

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

MDC RESTAURANTS, LLC, a Nevada  
limited liability company; LAGUNA  
RESTAURANTS, LLC, a Nevada limited  
liability company; INKA, LLC, a Nevada  
limited liability company,  
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA  
in and for the County of Clark and THE  
HONORABLE TIMOTHY C.  
WILLIAMS, District Court Judge,  
Respondents,

vs.

PAULETTE DIAZ, an individual;  
LAWANDA GAIL WILBANKS, an  
individual; SHANNON OLSZYNSKI, an  
individual; and CHARITY FITZLAFF, an  
individual, on behalf of themselves and all  
similarly-situated individuals,  
Real Parties in Interest.

**Case No.**

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**PETITION FOR WRIT OF MANDAMUS OR PROHIBITION OR, IN THE  
ALTERNATIVE, MOTION TO CONSOLIDATE**

RICK D. ROSKELLEY, ESQ., Nevada Bar # 3192  
ROGER L. GRANDGENETT II, ESQ., Nevada Bar # 6323  
MONTGOMERY Y. PAEK, ESQ., Nevada Bar #10176  
KATHRYN B. BLAKEY, ESQ., Nevada Bar # 12701  
LITTLER MENDELSON, P.C.

3960 Howard Hughes Parkway, Suite 300  
Las Vegas, NV 89169-5937  
Telephone: 702.862.8800  
Fax No.: 702.862.8811  
Attorneys for Petitioners


### **NRAP 26.1 DISCLOSURE**

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

1. MDC Restaurants, LLC, is a privately-held company and no publically traded company owns 10% or more of MDC Restaurants, LLC's stock.
2. Laguna Restaurants, LLC, is a privately-held company and no publically traded company owns 10% or more of Laguna Restaurants, LLC's stock.
3. Inka, LLC, is a privately-held company and no publically traded company owns 10% or more of Inka, LLC's stock.

Dated: March 24, 2015

Respectfully submitted,



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RICK D. ROSKELLEY, ESQ.  
ROGER L. GRANDGENETT II, ESQ.  
MONTGOMERY Y. PAEK, ESQ.  
KATIE BLAKEY, ESQ.  
LITTLER MENDELSON, P.C.  
3960 Howard Hughes Parkway, Suite 300  
Las Vegas, NV 89169-5937  
Telephone: 702.862.8800  
Fax No.: 702.862.8811  
Attorneys for Petitioners

## TABLE OF CONTENTS

MEMORANDUM OF POINTS AND LEGAL AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, MOTION TO CONSOLIDATE.....	1
I. RELIEF SOUGHT.....	1
II. ISSUES PRESENTED.....	2
III. FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED.....	2
IV. LEGAL ARGUMENT AND REASON WHY THE WRIT SHOULD ISSUE.....	10
A. Standard For Writ Of Mandamus Or Prohibition.....	10
B. Under Thomas And Terry, This Court Should Clarify That The Statute Of Limitations For Nevada Minimum Wage Claims Under The MWA Is Two Years Because There Are No Conflicting Terms That Would Be Irreconcilably Repugnant With The MWA. ....	11
C. Under Thomas And Terry, This Court Should Clarify That The MWA Does Not Impliedly Repeal All Existing Statutes Regarding The Minimum Wage Under NRS 608. ....	19
V. Alternatively, This Petition Should Be Consolidated With The Petition In Williams.....	20
VI. CONCLUSION.....	21
DECLARATION OF THE PARTY BENEFICIALLY INTERESTED .....	23
CERTIFICATE OF COMPLIANCE .....	26
CERTIFICATE OF SERVICE.....	28

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>Clean Water Coal. v. The M Resort, L.L.C.</i> , 127 Nev. Adv. Rep. 24, 255 P.3d 247 (2011).....	12
<i>Ewell v. State</i> , 105 Nev. 897 at fn.1 (1989).....	21
<i>Falcke v. Douglas County</i> , 116 Nev. 583 (2000).....	14
<i>Galloway v. Truesdell</i> , 83 Nev. 13, 422 P.2d 237 (1967) .....	13
<i>Hanks et al. v. Briad Restaurant Group, LLC</i> , 2:14-cv-00786-GMN-PAL .....	8
<i>Mengelkamp v. List</i> , 88 Nev. 542, 501 P.2d 1032 (1972).....	12, 13
<i>Perry et al. v. Terrible Herbst, Inc.</i> , A-14-704428-C.....	9
<i>Smith v. District Court</i> , 107 Nev. 674, 818 P.2d 849 (1991).....	10
<i>State ex rel. DOT v. Public Emples. Ret. Sys. of Nev.</i> , 120 Nev. 19, 83 P.3d 815 (2004) .....	10, 11
<i>State v. Glusman</i> , 98 Nev. 412, 651 P.2d 639 (1982).....	12
<i>Terry v. Sapphire/Sapphire Gentlemen’s Club</i> , 130 Nev. Adv. Rep. 87, 336 P.3d 951 (2014).....	5, 11, 14, 15, 16, 19
<i>Thomas v. Nevada Yellow Cab Corp.</i> , 130 Nev. Adv. Op. 52 (2014).....	3, 5, 6, 8, 11, 12, 13, 14, 15, 16, 18, 19
<i>Thomas v. Nevada Yellow Cab Corp.</i> , 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014) .....	11, 12

# TABLE OF AUTHORITIES

## (continued)

	Page(s)
<i>Tyus et al. v. Wendy's of Las Vegas, Inc. et al.</i> , 2:14-cv-00729-GMN-VCF .....	8
<i>W. Realty Co. v. City of Reno</i> , 63 Nev. 330, 172 P.2d 158 (1946).....	12, 13
<i>Walters v. Eighth Judicial Dist. Court</i> , 2011 Nev. LEXIS 82, 263 P.3d 231 (2011) .....	10, 11
<i>Williams et al. v. The Eighth Judicial District Court of the State of Nevada et al.</i> , Nevada Supreme Court case no. 66629.....	1, 2, 8, 9, 21, 22
STATUTES	
NRS 11.010 .....	20
NRS 11.220 .....	4, 8, 11, 17, 19, 20
NRS 34.150 et seq. ....	1
NRS 608 .....	5, 11, 12, 14, 15, 19
NRS 608.010 .....	14
NRS 608.011 .....	14, 15
NRS 608.115 .....	9
NRS 608.250(2).....	12, 13, 14, 15, 18
NRS 608.250(2)(e) .....	11, 13
NRS 608.260 .....	1, 3, 5, 6, 7, 8, 11, 16, 17, 18, 19, 20, 21
NRS Chapter 11 .....	19, 20
NRS Chapter 608 .....	14, 15, 16, 18, 19, 20

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
<b>OTHER AUTHORITIES</b>	
N.R.A.P. 21 .....	1
N.R.A.P. 27 .....	1
N.R.A.P. 3(b) .....	1
Nev. Const. art. XV, 16 .....	3, 6, 7, 13, 18

**MEMORANDUM OF POINTS AND LEGAL AUTHORITIES IN SUPPORT  
OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION OR, IN  
THE ALTERNATIVE, MOTION TO CONSOLIDATE**

**I. RELIEF SOUGHT.**

Pursuant to NRS 34.150 et seq., Nevada Rule of Appellate Procedure 21 and Nevada Rule of Appellate Procedure 27, Petitioners MDC Restaurants, LLC; Laguna Restaurants, LLC; and Inka, LLC (collectively “Petitioners”), by and through their counsel, Littler Mendelson, P.C., hereby petition this Court for the issuance of a writ of mandamus or, in the alternative, writ of prohibition for clarification of law. Petitioners request that this Court compel the Honorable Timothy C. Williams of the Eighth Judicial District Court of the State of Nevada to vacate his Order of Findings of Fact and Conclusions of Law entered on February 24, 2015 denying Defendants’ Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statute of Limitations and granting Plaintiffs’ Countermotion for Summary Judgment Re Limitation of the Action and enter an order that the statute of limitations for Nevada minimum wage claims is two years under NRS 608.260.

Alternatively, pursuant to Nevada Rule of Appellate Procedure 3(b), Petitioners request that this Petition be consolidated with the pending Petition for Writ of Mandamus or, in the Alternative, for Writ of Prohibition filed on October 6, 2014 in *Williams et al. v. The Eighth Judicial District Court of the State of*

*Nevada et al.*, Nevada Supreme Court case no. 66629 as that Petition involves the same issue that this Court should clarify what the statute of limitations is for Nevada minimum wage claims.

## **II. ISSUES PRESENTED.**

Whether, as an important issue of law requiring clarification, the statute of limitations for Nevada minimum wage claims under the MWA is two years.

Alternatively, whether this Petition should be consolidated with the pending Petition in *Williams et al. v. The Eighth Judicial District Court of the State of Nevada et al.*, Nevada Supreme Court case no. 66629.

## **III. FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED.**

In the underlying district court case, the named Plaintiffs and Real Parties in Interest Paulette Diaz, Lawanda Gail Wilbanks, Shannon Olzynski and Charity Fitzlaff (collectively “Plaintiffs”) are four individuals who allege that they have worked at restaurants operated by Petitioners in Clark County, Nevada. (Appendix at 1-31). These Plaintiffs filed their Complaint against Petitioners on May 30, 2014 and filed their Amended Class Action Complaint on June 5, 2014. *Id.* On July 22, 2014, Petitioners filed their Answer to the Amended Class Action Complaint. (Appendix at 32-42).



On October 1, 2014, Petitioners filed a Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statute of Limitations (also referred to as “Motion for Judgment on the Pleadings”). (Appendix at 43-70). In this Motion for Judgment on the Pleadings, Petitioners argued, under the guidance provided by this Court in *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52 (2014), that a claim for Nevada minimum wage under Article XV, Section 16 of the Nevada Constitution (the “Minimum Wage Amendment” or “MWA”) was to be harmonized with the two-year statute of limitations for Nevada minimum wage claims under NRS 608.260. (Appendix at 46-54).

On October 20, 2014, Plaintiffs filed an Opposition to Defendants’ Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statute of Limitations and Plaintiffs’ Countermotion for Partial Summary Judgment (also referred to as “Countermotion for Partial Summary Judgment”). (Appendix at 71-105). In their Countermotion for Partial Summary Judgment, Plaintiffs argued that NRS 608.260 was “likely impliedly repealed in its entirety” by the passage of the MWA and defunct in light of *Thomas*. (Appendix at 72:26-73:2). Consequently, Plaintiffs asserted that a Nevada minimum wage claim now has “no limitation” or, in the alternative, a four-

year statute of limitations applies under NRS 11.220 which governs actions for relief not otherwise provided for. (Appendix at 73:4-7).

On October 22, 2014, Petitioners filed their Reply in Support of Defendant's Motion for Judgment on the Pleadings and Response to Plaintiffs' Countermotion for Partial Summary Judgment Re Limitation of the Action and Motion to Strike Plaintiffs' Countermotion for Partial Summary Judgment Re Limitation of the Action. (Appendix at 106-121). On November 7, 2014, Plaintiffs responded with their Reply in Support of Plaintiffs' Countermotion for Partial Summary Judgment Re Limitation of the Action and Plaintiffs' Opposition to Defendants' Motion to Strike Plaintiffs' Countermotion for Partial Summary Judgment Re Limitation of the Action. (Appendix at 122-128). On November 11, 2014, Petitioners responded with their Reply in Support of Defendants' Motion to Strike Plaintiffs' Countermotion for Partial Summary Judgment Re Limitation of the Action. (Appendix at 129-136). With the briefing complete, the hearing on all the pending motions for December 4, 2014.

On December 4, 2014, Respondents Honorable Timothy C. Williams and Eighth Judicial District Court held a hearing on the Petitioners' Motion for Judgment on the Pleadings, Plaintiffs' Countermotion for Partial Summary Judgment and all related filings. (Appendix at 137). At the hearing, the Petitioners provided extensive arguments as to why all Nevada minimum wage claims were

still subject to a two-year statute of limitation in the existing applicable statute of NRS 608.260. (Appendix at 138-197). When directed to the *Thomas* analysis of conflicting exemption language in the MWA and the existing minimum wage laws in NRS 608, the district court criticized this Court's standard of "harmonizing" the MWA with existing statutes and noted that its view may be different. (Appendix at 143:14-145:7 and 145:8-146:18). Petitioners argued that the district court must use the *Thomas* analysis and that a silent statute of limitations under the MWA was not the same as a conflicting statute of limitations in the MWA such as three years or some other number of years. (Appendix at 147:8-154:4). At the hearing, Petitioners also noted that in the recent Nevada Supreme Court authority in *Terry v. Sapphire/Sapphire Gentlemen's Club*, 130 Nev. Adv. Rep. 87, 336 P.3d 951 (2014), this Court affirmed that the MWA only supplanted the existing NRS 608 statutory scheme to "some extent" while affirming that the laws had to be read together. (Appendix at 178:6-179:13). At the conclusion of the hearing, the district court deferred its decision on all motions so that it could "review the briefing and read the *Thomas v. Yellow Cab* case before rendering a decision." (Appendix at 136).

On February 3, 2015, the district court issued a minute order regarding the motions that were heard on December 4, 2014. (Appendix at 137). On February 24, 2015, the Notice of Findings of Fact, Conclusions of Law, and Order was filed

incorporating the district court's Order (also referred to as "Order"). (Appendix at 138-146). In its Order, the district court made no reference to *Thomas* despite indicating that it would read that case before issuing its Order. (Appendix at 136 and 141-144). As a result, the district court did not attempt to harmonize the two-year statute of limitations under NRS 608.260 with the silent statute of limitations under the MWA. *Id.* Instead, the district court adopted its own "expansive rights" standard promulgated by Plaintiffs and specifically found:

1. The civil claims and remedies for violations of minimum wage laws under NRS 608.260 and article XV, section 16 of the Nevada Constitution differ significantly in both character and nature.

2. Pursuant to NRS 608.260, an employee may, at any time within 2 years, bring a civil action to recover the difference between the amount paid to the employee and the minimum wage amount. Thus, under the Nevada statutory scheme, the employee is solely limited to back pay, i.e., the difference between the amount paid and the amount of the minimum wage. See NRS 608.260.

3. In contrast, article XV, section 16(B) of the Nevada Constitution provides that "[a]n employee claiming a violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of the section and shall be entitled to all of the remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action under this section shall be awarded his or her attorney fees and costs." Nev. Const. art. XV, § 16(B).

4. The claims for relief and remedies afforded to Nevada employees under the Nevada Constitutional Amendment are expanded and not merely limited to back pay.

5. By its very nature, the Nevada Constitutional Amendment grants Nevada employees expansive rights, relief and legal remedies available in law or in equity. Id. In addition, the Nevada Constitutional Amendment expands employee rights even further, providing for an entitlement to attorney fees and costs should an employee prevail in the prosecution of his or her action. Id.

6. It is of paramount importance to distinguish the limited remedy of back pay available to Nevada employees under NRS 608.260 versus the Constitutional rights, claims, and remedies available to Nevada employees under the Nevada Constitutional Amendment, which could include, but are not limited to, back pay, damages, and injunctive relief.

7. Pursuant to the language of NRS 608.260, the two-year limitations period applies only to claims for back pay. See NRS 608.260. Consequently, this statutory limitation does not affect or apply to the constitutionally mandated claims, rights, and remedies afforded to claimants under the Constitutional Amendment.

8. It is also important to note that the Nevada Constitutional Amendment is much more expansive in the rights, claims, relief, and remedies available to claimants. As a result, it would be problematic to apply a two year statute of limitations to a claim for back pay and a different limitations period for claims for damages and/or injunctive relief not covered by the statute (NRS 608.260).

9. Clearly, the implication of the expansive Nevada Constitutional Amendment effectively supplants, supersedes, and/or repeals the two-year limitations period and the limited civil remedy provisions of NRS 608.260.

10. Lastly, with respect to the applicable statute of limitations period, this determination is based largely on the allegations and claims for relief asserted in Plaintiffs Complaint. A review of Plaintiffs' Amended Complaint clearly indicates that Plaintiffs' action is primarily based on Defendants' alleged violations of Nev. Const. art. XV, 16. Furthermore, Plaintiffs Prayer For Relief is not limited to an award of back pay; rather, Plaintiffs request

declaratory relief, unpaid wages, damages, interest, attorneys' fees and costs, and other relief necessary and just in law and in equity.

11. Therefore, the Court finds that in this action, the most plausible applicable limitations provision shall be the four-year catch-all limitations period for civil actions pursuant to NRS 11.220.

(Emphasis added). (Appendix at 142:6-143:22). While disregarding the *Thomas* analysis of implied repeal for conflicting terms, the district court found that under its own expansive rights analysis, the MWA "supplants, supersedes, and/or repeals" NRS 608.260. (Appendix at 143:12-14). Based on this, the district court held that the "most plausible" statute of limitations for a Nevada minimum wage claim under the MWA was "the four-year catch-all limitations period for civil actions pursuant to NRS 11.220." (Appendix at 143:21-22).

On March 24, 2014, Petitioners filed a Notice to the district court regarding this Petition and Motion. (Appendix at 198-200). The applicable statute of limitations period under the MWA is an important issue of law in need of clarification. Declaration of Montgomery Y. Paek, Esq. attached hereto. Indeed, even Plaintiffs' counsel agrees that the statute of limitations under the MWA is an important issue in need of clarification as stated in *Williams et al. v. The Eighth Judicial District Court of the State of Nevada et al.*, Nevada Supreme Court case no. 66629. (Appendix at 147-177). In addition to this matter, Petitioners' counsel is also counsel of record for Defendants in the *Tyus et al. v. Wendy's of Las Vegas, Inc. et al.*, 2:14-cv-00729-GMN-VCF; *Hanks et al. v. Briad Restaurant Group*,

*LLC*, 2:14-cv-00786-GMN-PAL; and *Perry et al. v. Terrible Herbst, Inc.*, A-14-704428-C cases listed in the *Williams* Petition. (Appendix at 155-156). In one of these matters, the statute of limitations also became a major impediment to any possibility of settlement as the parties vehemently disagreed as to what the applicable statute of limitations was. Decl. of Montgomery Y. Paek, Esq. In order to clarify the statute of limitations under the MWA, Petitioners' counsel has also filed an amicus curiae brief on behalf of the Defendants in *Hanks* and *Wendy's of Las Vegas, Inc.* in the *Williams* matter. *Id.*

Additionally, in this matter, the parties have voluminous pending discovery that hinges in part on how long the applicable statute of limitations is for both document productions and depositions. Decl. of Montgomery Y. Paek, Esq. Due to the district court's ruling, Petitioners now face the prospect of a discovery period and damages period that is double what even the Nevada Labor Commissioner says is the appropriate period for employers to retain wage records under NRS 608.115 and NAC 608.140. Accordingly, this Court should issue a writ of mandamus or prohibition clarifying that the statute of limitations for claims under the MWA is two-years and compelling the district court to vacate its Order. Alternatively, Petitioners request that this Court consolidate this Petition with the issues raised in *Williams et al. v. The Eighth Judicial District Court of the State of Nevada et al.*, Nevada Supreme Court case no. 66629.

#### **IV. LEGAL ARGUMENT AND REASON WHY THE WRIT SHOULD ISSUE.**

##### **A. Standard For Writ Of Mandamus Or Prohibition.**

Both a writ of mandamus and writ of prohibition are extraordinary remedies within the Court's discretion. *Smith v. District Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Neither writ will issue when a petitioner has a plain, speedy and adequate remedy in the ordinary course of law. *Walters v. Eighth Judicial Dist. Court*, 2011 Nev. LEXIS 82, 7, 263 P.3d 231, 233-234 (2011). The Court will only consider writ petitions challenging a district court denial of a motion for summary judgment when no factual dispute exists and summary judgment is clearly required by a statute or an important issue of law requires clarification. *Smith* at 1345 and *Walters* at 7-8.

The Court reviews a petition for writ of mandamus or prohibition when statutory interpretation or application is at issue. *Walters* at 8-10. This Court has also reviewed a writ of mandamus in regards to interpretation of a statute of limitations where parties have disputed when the statute of limitations began to run. *State ex rel. DOT v. Public Emples. Ret. Sys. of Nev.*, 120 Nev. 19, 21, 83 P.3d 815, 816 (2004).

Here, the district court did not find any question of fact that would prevent it from deciding the statute of limitations for a Nevada minimum wage claim under the MWA as a matter of law. The district court interpreted the language of the



MWA as granting expansive rights that required the application of a four-year statute of limitations under NRS 11.220. The district court also did not make any application of the Thomas analysis to NRS 608.260 even though that holding is this Court's guidance for interpreting whether or not the MWA repealed the existing statutory scheme for minimum wage claims under NRS 608.

This Court should interpret and clarify the applicable statute of limitations as it has done in *Walters* and *State ex rel. DOT*. Accordingly, a petition for writ of mandamus or prohibition is appropriate in a case such as this where the statute of limitations for a MWA claim is an important issue of law in need of clarification.

**B. Under *Thomas* And *Terry*, This Court Should Clarify That The Statute Of Limitations For Nevada Minimum Wage Claims Under The MWA Is Two Years Because There Are No Conflicting Terms That Would Be Irreconcilably Repugnant With The MWA.**

As was explained to the district court, the decisions of *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014) and *Terry v. Sapphire/Sapphire Gentlemen's Club*, 130 Nev. Adv. Rep. 87, 336 P.3d 951 (2014) are directly applicable to whether or not the two-year statute of limitations applies to a minimum wage claim brought under the MWA. In *Thomas*, this Court analyzed whether MWA overrode the exception for taxicab drivers provided in Nevada's minimum wage statute, NRS 608.250(2)(e). *Thomas*, 327 P.3d at 520. In doing so, the Court laid out the test for determining how the MWA would affect

existing NRS 608 statutes.

The Court in *Thomas* held that the Nevada Constitution is the “supreme law of the state,” which “control[s] over any conflicting statutory provisions.” *Thomas*, 327 P.3d at 521 citing *Clean Water Coal. v. The M Resort, L.L.C.*, 127 Nev. Adv. Rep. 24, 255 P.3d 247, 253 (2011) (alteration in original). However, “if reasonably possible,” statutes are to be construed “in harmony with the constitution.” *Id.* citing *State v. Glusman*, 98 Nev. 412, 419, 651 P.2d 639, 644 (1982). The exception to harmonizing, is when a statute “is irreconcilably repugnant” to a constitutional amendment, in which case the statute is deemed to have be impliedly repealed by the amendment. *Id.* citing *Mengelkamp v. List*, 88 Nev. 542, 545-46, 501 P.2d 1032, 1034 (1972). Importantly, this Court stated that “[t]he presumption is against implied repeal unless the enactment conflicts with existing law to the extent that both cannot logically coexist.” (Emphasis added). *Id.* citing *W. Realty Co. v. City of Reno*, 63 Nev. 330, 344, 172 P.2d 158, 165 (1946).

When the Court applied these standards to the exceptions listed in the MWA with the exceptions listed in NRS 608.250(2), the Court found that the canon of construction “*expressio unius est exclusio alterius*,” the expression of one thing is the exclusion of another, must be applied when there are two conflicting definitions of “employee” each with their own defined and different exception

categories. *Id. citing Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). Thus, under *expressio unius est exclusio alterius*, this Court contrasted the conflicting definitions of “employee” in the MWA and NRS 608.250(2):

The Minimum Wage Amendment expressly and broadly defines employee, exempting only certain groups: “‘employee’ means any person who is employed [by an individual or entity that may employ individuals or enter into contracts of employment] but does not include 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. 15, § 16(C). 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). Therefore, the two are “irreconcilably repugnant,” *Mengelkamp*, 88 Nev. at 546, 501 P.2d at 1034, such that “both cannot stand,” *W. Realty Co.*, 63 Nev. at 344, 172 P.2d at 165, and the statute is impliedly repealed by the constitutional amendment.

\* \* \*

The text of the Minimum Wage Amendment, by enumerating specific exceptions that do not include taxicab drivers, supersedes and supplants the taxicab driver exception set out in NRS 608.250(2).

(Footnotes omitted). *Thomas* at 521-522. Thus, to impliedly repeal, supersede and supplant the exception in NRS 608.250(2), there first must be a “conflicting” statutory term that cannot be harmonized with the MWA. Then, when the conflicting term expresses something different, such as an exceptions for under eighteen (18) year employees, nonprofit organization employees or as a trainee

employees rather than exceptions for taxicab employees, is when the statute will be viewed as irreconcilably repugnant to the Nevada Constitution.

Additionally, in the case of silence in a statute, this Court has held that “it is not the business of [the] court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done.” *Falcke v. Douglas County*, 116 Nev. 583, 589 (2000) (Holding that a statute which did not expressly provide for a two-thirds super-majority vote by county board of commissioners did not authorize the county planning commission to require a super-majority vote for approval of amendments). Thus, an omitted term such as in *Falcke* is not the same as a conflicting term as in *Thomas*.

In *Terry*, this Court noted the implications of its holdings in *Thomas*. The issue before the Court in *Terry* was whether appellants, performers at Sapphire Gentlemen’s Club, were employees within the meaning of NRS 608.010, the definition of which hinges on the definition of “employer” under NRS 608.011, and thus entitled to minimum wage under NRS Chapter 608. *Terry*, 336 P.3d 951 at 953. Citing the *Thomas* analysis as a guide, the Court recognized that the text of the MWA supplanted that of that statutory minimum wage laws to “some extent” with regards to “the taxicab driver exception set out in NRS 608.250(2).” *Id.* at 955 citing *Thomas* at 522. However, the Court also recognized the continued viability of other NRS 608 minimum wage by noting that “the Department of

Labor continues to use the definition of ‘employer’ found in NRS 608.011, not that in the Minimum Wage Amendment. NAC 608.070.” *Id.* Although the MWA had its own “definition of ‘employer’” that was different than the definition of “employer” found in NRS 608.011, the MWA’s definition was not instructive because it was “equally, if not more, tautological than NRS 608.011.” *Id.* Thus, in *Terry*, the Court recognized that *Thomas*’ repeal was limited to the conflicting “employee” exception for taxicab drivers in NRS 608.250(2) and that the MWA did not impliedly repeal all NRS Chapter 608 statutes concerning the minimum wage. Where there was no conflict, such as the “employer” definition under the MWA and NRS 608.011, the Court looked at both definitions harmoniously, rather than hold that the MWA had impliedly repealed all NRS 608 statutes concerning the minimum wage or its definitions.

In this matter, the district court made no reference to *Thomas* or *Terry* nor did it apply the principles of harmonizing NRS 608 with the MWA except where conflicting terms exist. Instead, the district court set out its own “expansive rights” analysis that did not attempt to harmonize the existing two-year statute of limitations with the complete absence of any statute of limitations in the MWA. (Appendix at 142:19-143:14).

At the hearing, Petitioners argued that *Thomas* and *Terry* were the applicable standard for determining whether or not the two-year statute of limitations under

NRS 608.260 applied to the MWA. (Appendix at 147:8-154:4 and 178:6-179:13). Under *Thomas*, Petitioners explained that where the MWA was silent, such as having no provision for the statute of limitations, then there was no conflict with the existing statute of limitations in NRS 608.260. (Appendix at 147:8-149:3). Further, Petitioners argued without two conflicting statute of limitations to compare, there could never be an application of *expressio unius est exclusio alterius* from *Thomas* which would exclude NRS 608.260 from applying to a minimum wage claim. (Appendix at 149:10-154:4). Under *Terry*, Petitioners argued that this Court upheld that where there is no conflicting terms, provisions under NRS Chapter 608 are not impliedly repealed by the MWA. (Appendix at 177:3-179:13). Consequently, in its minutes, the district court noted that it would “review the briefing and read the *Thomas v. Yellow Cab* case before rendering a decision.” (Appendix at 136).

In its Order, however, the district court made no attempt to apply *Thomas* to the statute of limitations. (Appendix at 142:6-143:22). Without applying *Thomas*, the district court found that the remedy provisions of the MWA of “back pay, damages, and injunctive relief” were “distinguishable” from the “limited remedy of back pay available to Nevada employees under NRS 608.260.” (Appendix at 142:25-143:3). Further, the district court stated that as a result of the more expansive remedies under the MWA, it would be “problematic to apply a two year

statute of limitations to a claim for back pay and a different limitations period for claims for damages and/or injunctive relief not covered by the statute (NRS 608.260)” and that the implication was that the MWA “effectively supplants, supersedes, and/or repeals the two-year limitations period and the limited civil remedy provisions of NRS 608.260.” (Appendix at 143:8-14). Consequently, the Court chose to impose the four year statute of limitations pursuant to NRS 11.220. (Appendix at 143:21-22).

In so ruling, the district court ignored Petitioners’ distinction that remedy provisions were not the same as a statute of limitations provisions and therefore, not “conflicting” terms. (Appendix at 181:21-183:15). The district court cited no conflict between the terms “back pay” in the MWA and NRS 608.260. Instead, it only cited that an application of the two-year statute of limitations would be “problematic” without explanation. (Appendix at 143:8-14). At the hearing, Petitioners addressed the additional remedy provisions of the MWA and explained that the statute of limitations for non-back pay remedies would still flow from the underlying claim rather than the remedy. (Appendix at 152:7-154:4). Thus, even an injunctive relief action would be limited to two years if the underlying claim was one based in minimum wage, rather than six years for a written contract. (Appendix at 152:7-154:4). The district court did not cite any reason why a two-year statute of limitations for injunctive relief would be irreconcilably repugnant

with the remedy provisions of the MWA. Therefore, there is no reasoning as to why NRS 608.260's two-year statute of limitations cannot logically co-exist as the statute of limitations for claims under the MWA.

Even under an analysis of remedies as the district court performed, neither NRS 608.260 nor the MWA provide an exclusive or conflicting list of remedies. NRS 608.260 states that an employee may bring a "civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage" but does not state that this is an exclusive remedy or that an action for injunctive relief is barred. The MWA states that an employee may bring a civil action and is entitled to "all remedies available under the law or in equity appropriate to remedy any violation of this section, but are not limited to back pay, damages, reinstatement or injunctive relief." (Emphasis added). Nev. Const. art. XV § 16(b). This is in contrast to the conflict addressed in *Thomas*, where NRS 608.250(2) and the MWA both provided for an exclusive list of exceptions under "employee" and could not be reconciled. Therefore, ignoring the fatal flaw of not citing a conflicting statute of limitation in the MWA, the district court's reliance on distinguishing remedies does not meet the *Thomas* test.

The district court's Order is contrary to the case law in *Thomas* which has directly addressed the MWA's compatibility with the existing minimum wage provisions in NRS Chapter 608. At the very least, the district court was required to



determine whether or not the two-year statute of limitations in NRS 608.260 conflicted with any term in the MWA. Recognizing that under that analysis, there was no conflict, the district court adopted a different standard and found that under the expansive rights of the MWA, that NRS 608.260 was impliedly repealed. This finding is the opposite of the presumption that was enunciated in *Thomas* in favor of harmonizing NRS Chapter 608 with the MWA. Therefore, the district court's order with regards to the statute of limitations should be vacated for the two-year statute of limitations.

**C. Under *Thomas* And *Terry*, This Court Should Clarify That The MWA Does Not Impliedly Repeal All Existing Statutes Regarding The Minimum Wage Under NRS 608.**

In its Order, the district court applied the four-year statute of limitation in NRS 11.220 to minimum wage claims under the MWA. (Appendix at 143:21-22). The district court found that “the implication of the expansive Nevada Constitutional Amendment effectively supplants, supersedes, and/or repeals the two-year limitations period and the limited civil remedy provisions of NRS 608.260.” (Appendix at 143:12-14). Thus, to create an applicable statute of limitations where the MWA was silent, the district court then reached to NRS Chapter 11 as the closest applicable statute in light of its view that the MWA repeal all statute of limitations under NRS 608.260.

NRS 11.220 provides “Action for relief not otherwise provided for. An

action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued.” At the hearing, Petitioners argued that Plaintiffs’ reliance on NRS 11.220 was misplaced because the general provisions of NRS Chapter 11 indicate that NRS Chapter 11 provisions do not apply “where a different limitation is prescribed by statute.” NRS 11.010. (Appendix at 162:7-19). Therefore, the different limitation prescribed by NRS 608.260 controls. (Appendix at 162:13-19).

The district court’s application of a statute of limitation from the general Limitation of Actions in NRS Chapter 11 over a statute of limitation from the Compensation, Wages and Hours in NRS Chapter 608 shows that without clarification, district courts may continue to believe that minimum wage provisions under NRS Chapter 608 are repealed by the MWA. Therefore, this Court should clarify that NRS Chapter 608 remains applicable to minimum wage claims under the MWA to the extent that there are no conflicting terms and provisions can be read in harmony.

**V. ALTERNATIVELY, THIS PETITION SHOULD BE CONSOLIDATED WITH THE PETITION IN *WILLIAMS*.**

Under the Nevada Rules of Appellate Procedure, when the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the Supreme Court upon its own motion or upon motion of a party. NRAP 3(b)(2). Where appellants raise identical issues on appeal, the Court may consolidate those

appeals for purposes of disposition. *Ewell v. State*, 105 Nev. 897, 898 at fn.1 (1989) *citing* NRAP 3(b).

In this matter, the clarification of the applicable statute of limitations under the MWA has been brought before this Court in the *Williams* Petition. Therefore, for the purposes of judicial economy, this Court may consolidate this Petition with *Williams et al. v. The Eighth Judicial District Court of the State of Nevada et al.*, Nevada Supreme Court case no. 66629.

## VI. CONCLUSION

Nevada's constitutional, statutory, and case law is clear: minimum wage violation claims are subject to a two-year statute of limitations. The passage of the MWA did not change that. NRS 608.260 clearly provides for a two-year statute of limitations for minimum wage causes of action that can be read in harmony with the MWA. Accordingly, Petitioners respectfully submit that this Court grant its Petition for Mandamus or Prohibition and compel the district court to apply a two-year statute of limitations.

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Alternatively, this Petition and the points and authorities herein should be consolidated with the pending case in *Williams et al. v. The Eighth Judicial District Court of the State of Nevada et al.*, Nevada Supreme Court case no. 66629.

Dated: March 24, 2015

Respectfully submitted,



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RICK D. ROSKELLEY, ESQ.  
ROGER L. GRANDGENETT II, ESQ.  
MONTGOMERY Y. PAEK, ESQ.  
KATIE BLAKEY, ESQ.  
LITTLER MENDELSON, P.C.  
3960 Howard Hughes Parkway, Suite 300  
Las Vegas, NV 89169-5937  
Telephone: 702.862.8800  
Fax No.: 702.862.8811  
Attorneys for Petitioners

**DECLARATION OF THE PARTY BENEFICIALLY INTERESTED**

STATE OF NEVADA     )  
                                  ) ss:  
COUNTY OF CLARK    )

I, Montgomery Y. Paek, under penalty of perjury under the laws of the United States of America and the State of Nevada, declare and state as follows:

1. I am an attorney admitted to practice law in the State of Nevada. I am an Associate Attorney at the law firm of Littler Mendelson, one of the attorneys for Petitioners MDC Restaurants, LLC; Laguna Restaurants, LLC; and Inka, LLC (“Petitioners”).

2. Unless otherwise stated, this declaration is based on my personal knowledge.

3. Pursuant to NRS 15.010 and NRS 34.030, I make this Declaration in support of Petitioners’ Petition for Writ of Mandamus or Prohibition, or in the alternative, Motion to Clarify (“Petition”).

4. I have reviewed the Petition and its attachments and state that the contents are true of my own knowledge, except as to the matters which are therein stated upon information and belief, and as to those matters that I believe them to be true.

5. I believe that the applicable statute of limitations period under the MWA is an important issue of law in need of clarification.

6. In addition to this matter, I am counsel of record for Defendants in the *Tyus et al. v. Wendy's of Las Vegas, Inc. et al.*; *Hanks et al. v. Briad Restaurant Group, LLC*; and *Perry et al. v. Terrible Herbst, Inc.* cases listed in the *Williams et al. v. The Eighth Judicial District Court of the State of Nevada et al.* Petition. In one of these matters, the statute of limitations also became a major impediment to any possibility of settlement as the parties vehemently disagreed as to what the applicable statute of limitations was.

7. In order to clarify the statute of limitations under the MWA, my firm has filed an amicus curiae brief on behalf of the Defendants in *Hanks* and *Wendy's of Las Vegas, Inc.* in the *Williams* matter.

8. Additionally, in this matter, the parties have voluminous pending discovery that hinges in part on how long the applicable statute of limitations is for both document productions and depositions. Due to the district court's ruling, Petitioners now face the prospect of a discovery period and damages period that is double what even the Nevada Labor Commissioner says is the appropriate period for employers to retain wage records under NRS 608.115 and NAC 608.140.

9. Accordingly, I believe this Court should issue a writ of mandamus or prohibition clarifying that the statute of limitations for claims under the MWA is two-years and compelling the district court to vacate its Order. Alternatively, I would request that this Court consolidate this Petition with the issues raised in *Williams et al. v. The Eighth Judicial District Court of the State of Nevada et al.*, Nevada Supreme Court case no. 66629.

10. I declare under penalty of perjury that the foregoing statements are true and correct.

Executed in Las Vegas, Nevada, on March 24, 2015.

  
\_\_\_\_\_  
MONTGOMERY Y. PAEK, ESQ.

### **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font size and Times New Roman.

I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☐ Proportionately spaced, has a typeface of 14 points or more, and contains \_\_\_\_\_ words:

☐ Monospaced, has 10.5 or fewer characters per inch, and contains \_\_\_\_\_ words or \_\_\_\_\_ lines of text; or

☒ Does not exceed 30 pages.

Finally, I 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.

Dated: March 24, 2015

Respectfully submitted,



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RICK D. ROSKELLEY, ESQ.  
ROGER L. GRANDGENETT II, ESQ.  
MONTGOMERY Y. PAEK, ESQ.  
KATIE BLAKEY, ESQ.  
LITTLER MENDELSON, P.C.  
3960 Howard Hughes Parkway, Suite 300  
Las Vegas, NV 89169-5937  
Telephone: 702.862.8800  
Fax No.: 702.862.8811  
Attorneys for Petitioners

## **CERTIFICATE OF SERVICE**

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada, 89169. On March 24, 2015, I served the within document:

### **PETITION FOR WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, MOTION TO CONSOLIDATE**

- ☒ By **CM/ECF Filing** – Pursuant to N.E.F.R. the above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing (CM/ECF) system.
- ☒ By **United States Mail** – a true copy of the document listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Las Vegas, Nevada addressed as set forth below.

Don Springmeyer, Esq.  
Bradley Schrager, Esq.  
Daniel Bravo, Esq.  
Wolf, Rifkin, Shapiro, Schulman &  
Rabkin, LLP  
3556 E. Russell Road, 2nd Floor  
Las Vegas, NV 89120-2234  
Attorneys for Real Party in Interest

Honorable Timothy C. Williams  
Eighth Judicial District Court, Dept. 16  
200 Lewis Avenue  
Las Vegas, NV 89155  
Respondents

I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on March 24, 2015, at Las Vegas, Nevada.

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/s/ Erin J. Melwak