IN THE SUPREME COURT OF THE STATE OF NEVADA

JANE DOE DANCER, I; JANE DOE DANCER, II; JANE DOE DANCER, III; and JANE DOE DANCER, V, individually, and on behalf of Class of similarly situated individuals,

Appellants,

vs.

LA FUENTE, INC., an active Nevada Corporation,

Respondent.

CASE NO.: 78078

District Court Case No.: A-14-709891-C

Appeal from the Eighth Judicial District Court, Clark County, Nevada

APPELLANTS' OPENING BRIEF

KIMBALL JONES, ESQ.
Nevada Bar No.: 12982
BIGHORN LAW
716 S. Jones Blvd.
Las Vegas, Nevada 89107
Telephone: (702) 333-1111
Email: kimball@bighornlaw.com

MICHAEL J. RUSING, ESQ.
(AZ Bar No. 6617 – *Admitted Pro Hac Vice)*
RUSING LOPEZ & LIZARDI, P.L.L.C.
6363 North Swan Road, Suite 151
Tucson, Arizona 85718
Telephone: (520) 792-4800
Email: mrusing@rllaz.com

Attorneys for Appellants

NRAP 26.1 DISCLOSURE

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

Kimball Jones, Esq., with the Law Offices of **BIGHORN LAW** and Michael Rusing, Esq., with the Law Offices of **RUSING, LOPEZ & LIZARDI, PLLC**, have appeared for Appellants in this case and are expected to appear for them in this Court.

DATED this 10 day of March 2020.

BIGHORN LAW

KIMBALL JONES, ESQ.
Nevada Bar No.: 12982
716 S. Jones Blvd.
Las Vegas, Nevada 89107
Telephone: (702) 333-1111
Email: kimball@bighornlaw.com

MICHAEL J. RUSING, ESQ.
(AZ Bar No. 6617-*Admitted Pro Hac Vice)*
RUSING LOPEZ & LIZARDI, P.L.L.C.
6363 North Swan Road, Suite 151
Tucson, Arizona 85718
Telephone: (520) 792-4800
Email: mrusing@rllaz.com
Attorneys for Appellants

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal of a final judgment under NRAP 3A.

ROUTING STATEMENT

This appeal should be retained by the Supreme Court because it raises as a principal issue a question both of first impression and of statewide public importance involving the scope of the Minimum Wage Amendment to the Nevada Constitution, Nev. Const. Art. XV, sec. 16 (the "MWA"). NRAP 17(a)(10-11).

ISSUES PRESENTED FOR REVIEW

1. The test for independent contractor status in NRS 608.0155 states it applies only "[f]or the purposes of this chapter" (*i.e.*, Chapter 608). NRS 608.0155(1). Did the trial court err in determining NRS 608.0155 applies to MWA claims?
2. The MWA was enacted by Nevada voters to ensure that "more, not fewer, persons would receive minimum wage protections." *Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951, 955 (2014), *reh'g denied* (Jan. 22, 2015). Can the Legislature, by ordinary enactment, ensure that fewer, not more, persons would receive minimum wage protections under the MWA?
3. Should the MWA's definition of employee be construed in the same manner as the identical definition in the parallel federal minimum wage law (*i.e.*, by

reference to the economic realities test) and are the Dancers the Club's employees under that test?

4. If the test for independent contractor status in NRS 608.0155 limits the scope of MWA claims, did the trial court err in applying it?

STATEMENT OF THE CASE

This is an employee misclassification class action. Appellants (the Dancers) worked as exotic dancers at Appellee La Fuente, Inc.'s Las Vegas strip club, Cheetah's, and seek a determination that Appellee ("Cheetah's" or "the Club") is required to treat them as employees under the Minimum Wage Amendment to the Nevada Constitution, Art. XV, sec. 16. *See generally* Amended Complaint at APP 0001-0017. Cheetahs, as Sapphire and other clubs have done, classifies its dancers as independent contractors who must pay the club a "house fee" to use the club's facilities to conduct their own allegedly independent business with their "clients" (the club patrons). *See generally* Answer at APP 0008-0037. Cheetahs claims its relationship with its Dancers is that of principal and independent contractor, even though the Club has never paid its Dancers as independent contractors and continues to insist the Dancers perform work for it. APP 0187-209.

The Court held that NRS 608.0155 applied to limit MWA claims, concluded the Dancers were independent contractors under that test as a matter of law, and therefore granted the Club's motion for summary judgment on the Dancers' claims.

APP 2502-2506; APP 2507-2522.

PROCEDURAL HISTORY

The original complaint was filed on November 14, 2014 and the operative amended complaint (alleging violation of the MWA and unjust enrichment) was filed on May 1, 2015. APP 0001-0017. The Club filed an answer on June 9, 2015. APP 0018-0033.

On January 4, 2019, the trial court (a) granted the Club's motion for summary judgment on all the Dancers' claims because it found the Club's dancers were independent contractors under NRS 608.0155; and (b) denied the Dancers' motion for summary judgment on employee status with prejudice. APP 952-961.

STATEMENT OF FACTS

A. Facts relating to employee status under the MWA.

1. Whether dancers exert control over a meaningful part of the exotic dance business.

- The Club controls the club's layout, décor, and ambiance. Dancers have no control over the club layout, décor, and ambiance. *See* APP at 0038 (Deposition of Diana Pontrelli); App at 0734 (La Fuente Response to Second Set of Requests for Admissions at Response to Request No. 13).
- The Club controls Cheetahs hours of operation and sets the amount of cover charges charged to Club Patrons. Dancers have no control over Cheetahs

hours of operation and cover charge amounts. *APP* at 0733 (Response to Request Nos. 10 and 11); and APP at 0039 (Deposition of Diana Pontrelli).

- The Club sets up, maintains, and controls access to VIP rooms. APP at 0039
- The Club set pricing for VIP rooms, requires a 2-drink minimum to use the VIP room, and requires all fees to be paid for in advance. *See* APP at 0059 (Deposition of Diana Pontrelli).
- The Club set pricing for floor dances. *See* APP at 0049 (Deposition of Diana Pontrelli).
- The Club sets dance pricing and advertises the pricing on signs throughout the club. *See* APP at 0049 (Deposition of Diana Pontrelli).
- The Club established and maintained three shifts for its dancers: a "day shift" from 5:00 a.m. to 1:00 p.m., a "swing shift" from 1:00 p.m. to 9:00 p.m., and a "graveyard shift" from 9:00 p.m. to 5:00 a.m. *See* APP at 0040 (Deposition of Diana Pontrelli).
- The Club controlled which shifts dancers could work. *See* APP at 0055, 0066, 131 (Deposition of Diana Pontrelli); and Ex. 6 [*La Fuente House Mom Log Book (2015-2017) produced by Defendant La Fuente, Inc. in response to Plaintiffs' Third Set of Requests for Production, Request No. 18*] at 0767-0784.

- The Club requires dancers to pay a fee to work each shift and another fee if they do not want to dance on stage. *See* APP at 0058, 0063 (Deposition of Diana Pontrelli).
- The Club requires dancers who work two consecutive shifts to pay a $25 "stay over" fee. *See* APP at 0057 (Deposition of Diana Pontrelli).
- The Club requires dancers to check in with the DJ at the beginning of a shift to get on the stage rotation list unless they paid an additional "off stage" fee. App at 0058, 0063.
- The Club's managers could terminate or suspend dancers for any reason. *See* APP at 0062; and APP 0767-0784
- On March 29, 2015 the Club suspended a dancer because she "refused to finish her 6 hrs" shift and allegedly exhibited a "bad attitude." *See* APP 0770.
- On May 18, 2015, the Club terminated a dancer for "leaving early without any explanation" and for getting into a dispute with a customer over payment for dances. *See* APP at 0772.
- On May 25, 2015, the Club informed a dancer that she could not work any afternoon shifts on Sunday, Monday, or Tuesday because of an alleged "negative attitude." *See* APP at 0773.

- On August 30, 2015, the Club informed a dancer that she could not work on Sunday, Monday, or Tuesday because she asked to leave early on several occasions. *See* APP at 0774.
- On November 14, 2015, the Club terminated a dancer because of her alleged "poor, rude, nasty attitude towards Cheetahs staff." *See* APP at 0777.
- On August 16, 2016, the Club terminated a dancer for being "very disrespectable [sic] to mgr [sic]." *See* APP at 0780.
- On August 16, 2016, the Club suspended a dancer from all shifts "until she speaks to a mgr [sic] to clarify a very vicious rumor." *See* APP at 0780.
- On December 18, 2016, the Club terminated a dancer from "all shifts" allegedly for being "disrespectful to house mom." *See* APP at 0782.
- On February 21, 2017, the Club prohibited a dancer from working past 1:00 p.m. because of "her attitude + being disrespectable [sic] towards house mom." *See* APP at 0784.
- The Club requires all dancers to sign a "Dancer Performance Lease" (the "Lease") in order to work at the Club. *See* APP 0043 (Deposition of Diana Pontrelli); and APP 0762-0765 (*Dancer Performance Lease*).
- The Lease contains the following provisions:

a. Each lease date "shall consist of a minimum of 6 consecutive hours (one "set") during which PERFORMER shall provide entertainment consistent with this LEASE." *See* APP 0762-0765.

b. "PERFORMER agrees to: Perform nude and/or semi-nude entertainment at the PREMISE for the general public during all hours of each set for which she has LEASED the PREMISES." *See* APP 0762-0765.

c. OWNER shall establish a fixed fee for the price of table, taxi and couch dances performed on the PREMISES … and PERFORMER agrees not to charge a customer more than the fixed price for any such dance performance" APP 0762-0765.

d. OWNER shall have the right to impose such rules and regulations upon the use of the PREMISES by PERFORMER as OWNER, in its sole and absolute discretion, deems necessary and appropriate" APP 0762-0765.

- The club requires dancers to sign in on a sheet, at the top of which is printed a list of rules. *See* APP 0052-0053.
- The Club published and enforced the following rules: no street clothes, wear high heels (at least 3"), check out with the manager and DJ, do not refuse a drink or shooter from a customer, change costumes at least three times during

each shift, no purse or cell phone on the floor, no smoking or chewing gum on the floor. *See* APP at 0052-0054.

- The Club does not allow dancers to run tabs on dances. *See* APP 0059.
- The Club does not allow dancers who were not on stage to approach customers sitting at a stage. *See* APP at 0059.
- The Club requires dancers to talk to customers and sit with them for at least one song before asking them for a dance. *See* APP at 0753
- The Club requires Dancers dancing on stage to have removed their tops after the second song. *See* APP at 0059
- The Club did not allow Dancers' spouses or significant others in the club while they were working. *See* APP at 0059; and 0753.
- The Club did not allow anyone who may have given a Dancer a ride to the club to enter the club during that dancer's shift. *See* APP at 0059; and 0753.

2. Whether the relative investment of the parties in the exotic dance business indicates a dependent relationship.

- The Club does all the advertising for Cheetahs, including offering special promotions and creating content on Cheetahs' webpage. Dancers have no control advertising for Cheetahs and do not create content on Cheetahs' webpage. *See* APP at 0038.

- The Club obtains and pays for all of the licensing and fees necessary to operate the Club. Dancers do not pay any amount for the licensing and fees necessary to operate the Club. *See* APP at 0038.
- The Club advertised 2 for $20 lap dance promotions and expects dancers to honor the deal. *See* APP at 0051
- The Club hires and pays a DJ and all other employees necessary to run the club. Dancers have nothing to do with hiring or paying any club employees. *See* APP at 0038.
- The Club pays for all repairs, maintenance, rent and utilities necessary to operate the Club. Dancers do not pay any amount for repairs, maintenance, rent and utilities necessary to operate the Club. *See* APP at 0038.
- Exotic dancers are integral to Cheetah's business model. *See* APP at 0043; and Defendant La Fuente, Inc.'s Answer to Plaintiffs' First Amended Class Action Complaint APP at 0022.

3. Whether the dancers' opportunity for profit or loss depends on their managerial skill.

- The Club obtains and pays for all of the licensing and fees necessary to operate the Club. Dancers do not pay any amount for the licensing and fees necessary to operate the Club. *See* APP at 0038.

- The Club hires and pays a DJ and all other employees necessary to run the club. Dancers have nothing to do with hiring or paying any club employees. *See* APP at 0039.
- The Club pays for all repairs, maintenance, rent and utilities necessary to operate the Club. Dancers do not pay any amount for repairs, maintenance, rent and utilities necessary to operate the Club. *See* APP at 0039.
- The Club was responsible for attracting customers to the venue through its exclusive control over advertising and marketing and the setting of a cover charge for admission. *See* APP at 0038.

4. Whether exotic dancing requires a special skill.

- The Club does not require prospective dancers to audition in order to work at the club; managers simply perform a visual inspection and brief interview "to get a vibe where they're coming from." *See* APP at 0041.
- The Club does not require Dancers to have any prior experience or dance training in order to work at the club. *See* APP at 0041.

5. Whether the dancer-club relationship lacks a high degree of permanence.

- The Club's managers could terminate or suspend dancers for any reason. *See* APP at 0062; and APP 0767-0784

SUMMARY OF ARGUMENT

The central liability question in this case is whether the Club's dancers are employees within the meaning of the MWA. The trial court erred by ignoring the MWA's definition of employee and instead holding that the dancers met the test for independent contractor status in NRS 608.0155 and therefore are excluded from the MWA's protections. NRS 608.0155 does not purport to apply to MWA claims and, as this Court held in *Thomas*, if it did it would be preempted. The MWA's definition of employee, which this Court already has indicated is very broad, is identical to the definition in the parallel federal wage law, the Fair Labor Standards Act (FLSA), 29 USC §§ 201-219. This Court should confirm that the MWA incorporates the FLSA's economic realities test and that the Club's dancers are its employees under that test as a matter of law.

STANDARD OF REVIEW

This Court reviews a trial court's grant of summary judgment and construction of statutes *de novo*, giving no deference to its findings. *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005).

A lower court's decision concerning subject matter jurisdiction is subject to *de novo* review. *Castillo v. United Fed. Credit Union*, 409 P.3d 54, 57 (Nev. 2018).

ARGUMENT

A. The trial court erred in determining NRS 608.0155 applies to MWA claims because the statute does not purport to do so (Issue 1).

NRS 608.0155 creates a new threshold test for independent contractor status in evaluating Chapter 608 claims. And, of course, the Legislature is free to modify this statutory scheme as it wishes, subject to federal preemption concerns. Under the amended statutory scheme, this Court's decision in *Terry* that NRS 608.010 (the statutory definition of employee) incorporates the FLSA's economic realities test still stands,[1] although individuals who meet the NRS 608.0155 test for independent contractor status now will be excluded from that definition.

The trial court erred in applying NRS 608.0155 to limit the Dancers' MWA claim and in ignoring the MWA's definition of employee because, as the first six words of the statute state, its test for independent contractor status applies only "[f]or the purposes of this chapter" (*i.e.*, Chapter 608). NRS 608.0155(1). It is well established that, when interpreting a statute, the language of a statute should be given its plain meaning. *We the People Nevada v. Secretary of State*, 124 Nev. 874, 881, 192 P.3d 1166, 1170–71 (2008). If the Nevada Legislature had intended to ignore the principle of constitutional supremacy and enact a statute that purported to exclude individuals from the protections afforded by the MWA, it easily could have said so, but did not.

As discussed in this brief's next section, application of NRS 608.0155 to limit

[1] The Club in its briefing to the trial court suggested, erroneously, that this Court's interpretation of NRS 608.010 in *Terry* was "abrogated by statute." APP 1312:1.

an MWA claim would run afoul of the principle of constitutional supremacy and raise preemption concerns. Thus, even if NRS 608.0155 could conceivably be construed to apply to MWA claims, such a problematic interpretation would be eschewed per the doctrine of constitutional avoidance. *Sheriff, Washoe Cty. v. Wu*, 101 Nev. 687, 689–90, 708 P.2d 305, 306 (1985) ("Where a statute may be given conflicting interpretations, one rendering it constitutional, and the other unconstitutional, the constitutional interpretation is favored."). *See also United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.").

The only reasonable interpretation of NRS 608.0155's scope that saves it from unconstitutionality and preemption concerns is the interpretation suggested by its plain language: that it does not apply to MWA claims but applies only "[f]or the purposes of this chapter." NRS 608.0155(1).

B. The Legislature cannot, by ordinary enactment, exclude individuals from the protections afforded by the MWA (Issue 2).

1. Applying NRS 608.0155 to exclude individuals from the protections afforded by the MWA would run afoul of the principle of constitutional supremacy.

If NRS 608.0155 were interpreted to apply to MWA claims it would be unconstitutional. If an individual is an employee within the MWA's definition of that term (as interpreted by this Court, the ultimate authority on the constitution's

meaning) then no statute can remove that individual from the constitution's protections because "the principle of constitutional supremacy prevents the Nevada Legislature from creating exceptions to the rights and privileges protected by Nevada's Constitution." *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518, 522 (2014), *reh'g denied* (Sept. 24, 2014). *See also Strickland v. Waymire*, 126 Nev. 230, 241, 235 P.3d 605, 613 (2010) ("The constitution may not be construed according to a statute enacted pursuant thereto; rather, statutes must be construed consistent with the constitution — and rejected if inconsistent therewith.").

The Legislature has no power to limit the scope of a constitutional provision or a constitutional cause of action. "If the Legislature could change the Constitution by ordinary enactment, 'no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, ... alterable when the legislature shall please to alter it.'" *Thomas,* 327 P.3d at 522 (*quoting City of Boerne v. Flores*, 521 U.S. 507, 529 (1997) (alteration in original) (*quoting Marbury v. Madison*, 5 U.S. 137 (1803)).

This Court in *Thomas* already enforced the principle of constitutional supremacy and foreclosed any legislative attempt to restrict or alter the MWA's broad scope when it struck down a pre-existing statute purporting to exclude taxicab drivers from the MWA's broad definition of employee. *Thomas* at 522. For the

reasons set forth at length in *Thomas*, a threshold statutory test that would accomplish a similar result as the legislative exemption at issue in *Thomas* (*i.e.*, excluding individuals from the "rights and privileges protected by Nevada's Constitution") also would be preempted. That a specific statutory exemption (at issue in *Thomas*) and a statutory test excluding an entire category of individuals from the constitution's protections (at issue here) are equally impermissible seems beyond argument. To hold otherwise would render meaningless this Court's ruling in *Thomas* (and the principle of constitutional supremacy it enforced) because it would permit the Legislature to re-establish the supposedly preempted statutory exemption for taxicab drivers simply by enacting a statute that said "any person who transports passengers in a vehicle for a fee" is an independent contractor. The principle of constitutional supremacy cannot be so easily subverted. This Court has determined that the MWA was enacted by Nevada voters to ensure that "more, not fewer, persons would receive minimum wage protections." *Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951, 955 (2014). If the Legislature for some reason wanted to ensure that fewer, not more, persons would receive minimum wage protections under Nevada law, it would need to amend or repeal the MWA (although, as explained in the next section and as this Court previously has noted, even if the MWA was repealed a state wage law that purported to cover fewer persons than the parallel federal wage law would be preempted).

2. NRS 608.0155 is preempted by its conflict with the Fair Labor Standards Act.

> Pursuant to the Supremacy Clause of the United States Constitution, 'state laws that conflict with federal law are without effect.'" *Munoz v. Branch Banking*, 131 Nev. Adv. Op. 23, 348 P.3d 689, 690 (2015) (*quoting Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (internal quotations omitted)). *See also Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our preemption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."). State laws are preempted and without effect if "a party's compliance with both state and federal laws is impossible, or … the [federal] act's purpose would be frustrated if state law were to apply." *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 375, 168 P.3d 73, 82 (2007).

NRS 608.0155 directly conflicts with the FLSA.[2] The FLSA broadly covers all Nevada employees engaged in commerce or in the production of goods for commerce (individual coverage) and all Nevada employers with annual gross revenue of at least $500,000 (enterprise coverage). *See* 29 U.S.C. §§ 203(s), 206(a). The FLSA "explicitly permits more protective state wage and hour laws," *Newton v. Parker Drilling Mgmt. Servs.*, Ltd., 881 F.3d 1078, 1097 (9th Cir. 2018) (*citing* 29 U.S.C. § 218(a)) but, as this Court has noted, a less protective state minimum wage law would be preempted. *Terry* at 956 ("to avoid preemption, our state's

[2] Specifically, the Club suggested NRS 608.0155 "constitutes the Nevada Legislature's 'signal' to the Nevada Supreme Court of its intent to have Nevada's minimum wage scheme deviate from the federal scheme that the Nevada Supreme Court was searching for in *Terry*." APP 70:25-71:2.

minimum wage laws may only be equal to or more protective than the FLSA.").

The problem with a state wage law using a narrower definition of employee than the FLSA is readily apparent. It would be impossible for covered employers, like strip clubs, to comply with different federal and state tests for determining whether its workers must be classified and paid as employees. Clubs could not comply both with a state wage law requiring it to treat dancers as independent contractors and a federal wage law requiring it to treat dancers as employees. And the federal objective to provide wage protections to all persons who are employees under the broad economic realities test would be frustrated if Nevada employers could avoid their federal wage obligations by hiding behind less protective state wage laws.

The preemption conflict analysis here is identical to that in cases examining the interplay between state and federal laws regulating labeling of pharmaceutical products. A state law requiring a drug manufacturer to label a product one way is preempted by a federal law requiring the product to be labeled another way because it is impossible for manufacturers to comply with both standards. *See Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 480 (2013) ("[I]t was impossible for Mutual to comply with both its state-law duty to strengthen the warnings on sulindac's label and its federal-law duty not to alter sulindac's label. Accordingly, the state law is pre-empted."); *see also PLIVA, Inc. v. Mensing*, 564 U.S. 604, 618 (2011) (holding state

law preempted where "impossible for the Manufacturers to comply with both their state-law duty to change the label and their federal law duty to keep the label the same.").

3. NRS 608.0155 cannot apply retroactively to impair employees' vested rights to wages.

Even if NRS 608.0155 could apply to limit the MWA's broad scope and was not preempted by federal law, it could not be applied retroactively because that would run afoul of constitutional limits on a legislature's ability retroactively to impair vested rights. *See Town of Eureka v. Office of State Eng'r of State of Nev*., 826 P.2d 948, 950 (Nev. 1992) (due process prevents retrospective laws from divesting vested rights). There are two vested rights at issue: (1) an employee's property right to wages for each hour worked and (2) a property right in an accrued cause of action.

The law in Nevada on this point is clear. The right to a minimum hourly wage (a fundamental property right) vests as soon as the worker performs each hour of labor. *See Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 313 P.3d 849, 856 (Nev. 2013) (lienholder's right to deficiency payment vests at time of trustee sale because that's when amount owed becomes "crystalized"). In *Sandpointe*, this Court held a statute limiting deficiency judgments would impermissibly impair lienholders' vested rights if retroactively applied to deficiencies arising after trustee sales occurring before the statute became effective. *Id*. This Court explained that a lienholder's right

to a deficiency payment "crystalizes" (vests) as soon as the trustee sale results in a deficiency amount. *Id*. For the same reason, a statute erasing a minimum wage obligation would impair workers' vested rights if retroactively applied to hours already worked before the statute became effective. The rule that an employee's right to an hourly wage vests as soon as each hour of labor is performed makes intuitive sense and is widely recognized. *See, e.g., Sanders v. Loomis Armored, Inc.*, 614 A.2d 320 (Penn. 1992) (employees had vested right in wages earned which could not be extinguished by legislation without violating due process); *Fletcher v. Grinnell Bros.*, 64 F. Supp. 778, 780 (E.D. Mich. 1946) (Upon failure to pay minimum wages employee obtains "a vested right thereto regardless of whether or not the employee is forced to institute suit to recover the amount due."). The dancers' right to a minimum wage for each hour worked became absolute and unconditional upon their performance of each hour of work.

The putative class members also have a vested property right in this existing class action, which was filed eight months before NRS 608.0155 was passed into law by the governor. *See Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933) ("a vested cause of action is property and is protected from arbitrary interference"); *Gibson v. Com.*, 490 Pa. 156, 161, 415 A.2d 80, 83 (1980) ("It is well-settled that the Legislature may not extinguish a right of action which has already accrued to a claimant."). *See also* 16A C.J.S. Constitutional Law § 486 ("an existing right of

action which has accrued to a person . . . is a vested property right in the same sense in which tangible things are property and may not be destroyed or impaired by legislation.").

C. The MWA's definition of "employee" incorporates the FLSA's economic realities test and the Club's dancers are employees under that test as a matter of law (Issue 3).

1. The MWA's definition of "employee" incorporates the FLSA's economic realities test.

The MWA defines an employee as "any person who is employed by an employer" and includes three enumerated exemptions ("an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days"). Nev. Const. Art. XV, Sec. 16(C). This Court in *Terry* interpreted the definition of employee in NRS Chapter 608, but has not yet squarely addressed the meaning of the MWA term.

The Club in its briefing below did not appear to dispute that the MWA's definition of employee incorporates the federal economic realities test. *See* APP 1312 (noting if NRS 608.0155 not met "it logically follows that the Nevada Supreme Court's usage of the 'economic realities' test may perhaps then be appropriate.") and has offered no alternative definition of the term. Well-established principles of constitutional interpretation confirm the MWA definition is indeed co-extensive with its federal counterpart.

> To determine a constitutional provision's meaning, we turn first to the provision's language. In so doing, we give that language its plain effect, unless the language is ambiguous. If a constitutional provision's language is ambiguous, meaning that it is susceptible to two or more reasonable but inconsistent interpretations, we may look to the provision's history, public policy, and reason to determine what the voters intended. . . . Whatever meaning ultimately is attributed to a constitutional provision may not violate the spirit of that provision.

Miller v. Burk, 124 Nev. 579, 590–91, 188 P.3d 1112, 1119–20 (2008) (quotations and citations omitted).

The first step in determining the scope of the MWA's definition of employee is to ask whether the term "employee" as it is used in the MWA is ambiguous.[3] Three well-established canons of construction and several observations by this Court suggest it is not.

First, the MWA's definition of employee is identical to the FLSA definition. *See* 29 U.S.C. § 203(e)(I) ("the term 'employee' means any individual employed by an employer"). This definition may seem tautological, but it is a well-known term of art and for decades it consistently has been interpreted by courts with reference to the economic realities test. "Generally, when a legislature [or voters] uses a term of art in a statute [or initiative], it does so with full knowledge of how that term has been interpreted in the past, and it is presumed that the legislature [or voters]

[3] A provision is ambiguous when it is susceptible to more than one reasonable interpretation. *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007).

intended it to be interpreted in the same fashion." *Beazer Homes Nevada, Inc. v. Dist. Ct.*, 120 Nev. 575, 587, 97 P.3d 1132, 1139–40 (2004) (emphasis added).

Second, where, as here, a state statute or constitutional provision parallels language in a federal counterpart (the FLSA), Nevada courts look for guidance to federal precedent interpreting the federal statutes. *Hernandez v. Bennett-Haron*, 128 Nev. Adv. Op. 54, 287 P.3d 305, 310 (2012).

Third, the MWA unquestionably is a remedial constitutional provision. When construing remedial provision, "a broad and liberal construction is required, in order that the purposes designed by them shall be most completely served." *Warren v. De Long*, 59 Nev. 481, 97 P.2d 792, 795 (1940) (emphasis added). *See also Terry* at 956 (noting "a broader or more comprehensive coverage of employees [than that provided in the FLSA's definitions] would be difficult to frame.") (*quoting United States v. Rosenwasser*, 323 U.S. 360, 362 (1945)).

The only reasonable interpretation of the MWA's definition of employee is that it is co-extensive with the identical FLSA definition. The Club has suggested no plausible alternative definition. And, although this Court has not expressly addressed the issue, it clearly has indicated that the scope of the MWA should be broadly construed. *See Terry*, 336 P.3d at 955 (noting MWA enacted by Nevada voters to ensure "more, not fewer, persons would receive minimum wage protections"); *Thomas*, 327 P.3d at 521 (noting "[t]he Minimum Wage Amendment *expressly and*

broadly defines employee, exempting only certain groups.") (emphasis added).

Even if the MWA's definition of employee were ambiguous (*i.e.*, susceptible of more than one plausible interpretation), the next step would be to examine "the provision's history, public policy, and reason to determine what the voters intended." *Miller*, 124 Nev. at 590–91, 188 P.3d at 1119–20. As noted above, the historical and public policy connections are immediately apparent because the MWA's definition of employee is identical to the well-known FLSA definition and both laws serve the same remedial purpose. Interpreting the MWA definition to be consistent with the FLSA definition advances public policy concerns and is faithful to the spirit of the provision because the MWA, like the FLSA, must be construed broadly to most completely serve its remedial purpose. *Terry* at 956. *See also Warren*, 59 Nev. 481, 97 P.2d at 795 ("For statutes so highly remedial, a broad and liberal construction is required, in order that the purposes designed by them shall be most completely served."). Additionally, in determining, for similar reasons, that the definition of employee in NRS 608.010 also should incorporate the FLSA's economic realities test, this Court noted that, even if there were no preemption concerns, it would make no sense and sow considerable confusion to have different rules for who qualifies as an employee under state and federal wage laws. *Terry* at 957.

The MWA's history and considerations of public policy and reason thus all strongly indicate that, even if the MWA's definition of employee were ambiguous

(it is not), it should be construed in the same manner as the identical definition in the parallel federal minimum wage law (*i.e.*, by reference to the economic realities test). To needlessly restrict or alter the definition would raise conflict preemption concerns, sow considerable confusion, and not comport with "the spirit of the provision." *Miller*, 124 Nev. at 590–91, 188 P.3d at 1119–20.

2. The Club's dancers are its employees under the MWA as a matter of law.

a. Substantial persuasive authority indicates the Dancers are employees under the MWA's economic realities test.

Courts in applying the economic realities test consider various factors, such as: (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon her managerial skill; (3) the alleged employee's investment in equipment or materials required for her task, or her employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer's business. *Terry* at 958 (*citing Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754 (9th Cir. 1979)). "Neither the presence nor the absence of any individual factor is determinative." *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir.1981). Contractual labels and the subjective intent of the parties are not relevant factors in this analysis. *Real*, 603 F.2d at 755. "When a

disposition in either direction can be justified, the Court must err in favor of a broader reading of 'employee.'" *Hanson v. Trop, Inc.*, 167 F.Supp.3d 1324, 1328 (N.D. Ga. 2016) (*citing Usery v. Pilgrim Equip. Co., Inc.*, 527 F.2d 1308, 1311 (5th Cir. 1976).

Before considering the economic reality of the relationship between this strip club and its dancers it is important to note that many courts, including this one, have considered whether exotic dancers are employees under the economic realities test, and almost.

> '[w]ithout exception, these courts have found an employment relationship and required the nightclub to pay its dancers a minimum wage.' *Harrell v. Diamond A Entm't, Inc.*, 992 F.Supp. 1343, 1347–48 (M.D.Fla.1997) (*citing e.g. Reich v. Circle C. Invs., Inc.*, 998 F.2d 324 (5th Cir.1993) (finding dancers are employees under the FLSA); *Reich v. Priba Corp.*, 890 F.Supp. 586 (N.D.Tex.1995) (same); *Martin v. Priba Corp.*, 1992 WL 486911 (N.D.Tex. Nov.6, 1992) (same)); *see also Morse v. Mer Corp.*, 2010 WL 2346334 (S.D.Ind. June 4, 2010) (same); *Jeffcoat v. Alaska Dep't of Labor*, 732 P.2d 1073 (Alaska 1987) (finding entertainers to be employees under state labor laws based on FLSA); *Doe v. Cin–Lan, Inc.*, 2008 WL 4960170 (E.D.Mich. Nov. 20, 2008) (granting entertainer's motion for preliminary injunction, holding that entertainer was substantially likely to succeed on claim that she is an employee under FLSA).

Clincy v. Galardi S. Enterprises, Inc., 808 F. Supp. 2d 1326, 1343 (N.D. Ga. 2011) (granting plaintiff's motion for partial summary judgment on employee status). *See also Terry* at 960 (noting its holding that dancers are employees "is in accord with

the great weight of authority") (*citing Clincy*).[4]

b. The economic reality factors lopsidedly favor a finding that the Club's dancers are employees as a matter of law.

i. Dancers do not exert control over a meaningful part of the exotic dance business.

In considering the degree of control exercised by a club over its dancers,

> courts should look not only at the club's rules and guidelines regarding the dancers' performances and behavior, "but also to the club's control over the atmosphere and clientele." *Butler v. PP & G, Inc.*, No. WMN–13–430, 2013 WL 5964476, at *3 (D.Md. Nov. 7, 2013) *reconsideration denied*, No. WMN–13–430, 2014 WL 199001 (D.Md. Jan. 16, 2014). Examples of clubs exerting significant control include: fining dancers for absences and tardiness; enforcing behavioral rules; setting minimum performance fees; and requiring dancers to sign in upon arrival. *Id.; see also Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, 327 (5th Cir.1993) (finding significant control where the employer fined dancers, set minimum prices, promulgated rules concerning dancers' behavior, and required dancers to be on the floor at opening time); *Hart v. Rick's Cabaret Int'l, Inc.*, 967 F.Supp.2d 901, 913–19 (S.D.N.Y.2013) (holding club exerted significant control where it had

[4] There are many more decisions reaching the same conclusion. *See, e.g., Pizzarelli v. Cadillac Lounge, L.L.C.*, 2018 WL 2971114 (D.R.I. Apr. 13, 2018); *Lester v. Agment LLC*, 2016 WL 1588654 (N.D. Ohio Apr. 20, 2016); *Foster v. Gold & Silver Private Club, Inc*., 2015 WL 8489998 (W.D. Va. Dec. 9, 2015); *McFeeley v. Jackson St. Entm't LLC*, 47 F.Supp.3d 260 (D.Md. 2014); *Whitworth v. French Quarter Partners, LLC*, No. 6:13-CV-6003, 2014 WL 12594213 (W.D. Ark. June 30, 2014); *Stevenson v. Great Am. Dream, Inc.*, No. 1:12-CV-3359-TWT, 2013 WL 6880921 (N.D. Ga. Dec. 31, 2013); *Butler v. PP & G, Inc.*, No. CIV.A. WMN-13-430, 2013 WL 5964476 (D. Md. Nov. 7, 2013); *Thornton v. Crazy Horse, Inc.*, 2012 WL 2175753 (D.Alaska June 14, 2012); *Thompson v. Linda and A. Inc.*, 779 F.Supp.2d 139 (D.D.C.2011); *Mason v. Fantasy, LLC*, 2015 WL 4512327 (D. Colo. July 27, 2015); *Verma v. 3001 Castor, Inc.*, No. CIV.A. 13-3034, 2014 WL 2957453 (E.D.Pa. June 30, 2014); *Hart v. Rick's Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901 (S.D.N.Y. 2013).

> written behavioral guidelines and imposed fines on the dancers); *Thompson*, 779 F.Supp.2d at 148 (finding significant control where dancers were required to sign in, follow a schedule, and follow the club's rules). In *Butler*, 2013 WL 5964476, at *3–4, the court found that although the club did not exercise control "over the day-to-day decisions and work of its dancers," it still exercised significant control over the dancers by way of controlling the overall atmosphere of the club through advertising, setting business hours, maintaining the facility, and maintaining aesthetics. The court noted that the dancers were "entirely dependent on the [club] to provide [them] with customers, and [their] economic status 'is inextricably linked to those conditions over which [the club has] complete control.'" *Id*. (*quoting Reich v. Priba Corp.*, 890 F.Supp. 586, 592 (N.D.Tex.1995)). Similarly, in *Thompson*, 779 F.Supp.2d at 148, the court cited to the defendants' rules—that prohibited "cussing, fighting, biting, scratching or drugs," and a prohibition against inappropriate behavior on stage—when deciding that the control factor weighed in favor of the dancers.

McFeeley v. Jackson St. Entm't, LLC, 47 F. Supp. 3d 260, 268–69 (D. Md. 2014), *aff'd*, 825 F.3d 235 (4th Cir. 2016) (finding "Defendants exercised significant control over the atmosphere, clientele, and operations of the clubs" and holding dancers were employees as a matter of law).

Here, as in *McFeeley, Terry*, and the dozens of other dancer cases cited with approval by this Court in *Terry*, the record without question establishes that the Club wields significant control over all meaningful parts of the erotic dance business and that its Dancers in no way constitute separate economic entities. *See* Statement of Facts in Section A.1, above. Most notably, the Club controlled the business operations of the club, generated a "pricing sheet" listing prices for dances, required dancers to sign and out at the beginning and end of each shift, and imposed rules

governing every aspect of its Dancers' conduct and behavior including

(1) rules regarding appearance

(2) rules regarding conduct ("NO GUM"; "No cell phones or pagers"; "Do not walk around with a cigarette or cell phone");

(3) rules regarding use of space within the club

(4) rules regarding interactions with club customers ("Please do not turn down a drink"; "Never discourage bottle sales or you will be terminated"; "Do not run tabs on dances");

(5) rules requiring the dancers to perform on stage ("Make your stages…. Do not be late. Wait for your replacement before leaving the stage. You must go down to G-string on stage after first song and leave it off for every song after that"); and

(6) rules making clear that the club and its managers, and not the dancers, controlled the dancers' interactions with the Club's customers ("If a guest is rude, be polite and excuse yourself, let a manager know. The manager will handle it for you"; "Do not complain about club or employees in front of guests. Be supportive of staff at all times. If you have complaints find a manager"; ""Noncompliance [with Floor Host instructions] may lead to suspension or termination of your contract."). APP at 0767-0784.

The Club's control over its dancers is similar to the control exerted by other clubs. *See, e.g., McFeeley*, 47 F. Supp. 3d at 268 (noting, in finding employees as

matter of law, indicia of control include "fining dancers for absences and tardiness; enforcing behavioral rules; setting minimum performance fees; and requiring dancers to sign in upon arrival." (citations omitted).

Any effort by the Club to disclaim control over its dancers is not dispositive on the issue. As this Court held in *Terry*, any…

> supposed lack of control may actually reflect "a framework of false autonomy" that gives performers "a coercive 'choice' between accruing debt to the club or redrawing personal boundaries of consent and bodily integrity." Sheerine Alemzadeh, *Baring Inequality: Revisiting the Legalization Debate Through the Lens of Strippers' Rights*, 19 Mich. J. Gender & L. 339, 347 (2013). Put differently, Sapphire [here Crazy Horse III] emphasizes that performers may "choose[ ] not to dance on stage at Sapphire" so long as they also "choose to pay an optional 'off-stage fee'," and similarly that a performer may "choose[ ] not to dance for a patron she knows will pay with dance dollars, she may make that choice," though the performer may not ask that patron to pay in cash, and in making either choice the performers also risk taking a net loss for their shift. But by forcing them to make such "choices," Sapphire [here Crazy Horse III] is actually able to "heavily monitor [the performers], including dictating their appearance, interactions with customers, work schedules and minute to minute movements when working," while ostensibly ceding control to them. *Id*. at 342 n. 12. This reality undermines Sapphire's characterization of the "choices" it offers performers and the freedom it suggests that these choices allow them; the performers are, for all practical purposes, "not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973).

Terry at 959 (2014). *See also Harrell*, 992 F. Supp. at 1349 ("The mere fact that [the club] has delegated a measure of discretion to its dancers does not necessarily mean that its dancers are elevated to the status of independent contractors.") (cited with approval in *Terry*); *Circle C.*, 998 F.2d at (rejecting strip club's "effort on appeal to

downplay [the club's] control") (cited with approval in *Terry*); *Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 303 (5th Cir. 1975) ("An employer cannot saddle a worker with the status of independent contractor, thereby relieving itself of its duties [as an employer] by granting him some legal powers where the economic reality is that the worker is not and never has been independently in the business in which the employer would have him operate.").

As this Court and numerous other courts emphatically have held, strip club owners cannot evade their legal obligations as employers by disclaiming control over the dancers who work for them. Even if the Club chose not to enforce many of its rules, "[a]n employer's 'potential power' to enforce its rules and manage dancers' conduct is a form of control.'" *McFeeley*, 825 F.3d at 242 (alteration in original) (quoting *Hart v. Rick's Cabaret Int'l, Inc.*, 967 F.Supp.2d 901, 918 (S.D.N.Y. 2013)). "The real question is whether the dancer exerts control over a 'meaningful' part of the business," *Harrell*, 992 F.Supp. at 1349.This Court and other courts consistently have determined that strip clubs, and not their dancers, control all meaningful aspects of the exotic dance business. And even if the control factor could be made to tip slightly in the Club's favor (contrary to this Court's analysis in *Terry*), it would not be enough to outweigh the many other factors that point unequivocally to employee status.

ii. The dancers' opportunities for profit or loss does not depend on managerial skill.

An exotic dancer's opportunities for profit or loss, such as they are, is not dependent on managerial skill (as it would be for a person in business for themselves). As one court explained, "entertainers do not control the key determinants of profit and loss of a successful enterprise . . . Any profit to the entertainers is more analogous to earned wages than a return for risk on capital investment." *Priba Corp.*, 890 F. Supp. at 593. *See also Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, 328 (5th Cir. 1993) ("Given its control over determinants of customer volume, [the Club] exercises a high degree of control over a dancer's opportunity for 'profit.'"). As for loss, the worst a dancer can do on any given night is to have to pay her house fee and risk making no money if she receives no tips. As yet another court (cited with approval in *Terry*) convincingly reasoned:

> Defendant would have us believe that a dancer . . . could hang out her own shingle [if this were legal in Las Vegas],[5] pay nothing in overhead, no advertising, no facilities, no bouncers, and draw in a constant stream of paying customers. A dancer at [the club] risks little more than a daily 'tip out' fee, the cost of her costumes, and her time. That a dancer may increase her earnings by increased 'hustling' matters little. As is the case with the zealous waiter at a fancy, four star restaurant, a dancer's stake, her take and the control she exercises over each of these are limited by the bounds of good service; ultimately it is the restaurant that takes the risks and reaps the rewards.

[5] As explained in Section C.2.c, below, a dancer in Las Vegas could not "hang out her own shingle" even if she could afford the significant capital outlay required to do so because the City does not issue individual business licenses to dancers to operate independently.

Harrell, 992 F.Supp. at 1352. Here, as in these other cases, the Club controls and pays for all expenses relating to marketing and operating the venue, including paying rent, utilities, special promotions, obtaining licensing, bar and kitchen inventory, and repair and maintenance. APP 0038-0041. Dancers do not have any opportunity for profit and loss that might indicate economic independence, and exercise no managerial skill relating thereto. This factor also weighs strongly in favor of employee status.

iii. The relative investment of the parties weighs in favor of employee status.

> With regard to the relative investment of the parties, we note that Sapphire provides all the risk capital, funds advertising, and covers facility expenses. The performers' financial contributions are limited to those noted above—their costume and appearance-related expenses and house fees. Thus, the performers are "far more closely akin to wage earners toiling for a living, than to independent entrepreneurs seeking a return on their risky capital investments," *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 328 (5th Cir.1993) (internal quotation omitted); *see also Hart v. Rick's Cabaret Int'l, Inc.*, 967 F.Supp.2d 901, 920 (S.D.N.Y.2013); *Clincy*, 808 F.Supp.2d at 1347; *Harrell*, 992 F.Supp. at 1350; *Reich v. Priba Corp.*, 890 F.Supp. 586, 593 (N.D.Tex.1995); *Jeffcoat v. State, Dep't of Labor*, 732 P.2d 1073, 1077 (Alaska 1987), and this factor also weighs in the performers' favor.

Terry at 959. The relative investment of the parties in this case is identical to *Terry*, and therefore this factor also weighs in the performers' favor. *See* Statement of Facts in Section A.3, above.

iv. Exotic dancing does not require a special skill.

All work requires some skill, so in the economic realities context,

> courts look specifically for workers' "special" skills; namely, whether their work requires the initiative demonstrated by one in business for himself or herself. *See Circle C.*, 998 F.2d at 328. Sapphire suggests that the performers' ability to "hustle" clients is one such skill. But *960 inasmuch as Sapphire does not appear to have interviewed the performers for any indication of their hustling prowess, it is not apparent that their work actually requires such initiative. In any case, though it may well be that a good "hustle" is a considerable boon in the field, "the ability to develop and maintain rapport with customers is not the type of 'initiative' contemplated by this factor." *Id*.

Terry at 959-960. Here, too, the Club did not require its dancers to possess any formal dance training, certification or any other special skill. As in *Terry*, the lack of specialized skills required for the job (or any skills, for that matter, other than looking good in a bikini) weighs strongly in favor of finding employee status.

v. The fact that the dancer-club relationship lacks a high degree of permanence carries little persuasive value.

Clubs hire dancers on an at-will basis and dancers are able to work at other clubs. This factor weighs against employee status but "carries little persuasive value in the context of topless dancers and the clubs at which they perform and cannot alone tilt the scales in [the club's] favor." *Terry* at 960. *See also Thompson v. Linda And A., Inc.*, 779 F.Supp.2d 139, 150 (20110) ("Many of the courts that have found exotic dancers to be employees . . . did so despite finding the employment relationship lacked a high degree of permanence.") (citing cases).

vi. The services rendered by exotic dancers are an integral part of the Club's business.

Defendants operate a licensed exotic dance establishment and market itself as a strip club. As such, it is "a self-evident conclusion that nude dancers form an integral part of [the club's] business." *Linda & A.*, 779 F.Supp.2d at 150. *See also Terry* at 960 ("Given that Sapphire bills itself as the 'World's Largest Strip Club,' and not, say, a sports bar or night club, we are confident that women strip-dancing there are useful and indeed necessary to its operation."). This factor, too, points strongly towards employee status.

vii. Consideration of all factors indicate the Club's dancers are its employees as a matter of law.

Even viewing the evidence in the light most favorable to the Club, the economic reality factors unquestionably indicate that the Club's dancers are its employees as a matter of law. The only factor that does not clearly weigh in favor of employee status is the permanence of the working relationship, and this Court, and numerous others, have found exotic dancers to be employees despite the typically impermanent nature of the work force in this industry. *See* cases cited in Section C.2.a, above. "[T]he economic reality is that the dancers are not in business for themselves but are dependent upon finding employment in the business of others." *Circle C.*, 998 F.2d at 329 (cited with approval in *Terry*). The Club's Dancers are its employees within the meaning of the MWA and are entitled to all rights and privileges flowing therefrom, including a minimum wage and the right to not have to pay to work.

c. The Las Vegas Municipal Code further confirms dancers are not independent businesswomen.

The ultimate goal of the multi-factor economic reality test is to determine "whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves." *Saleem v. Corp. Transportation Grp., Ltd.*, 854 F.3d 131, 139 (2d Cir. 2017). Analysis of the various factors typically considered in that test overwhelmingly establishes that dancers are entirely dependent on the clubs in which they work. But it also should be noted that the Club's practice of treating its dancers as licensees who allegedly operate their own independent businesses on Club property is flatly foreclosed by City regulations, thus further confirming the Dancers' economic dependence on the clubs in which they work.

It is unlawful for any person to "[c]ommence, institute, advertise, aid, carry on, engage in or continue in the City any business without a valid unexpired license" issued by the City of Las Vegas. Las Vegas Municipal Code (LVMC) 6.02.060. The City does not issue business licenses to individual dancers, but only to the clubs in which they work. *See* LVMC 6.35.030 (license available for "erotic dance establishments," defined as "a fixed place of business which emphasizes and seeks, through one or more dancers, to arouse or excite the patrons' sexual desires"). The Las Vegas Municipal Code does not treat exotic dancers as licensed "independent businesses" but rather classifies them as someone who "performs for an erotic dance

establishment and who seeks to arouse or excite the patrons' sexual desires." LVMC 6.35.030. To oversee the operation of each licensed erotic dance establishment, the City of Las Vegas requires each club, as the licensed business entity, to ensure that its dancers and other employees have valid "work cards" issued by the Las Vegas Metropolitan Police Department. LVMC 6.35.080(A) ("no person shall work at an erotic dance establishment without a valid work card."). A work card is a card that "authorizes the holder *to be employed in the capacity as specified on the card* and contains a photograph and other identification of the holder." LVMC 6.86.010 (emphasis added). *See also* LVMC 6.86.030 ("Each employer shall designate a qualified agent to immediately complete referral slips *and refer prospective employees requiring work cards to Metro*.") (emphasis added); LVCM 6.35.100(C) ("An erotic dance establishment licensee shall maintain and retain for a period of three years the names, addresses, a copy of each dancer's work card, new and renewal, and ages of all persons *employed as dancers by the licensee*.") (emphasis added). This clear regulatory framework further confirms that dancers, as a matter of economic reality, are dependent on the clubs in which they work because they legally cannot be in business for themselves in the City of Las Vegas.

D. Even if NRS 608.0155 applied to limit MWA claims, its requirements would not be met here based on the undisputed facts (Issue 4).

1. The NRS 608.0155 test does not apply if there is no contract between the parties to perform work.

Even if NRS 608.0155 could apply to limit MWA claims, its plain language makes clear its purpose is limited to determining whether a relationship between a worker and the person hiring the worker to perform work is that of independent contractor and principal. Consistent with this limited purpose, all five criteria in NRS 608.0155(1)(c) either assume the existence of a contract between the two parties to perform work or, more critically, cannot meaningfully be applied unless there is such a contract. *See* NRS 608.0155(1)(c)(1) (asking whether "the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the principal in the contract"); *id*. at (c)(2) (asking whether principal gave putative contractor "control over the time the work is performed"); *id*. at (c)(3) (asking whether putative contractor "is required to work exclusively for one principal"); *id*. at (c)(4) (asking whether putative contractor "is free to hire employees to assist with the work"); *id*. at (c)(5) (asking whether putative contractor leased any "work space from the principal required to perform the work for which the person was engaged.").

This specific understanding (that an independent contractor renders services to a principal for a fee) consistently is used by the Legislature throughout the Nevada Revised Statutes and thus further confirms that NRS 608.0155 means what it says. *See, e.g.*, NRS 286.045 ("Independent contractor means any person who renders specified services [to a principal] for a stipulated fee…"); NRS 616A.255

("'Independent contractor' means any person who renders service for a specified recompense for a specified result…"); NRS 617.120 (same definition as 616A.255); NRS 333.700(2) ("An independent contractor is a natural person, firm or corporation who agrees to perform services for a fixed price according to his, her or its own methods and without subjection to the supervision or control of the other contracting party.…").

The only classification question in this case is whether the Club's dancers are employees, as the Dancers contend, or independent contractors who pay to use the Club's facilities, as the Club contends. NRS 608.0155 has nothing to say about the propriety of this alleged licensor-licensee relationship. How, for example, could a court determine under NRS 608.0155(c)(1) whether the Club "primarily bargained" for "the result of the work, rather than the means or manner by which the work is performed" when the Club never bargained for any work to be performed at all?[6]

2. Even if the NRS 608.0155 test could be applied coherently to the club-dancer relationship, its requirements still would not be met.

Looking, as an academic exercise, to the criteria in NRS 608.0155 for independent contractor status, it also is clear the Club could not meet its burden of satisfying the requisite three out of the five criteria or "sub-factors" listed in NRS

[6] The test could be applied coherently, for example, if a package delivery company hired and paid its delivery drivers as independent contractors and the drivers claimed they were in fact employees, as was the case in *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014).

608.0155(1)(c). This is not surprising, as the factors in NRS 608.0155 presumably are intended to identify individuals who are in business for themselves. Thus, one would expect that individuals, like exotic dancers, who are employees under the economic realities test (*i.e.*, who are economically dependent on their employer and not independent business owners), would not qualify as independent contractors under any test designed to measure true economic independence. The only factor that would be met (if there were the requisite contract to perform work) is section (c)(3) (dancers not required to work exclusively for one principal).

i. Sub-factor (1)(c)(1) is not met.

The first sub-factor has two components that must be satisfied. First, "[n]otwithstanding the exercise of any control necessary to comply with any statutory, regulatory or contractual obligations" the putative independent contractor must have "control and discretion over the means and manner of the performance of any work." NRS 608.0155(1)(c)(1). Second, "the result of the work, rather than the means or manner by which the work is performed [must be] the primary element bargained for by the principal in the contract." *Id*.

As discussed in Section C.2.b, above, the Club exerts significant control over its dancers' activity in the club. But, regardless of the degree of control, the second requirement (that the result of the work be the primary element bargained for by the Club in the contract) cannot be met here as a matter of law because, according to the

contract the Club drafted and required its dancers to sign, its dancers are mere licensees who do not perform any work for it at all. APP 0762-0765. To the extent a court intelligibly could discern the "primary element bargained for" by the Club in its license agreement, presumably it would be the payment of the license fee by the Dancers. It would strain credulity to suggest that "the primary element bargained for" by a licensor is the result of any work the licensee may happen to perform for its own customers in the licensor's facility.

ii. Sub-factor (1)(c)(2) is not met.

The second sub-factor asks whether "the person has control over the time the work is performed." NRS 608.0155(1)(c)(2). But this provision expressly states it does not apply "if the work contracted for is entertainment." NRS 608.0155(1)(c)(2). Thus, even if the Club had contracted with its dancers to provide dancing services, section (c)(2) simply would not apply.

iii. Sub-factor (1)(c)(4) is not met.

The fourth sub-factor asks whether the dancers are "free to hire employees to assist with the work." NRS 608.0155(1)(c)(4). The fact that such workers generally are "free to hire" people to help them look good for their jobs is not probative of whether they are independent contractors or employees. What is probative (and therefore presumably is what the Legislature intended) is whether the worker can hire employees to help complete the work she was hired by the putative principal to

do. Thus, for example, a painter hired to paint a building may be an independent contractor to the extent she is free to hire employees to help her with the painting project.

A finding that a worker is "free to hire employees to assist with the work" for purposes of NRS 608.0155(1)(c)(4) thus should require a showing that the worker was allowed by the contract with the putative principal to hire employees to assist with the work being done for the putative principal. Here, this sub-factor is not met because no provision in the License Agreement suggests the Dancers were free to hire employees to come to the club to "assist with the work" of dancing (again assuming the Club was hiring dancers to perform any work for it, which the Club denies).

iv. Sub-factor (1)(c)(5) is not met.

The fifth sub-factor asks whether the dancers contribute "a substantial investment of capital in the business of the person." NRS 608.0155(1)(c)(5). This determination "must be made on the basis of the amount of income the person receives, the equipment commonly used, and the expenses commonly incurred in the trade or profession in which the person engages." *Id.*

This Court and others have made clear that the exotic dance business requires a capital investment that vastly exceeds what even the most surgically-enhanced dancer might spend on her appearance. *See Harrell*, 992 F.Supp. at 1352 (cited with

approval in *Terry*) ("Defendant would have us believe that a dancer . . . could hang out her own shingle [if this were legal in Las Vegas], pay nothing in overhead, no advertising, no facilities, no bouncers, and draw in a constant stream of paying customers.").

Here, it is undisputed that dancers are required to make no capital investment in the most critical and costly components of the business exotic dancing, namely paying for a performance venue, advertising, maintenance, food, beverage, other inventory or staffing efforts (all of which is provided by the Club). APP 0038. All these substantial capital expenditures are absolutely essential to engage in the business of exotic dancing.

As this Court noted in *Terry*, it is facially implausible to suggest the amount of money a dancer spends on costumes, makeup, or anything else could ever amount to a "substantial investment of capital" that might indicate dancers are independent entrepreneurs in business for themselves. *See Terry*, 130 Nev. Adv. Op. 87, 336 P.3d at 959 (noting "performers' financial contributions are limited to . . . their costume and appearance-related expenses and house fees" and thus "are far more closely akin to wage earners toiling for a living, than to independent entrepreneurs seeking a return on their risky capital investments") (*quoting Circle C.*, 998 F.2d at 328).

CONCLUSION

On the central question of employee status this Court should hold that the Minimum Wage Amendment's broad definition of employee incorporates the FLSA's economic realities test and that the Club's dancers are employees under that test as a matter of law. NRS 608.0155 should not be interpreted to apply to MWA claims but, if it did, it would be unconstitutional for the reasons set forth in *Thomas* and also preempted by the FLSA.

DATED this 10 day of March, 2020.

BIGHORN LAW

KIMBALL JONES, ESQ.
Nevada Bar No.: 12982
716 S. Jones Blvd.
Las Vegas, Nevada 89107
Telephone: (702) 333-1111
Email: kimball@bighornlaw.com

MICHAEL J. RUSING, ESQ.
(AZ Bar No. 6617-*Admitted Pro Hac Vice)*
RUSING LOPEZ & LIZARDI, P.L.L.C.
6363 North Swan Road, Suite 151
Tucson, Arizona 85718
Telephone: (520) 792-4800
Email: mrusing@rllaz.com
Attorneys for Appellants

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1. 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 us Times New Romans in 14-size font.

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3. I further hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous, or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, 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.

Date: March 9TH 2020

BIGHORN LAW

KIMBALL JONES, ESQ.

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of **BIGHORN LAW** and that I served the foregoing APPELLANT'S OPENING BRIEF on the parties listed below by causing a full, true, and correct copy to be served in the matter identified

Doreen Spears Hartwell, Esq.
HARTWELL THALACKER, LTD.
11920 Southern Highlands Parkway, Suite 201
Las Vegas, Nevada 89141
Doreen@HartwellThalacker.com

Dean R. Fuchs, Esq.
SCHULTEN WARD & TURNER, LLP
260 Peachtree Street NW, Suite 2700
Atlanta, Georgia 30303
d.fuchs@swtwlaw.com

Attorneys for Respondent

Date: March 10, 2020 **BIGHORN LAW**

/s/ Erickson Finch
an employee of **BIGHORN LAW**