

IN THE SUPREME COURT OF NEVADA

Sup. Ct. No. 61681

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Tracie K. Lindeman
Clerk of Supreme Court

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CHRISTOPHER THOMAS and)
CHRISTOPHER CRAIG,)
Individually and on behalf of others)
similarly situated,)

) Petitioners,)

vs.)

NEVADA YELLOW CAB)
CORPORATION, NEVADA)
CHECKER CAB CORPORATION,)
NEVADA STAR CAB)
CORPORATION,)

) Respondents,)
_____)

Dist. Ct No.:A-12-661726-C
Dept. No. XXVIII

APPELLANTS' ANSWER TO PETITION FOR REHEARING

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1 **INTRODUCTION**

2 Respondent Yellow Checker Star’s (“YCS’s”) petition for rehearing
3 meets none of the criteria of NRAP 40(c)(2)(B) . It engages in a protracted,
4 already rejected by this Court, and irrelevant, argument as to Nevada’s standard
5 for finding an “implicit repeal” of a statute while ignoring this Court’s central
6 finding: “We hold that the district court erred because the *text of the*
7 *[Constitutional] Minimum Wage Amendment*, by clearly setting out some
8 exceptions to the minimum wage law and not others, supplants the exceptions
9 listed in NRS 608.250(2).” Opinion, p. 2 (emphasis added). It is the *text itself*
10 of Article 15, Section 16, of Nevada’s Constitution, and the principle of
11 constitutional supremacy whereby that text must “supplant” any different
12 statutory scheme, that underlie this Court’s Opinion. YCS never addresses that
13 text in its petition¹ nor the principle of constitutional supremacy that compelled
14 the result reached by this Court. Instead it would have this Court ignore both
15 what that text commands and Nevada’s entire scheme of constitutional
16 governance by placing the language of Nevada’s Statutes and its Constitution
17 on equal footing.

18 YCS also seeks rehearing based upon a wholly phantasmal “parade of
19 horrors” that have no basis in fact or law. What YCS is really claiming is that
20 because the minimum wage policy approved of by Nevada’s voters and placed
21 in Nevada’s Constitution is, in its view, absurd, unwise and unjust it should be
22 denied enforcement by this Court. Such an argument disregards the

23
24 ¹ That text is set forth in the Court’s Opinion at Footnote 1 (“Each
25 employer shall pay a wage to each employee of not less than the hourly rates set
26 forth in this section....”“As used in this section, “employee means any person
27 who is employed by an employer as defined herein but does not include any
28 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
of not longer than ninety (90) days....”)

1 fundamental principles of democracy upon which Nevada’s constitutional and
2 republican form of government is based. YCS’s belief that the minimum wage
3 policy enshrined in Nevada’s Constitution is absurd presents a purely political
4 question that is beyond the power of this Court to address. Rather than burden
5 this Court with a petition for rehearing, and implore this Court to refuse to
6 enforce what YCS views as “absurd” rights clearly granted by Nevada’s
7 Constitution, YCS needs to address its concerns to Nevada’s citizens. It is only
8 Nevada’s citizens, through the democratic process and their power to enact a
9 further constitutional amendment, that have the power to grant YCS the relief it
10 seeks.

11 LEGAL ARGUMENT

12 13 **A. The Court’s Opinion Correctly Recognized the** 14 **Direct Conflict Between Nevada’s Constitutionally** 15 **Imposed Minimum Wage Standard and NRS 608.250**

16 In its Opinion, after observing that the issue presented in this appeal was
17 a purely legal one, and reviewing the holding of the district court and
18 respondent’s arguments (which arguments are identical to the arguments now
19 raised in the petition for rehearing), this Court examined the constitutional text
20 at issue and found:

21 The Minimum Wage Amendment expressly and broadly defines
22 employee, exempting only certain groups: "'employee' means any person
23 who is employed [by an individual or entity that may employ individuals
24 or enter into contracts of employment] but does not include an employee
25 who is under eighteen (18) years of age, employed by a nonprofit
26 organization for after school or summer employment or as a trainee for a
27 period not longer than ninety (90) days." Nev. Const. art. 15, § 16(C).
28 Following the *expressio unius* canon, the text necessarily implies that all
employees not exempted by the Amendment, including taxicab drivers,
must be paid the minimum wage set out in the Amendment. The
Amendment's broad definition of employee and very specific exemptions
necessarily and directly conflict with the legislative exception for taxicab
drivers established by NRS 608.250(2)(e). Opinion p. 5-6.

The conflict recognized by this Court between the constitutional text and
NRS 608.250 is manifest and beyond question. The Constitutional

1 Amendment, at Section (A), commands that “Each employer shall pay a wage to
2 each employee of not less than the hourly rates set forth in this section....” It
3 then goes on at Section (C) to define the “employees” to whom Section (A) is
4 applicable. That broad definition of “employee” in Section (C) does not
5 exclude taxi drivers. The scope of this constitutionally imposed minimum wage
6 obligation indisputably differs from that imposed by NRS 608.250, which at
7 608.250(2) specifies that workers in a variety of occupations, including taxi
8 drivers, are not subject to the minimum wage imposed by NRS 608.250(1).

9 **B. The Court’s Opinion Correctly Recognized that**
10 **Nevada’s Constitutionally Imposed Minimum Wage**
11 **Obligation Must Supplant the More Limited Obligation**
12 **Imposed by NRS 608.250**

13 After correctly identifying the two varying minimum wage obligations
14 imposed by the plain text of Nevada’s Constitution and NRS 608.250 this Court
15 correctly recognized that the minimum wage obligation imposed by the text of
16 Nevada’s Constitution had to supplant and supercede any contrary statutory
17 directive:

18 If the Legislature could change the Constitution by ordinary enactment,
19 "no longer would the Constitution be 'superior paramount law,
20 unchangeable by ordinary means.' It would be 'on a level with ordinary
21 legislative acts, and, like other acts, ... alterable when the legislature shall
22 please to alter it.'" *City of Boerne u. Flores*, 521 U.S. 507, 529
23 (1997)(alteration in original) (quoting *Marbury v. Madison*, 5 U.S. 137,
24 177 (1803)). In this case, the principle of constitutional supremacy
25 prevents the Nevada Legislature from creating exceptions to the rights
26 and privileges protected by Nevada's Constitution. Opinion p. 7.

27 YCS now urges this Court to ignore the foregoing fundamental principle
28 of constitutional supremacy by arguing that (1) “[W]hen the Legislature enacts
a statute **prior to** the enactment of a constitutional provision, there can be no
conflict with a constitutional provision which does not yet exist” and (2)
“Where the preexisting statute and the constitutional provision are both laws of
the State of Nevada, it is of no consequence that one is a constitutional
provision.” Petition, page 3, emphasis in original. YCS cites no authority

1 whatsoever for these remarkable, indeed revolutionary, assertions.

2 YCS argues a constitutional amendment can *never* conflict with and
3 supercede a contrary and *previously enacted* statute because that constitutional
4 provision did “not yet exist” when the statute was enacted. YCS, while
5 proffering such expedient logic, never explains how such a heretofore
6 undiscovered principle of law can be reconciled with *Marbury’s* recognition, at
7 the dawn of the founding of our Republic, that the Constitution is the “superior
8 paramount law” which is not “on a level with ordinary legislative acts.”
9 Constitutional supremacy would almost cease to exist if it could only displace
10 *later* but not *prior* legislative acts. There is not an iota of suggestion in
11 *Marbury* or any subsequent case, much less any decision of this Court, that the
12 doctrine of constitutional supremacy is so limited. Nor does YCS cite a single
13 authority in support of such assertion. This claim by YCS, that a “first enacted”
14 statute can never be displaced by a later enacted constitutional amendment, or
15 that constitutional amendments are only superior to later, but not prior,
16 legislative acts, is frivolous and absurd.

17 **C. Respondent’s “Implied Repeal” Argument Seeks to Have**
18 **This Court Ignore the Text of Nevada’s Constitution and**
19 **Adopt a Form of Constitutional Interpretation that Would**
20 **Gravely Conflict With Fundamental Principles of**
21 **Constitutional Governance**

21 YCS seeks to have this Court find that the Constitution’s text, stating that
22 “[e]ach employer shall pay a wage to each employee of not less than the hourly
23 rates set forth in this section....” does not, in fact, mean what it says. Under the
24 approach urged by YCS, and already rejected by this Court, the Constitution’s
25 command to “pay a wage to each employee” in the manner “set forth in this
26 section” would not be the law. YCS would have this Court find the
27 Constitution’s command reaches no further than the command of NRS 608.250,
28 despite the Constitution’s express application to “each” employee, and its

1 specification that its application is further controlled by the terms of its
2 “section” of the Constitution and not Nevada’s Statutes or Legislature.

3 According to YCS this Court’s Opinion is in error because despite the
4 Constitution’s reference to “each employee” of “each employer” the
5 Constitution “...did not expressly state it was repealing the occupational
6 exemptions contained in NRS 608.250(2).” Petition, p. 1. YCS would have this
7 Court hold that a Constitutional Amendment’s broad, unambiguous, and clear
8 statement of constitutional rights cannot supercede the more limited scope of a
9 prior statute because it did not, by reference to that *exact statute*, state that such
10 a supersession was being effectuated. Under the reasoning of YCS a
11 Constitutional Amendment’s use of “all” or “every” or any other absolute terms
12 encompassing an entire group of relationships would *not* have such meaning.
13 The term “all” would no longer mean “all” but apply only to those relationships
14 *not* already subject to a pre-existing statutory scheme. And absent an express
15 reference in the Constitutional Amendment to that exact statutory scheme, such
16 relationships would be continue to be governed solely by that statutory scheme,
17 which would not be displaced, modified or superceded by such Constitutional
18 Amendment’s purported regulation of “all” such relationships.

19 The interpretive approach to Nevada’s Constitution advanced by YCS
20 would radically, gravely, alter Nevada’s principles of constitutional governance.
21 No longer would express, unambiguous, constitutional commands be subject to
22 enforcement by this Court or constitute the supreme law of Nevada. Every
23 Constitutional provision, even those set forth in absolute and universal
24 language, would be subject to being limited because it failed to expressly
25 identify a particular statute that it was superceding. The potential chaos and
26 uncertainty such an application of Nevada’s Constitution would cause is
27 manifest. Such circumstances would threaten to move Nevada’s government
28 from one of laws, as recognized by *Marbury* where the express terms of its

1 Constitution are supreme, to one of men, where the Constitution only controls
2 to the extent it is not deemed by this Court to have failed to explicitly mention
3 its supremacy to any particular statute.

4 **D. Respondent’s “Implied Repeal” Argument Seeks to Have**
5 **This Court Improperly Place Nevada’s Constitution on Equal**
6 **Footing With Nevada’s Statutes and “Harmonize” Their**
7 **Contrary Provisions in a Fashion that also Contravenes the**
8 **Express Language of NRS 608.250(2)(e)**

9 As discussed, YCS seeks to have this Court ignore the doctrine of
10 constitutional supremacy and apply the conflicting provisions of Nevada’s
11 Constitution and NRS 608.250(2)(e) as if each were mere statutes entitled to
12 equal weight. It proceeds from that improper and erroneous “equal footing”
13 analytical starting point into an irrelevant and lengthy discussion of the history
14 of NRS 608.250, its “employee” definition, and Nevada’s statutory regulation
15 of the minimum wage. While doing so it insists, without any actual
16 examination of the language of NRS 608.250, that the issue to be considered is
17 whether NRS 608.250(2)(e) was “implicitly repealed” by Nevada’s
18 Constitution. Yet even if YCS’s clearly erroneous “equal footing” analytic
19 starting point was adopted the “harmonization” of NRS 608.250(2)(e) and
20 Nevada’s Constitution would not change the result arrived at in this Court’s
21 Opinion.

22 What NRS 608.250 does is establish, by statute, at NRS 608.250(1), a
23 minimum hourly wage requirement. It then goes on at NRS 608.250(2)(e) to
24 provide that “[t]he provisions of subsection 1 do not apply to....taxicab and
25 limousine drivers.” By its plain language NRS 608.250(2)(e) does not provide,
26 or purport to provide, an exemption to *all* minimum wage requirements that
27 may be imposed under Nevada law for taxi drivers. It only provides an
28 exemption for taxi drivers to the specific minimum wage requirements imposed
by a single statute: NRS 608.250(1). None of its language speaks of modifying

1 or affecting the force or scope of any other statute or legal obligation of any sort
2 whatsoever.

3 The express and unambiguous language of NRS 608.250(2)(e) renders it
4 wholly irrelevant to the requirements imposed by Nevada’s Constitution or any
5 Nevada statute *besides* NRS 608.250(1). Assuming, *arguendo*, that the
6 minimum wage requirements of NRS 608.250 and Nevada’s Constitution are of
7 equal force in the event of a conflict between them, no proper argument exists
8 that NRS 608.250 can possibly contravene what Nevada’s Constitution requires.
9 The “taxi driver exemption” of NRS 608.250(2)(e) is, by its express terms
10 limited to the minimum wage imposed by NRS 608.250(1). There is no
11 principle of statutory construction that would, as YCS urges, have this Court re-
12 write the express language of NRS 608.250(2)(e) and expand its taxi driver
13 exception, which is restricted to NRS 608.250(1), to the requirements of any
14 other Nevada statute or Nevada’s Constitutional minimum wage amendment.²

15 **E. Respondent’s Argument that the Court’s Opinion Will Yield**
16 **“Absurd” Results is Unfounded and the Results Respondent**
17 **Complains About Can Only be Remedied by the**
Constitutional Amendment Process, Not This Court

18 YCS asserts, without foundation, that this Court’s Opinion will result in a
19 variety of “formerly-exempted employees listed in NRS 608.250(2)” being
20 “entitled to minimum wage, but still not to overtime - a result which would be
21 inexplicable and arbitrary.” Except for saying that such is the case, YCS offers
22 no explanation for that conclusion. The Nevada Constitution only addresses
23 minimum wage obligations. That it would create minimum wage rights for
24 certain persons who will remain, as they were prior to its enactment, without

25 _____
26 ² YCS also ignores that the Nevada Constitution, even if on equal footing
27 with NRS 608.250, must also be presumed to overrule such statute in the event
28 of a conflict since it is the more recently enacted law. *See, McKay v. Board of*
Supervisors, 730 P.2d 438, 442 (1986)

1 rights to overtime pay under NRS 608.018, is neither “inexplicable” nor
2 “arbitrary.” It is the law of Nevada, as established by both Nevada’s Statutes
3 and its Constitution.³

4 The other allegedly “absurd” results that this Court’s Opinion will foster
5 according to YCS are that (1) Public employees will now be subject to
6 minimum wage standards; (2) Employees *outside* of Nevada will be subject to
7 Nevada’s minimum wage standards; and (3) “Casual babysitters” will be subject
8 to Nevada’s minimum wage. These supposedly “absurd results” either have
9 already occurred *prior* to the enactment of Nevada’s Constitutional minimum
10 wage, are clearly untrue, or are grossly misrepresented by YCS in respect to
11 their scope and actual application.

12 Nevada’s public employees have, since 1974, been subject to the
13 minimum wage standards of federal law when the provisions of 29 U.S.C. §
14 203(d) were amended to include such persons as employees subject to the
15 minimum wage provisions of the Fair Labor Standards Act. There is nothing
16 “absurd” about the State of Nevada now, through a Constitutional Amendment,
17 enacting similar protections for public employees. Nor does the Constitutional
18 Amendment’s language, or this Court’s Opinion, establish such coverage
19 actually exists.⁴

21 ³ YCS makes the equally ridiculous argument that the Court’s Opinion
22 creates a doctrine of implied repeal that would also remove many of the existing
23 overtime wage exemptions set forth in NRS 608.018. That is absurd as the
24 Nevada Constitution does not address overtime pay obligations in any fashion.

25 ⁴ The definition of “employer” under the Constitutional Amendment does
26 *not* include any form of government agency or organization. Such definition
27 includes individuals, a list of business organizations and any “other entity that
28 may employ individuals....” Whether the State of Nevada or other Nevada
governmental units are properly deemed an “entity” under the Constitutional
Amendment poses a question far outside the scope of this Court’s Opinion.

1 YCS's argument that this Court's Opinion will extend Nevada's
2 Constitutional minimum wage standards to employees performing work *outside*
3 of Nevada for businesses that are also "Nevada employers" is specious. There
4 is nothing in the Constitutional Amendment that seeks to apply its minimum
5 wage standards outside of Nevada nor anything in this Court's Opinion that
6 suggests such an application. Nor would such an application of Nevada's law to
7 conduct occurring outside of Nevada, even if intended by Nevada's Constitution
8 or directed by this Court, be valid under the United States Constitution.
9 Nevada, whether via statutes or its Constitution, lacks the sovereign power to
10 impose minimum wage standards on employment relationships taking place
11 outside of Nevada. *See, State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S.
12 408, 421 (2003) ("A State cannot punish a defendant for conduct that may have
13 been lawful where it occurred.") *citing Bigelow v. Virginia*, 421 U.S. 809, 824,
14 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), *New York Life Ins. Co. v. Head*, 234 U.S.
15 149, 161, 34 S.Ct. 879, 58 L.Ed. 1259 (1914) and other cases.

16 The last remaining participant in YCS's parade of horrors is the
17 allegedly "absurd" specter of "casual babysitters" being subjected to hourly
18 minimum wage standards. YCS fails to delineate the actual contours of the
19 Nevada Constitution's reach on this issue. Nevada's Constitution does not
20 extend minimum wage rights to what is presumably the vast majority of
21 "casual" babysitters, persons under the age of 18 employed by a nonprofit
22 employer outside of school hours. That the Nevada Constitution's extension of
23 minimum wage standards to "non-casual," *e.g.*, adult and more likely true
24 "breadwinner," babysitters, may not be a wise policy, or may even be viewed by
25 some as "absurd," does not lessen its force of law. Any overreach by the
26 Nevada Constitution on this issue, just like the United States Constitution's ill
27 advised Eighteenth Amendment's enactment of alcohol prohibition, must be
28 remedied through the constitutional amendment process and not, as YCS urges,

1 by having this Court ignore the rule of law imposed by our constitutional
2 system of government.

3 **CONCLUSION**

4 Wherefore, for all the foregoing reasons, the Respondents' Petition for
5 Rehearing should be denied in its entirety.

6 Dated: July 31, 2014

7 Respectfully submitted,

8 /s/ Leon Greenberg
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1 **Certificate of Compliance With N.R.A.P Rule 28.2**

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

7 I further certify that this brief complies with the page- or type-volume
8 limitations of NRAP 40(b)(3) because, excluding the parts of the brief exempted
9 by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points
10 or more and contains less than 4,667 words.

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

21 Dated this 31st day of July, 2014.
22
23

24 /s/ Leon Greenberg
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CERTIFICATE OF MAILING

The undersigned certifies that on August 4, 2014, she served the within:

APPELLANTS' ANSWER TO
RESPONDENTS PETITION FOR
REHEARING

by depositing the same in the U.S. mail, first class postage, prepaid, addressed as follows:

TO:

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/s/Sydney Saucier

Sydney Saucier