.*, 546 U.S. at 37 ("[D]uring a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity

is excluded [from the Portal-to-Portal Act's travel exemption], and as a result is covered by FLSA.")

As to the postliminary activity of outgoing correctional officers briefing incoming officers, this is similarly necessary to the safety and security of the prison, and is an integral part of the officers' principal duties. (ECF No. 106 at 16-17.) Finally, as to the postliminary activities of walking back to and returning any tools or gear taken by an officer, the allegations in the FAC permit the Court to reasonably infer that Plaintiffs were not allowed to take these tools and gear home with them and so were required to return them. As Plaintiffs are purportedly required to take these tools and gear before starting their shifts in order to perform their assigned duties, the postliminary activity of returning tools or gear is also indispensable to their principal duties during their shifts.

Defendant also argues that these activities are *de minimus* and again asserts that the factual allegations in the FAC are implausible (*see, e.g.*, ECF No. 112 at 6, 7 ("surely de-briefing and returning tools must take less than a minute as plaintiffs must walk back the same way they came" and "[t]here is no factual basis for this Court to even attempt to estimate such time for 'walking to post' since plaintiffs admit in their complaint they all worked at different facilities and in different locations in those facilities")). The Court, however, does not quibble about the plausibility of facts when doing so would require this Court to look at evidence outside the pleadings. What is sufficient at this stage of the litigation is that there is a scope of

activities that employees must perform, that these activities are integral and indispensable to their positions as prison guards, and that the factual allegations are that these activities generally take 45 minutes to perform "off the clock." The Court therefore finds that the FAC's allegations permit this Court to make the reasonable inference that these activities, as alleged, are not *de minimis*.

Defendant's Motion to Dismiss is therefore denied as to Plaintiff's claim for violation of the FLSA's overtime provision.

D. Minimum Wage Amendment Claim

It is unclear from the plain language of the MWA whether "other entity" applies to the state government. The MWA states in relevant part that an "employer" is any "other entity that may employ individuals." Nev. Const., art. 15, § 16, cl. 7. Defendant contends that the MWA does not apply to it because NRS Chapter 284 governs the relationship between the State of Nevada and its employees. (*See* ECF No. 99 at 17-19.) Plaintiffs respond that the state government is not identified as one of the entities exempt from the MWA and that the MWA superseded NRS Chapter 284. (*See* ECF No. 105 at 20-23.) Resolution of this matter requires the Court to interpret state law; therefore, the Court questions whether certification of the issue to the Nevada Supreme Court is warranted.

The Court therefore denies Defendant's Motion to Dismiss as to this claim without prejudice and directs supplemental briefing as to whether this issue should

be certified and the effect of certification on the remaining claims in this action.

E. NRS § 284.180 Claim

Defendant argues that Plaintiff has failed to plead facts demonstrating they have exhausted the administrative requirements of NRS Chapter 284. (ECF No. 99 at 19-20.) Specifically, this process requires that claimants first file a grievance regarding issues of compensation or working hours, that they then appeal the decision regarding their grievance to the Employee Management Committee ("EMC"), and that, if still unsatisfied, they obtain judicial review of EMC's decision by filing a petition within 30 days. *See* NRS §§ 284.384, 233B.130(2)(d). Plaintiffs respond that they do not need to exhaust the administrative process and have a "direct private right of action to enforce the overtime provisions contained in NRS [§] 284.180" (ECF No. 105 at 23) because NRS § 284.195 provides:

> Any person employed or appointed contrary to the provisions of this chapter and the rules and regulations thereunder whose payroll or account is refused certification shall have an action against the appointing authority employing or appointing or attempting to employ or appoint the person for the amount due by reason of such employment or purported employment, and the costs of such action.

However, Plaintiffs are wrong. NRS § 284.195 applies where an "employee" has been appointed to a position of employment by an "appointing authority" where the appointment of the employee is "contrary to law and

regulation" and payroll certification does not occur. That unlawfully appointed "employee" then may sue the "appointing authority" and not the State of Nevada, *see* NRS § 284.190(2) & (3), for the amount that "employee" is owed based on any work she performed, and she may initiate a private right of action without going through the administrative grievance process normally required of state employees.

Failure to exhaust state administrative remedies is claim-dispositive and, therefore, state law applies in determining whether a claim for violation of NRS § 284.180 is justiciable in this Court. *See Hanna v. Plumer*, 380 U.S. 460, 467 (1965) ("The Erie rule is rooted in part in a realization that it would be unfair for the character of result of a litigation materially to differ because the suit had been brought in a federal court."). Because the Nevada Supreme Court has found that such a claim is not ripe for judicial review unless all state administrative remedies have been exhausted, *see City of Henderson v. Kilgore*, 131 P.3d 11, 14-15 (Nev. 2006), this Court will follow Nevada's lead and will not address the claim.

Therefore, the claim for violation of NRS § 284.180 is dismissed without prejudice.

F. Breach of Contract

Defendant argues in relevant part that NDOC's Variable Work Schedule Request form ("Variable Request Form") is not an employment agreement and is instead a document simply giving employees the choice of working either a forty-hour workweek over the course of five days or an eighty-hour workweek over

the course of fourteen days. (ECF No. 99 at 20-21; *see also* ECF No. 95-5 at 2.) Plaintiffs state that "Plaintiffs' breach of contract claim is premised upon the determination that the pre- and post-shift work is compensable under federal and state law."(ECF No. 105 at 23.) They go on to state that the "agreements were those that correctional officers would be compensated overtime when they worked over 40 hours in a workweek or over 80 hours in a biweekly pay period, depending on the variable work schedule the employee chose." (*Id*.) Based on the FAC, this "agreement" appears to be the Variable Request Form. (*See* ECF No. 95 at ¶95 ("Defendant had an agreement with Plaintiffs and with every Class Member under the Nevada Department of Corrections Variable Work Schedule to pay overtime").)

The Variable Request Form, however, is clearly an agreement to work a variable schedule in a workweek, not an agreement or contract to pay overtime. To the extent the Variable Request Form states that overtime will be paid under NRS § 284.180, this is merely a statement of what the law requires of Defendant. The Court therefore finds that the Variable Request Form is not a contract to pay overtime wages to Plaintiffs. The Court therefore dismisses the breach of contract claim.

VI. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant

discussion as they do not affect the outcome of Defendant's motions.

It is therefore ordered that Defendant's Motion to Strike (ECF No. 98) is denied.

It is further ordered that Defendant's Motion to Dismiss (ECF No. 99) is granted in part and denied in part. It is granted as to Plaintiffs' claim for violation of NRS § 284.180 and Plaintiffs' claim for breach of contract. It is denied as to Plaintiff's remaining claims and is denied without prejudice as to Plaintiffs' claim for violation of the Minimum Wage Amendment.

It is further ordered that the parties are to file supplemental briefs of no more than five (5) pages each within seven (7) days of this order to explain if certification of the question whether the Minimum Wage Amendment applies to state government employees is warranted and what effect certification would have on the remaining claims in this action.

DATED THIS 26th of March 2018.

/s/ Miranda M. Du
MIRANDA M. DU
UNITED STATES DISTRICT JUDGE