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; and 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 WILLIAMS, District Judge,

Respondents,

and

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

Real Parties in Interest.

Electronically Filed
Oct 21 2015 12:00 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

Case No.: 67631

Eighth Judicial District Court
Case No.: A701633

REAL PARTIES IN INTEREST'S ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

DON SPRINGMEYER, ESQ., Nevada Bar No. 1021
BRADLEY SCHRAGER, ESQ., Nevada Bar No. 10217
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120-2234
(702) 341-5200 / Fax: (702) 341-5300

Attorneys for Real Parties in Interest

N.R.A.P. 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

Dated this 21st day of October, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager, Esq.*

DON SPRINGMEYER, ESQ. (NV Bar No. 1021)
dspringmeyer@wrslawyers.com
BRADLEY SCHRAGER, ESQ. (NV Bar No. 10217)
bschrager@wrslawyers.com
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120-2234
(702) 341-5200 / Fax: (702) 341-5300

Attorneys for Real Parties in Interest

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ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

Petitioners rely upon only one argument to make their claim that actions brought pursuant to article XV, section 16 of the Nevada Constitution (the "Minimum Wage Amendment" or the "Amendment") should be subject to a two-year limitation period: They argue that this Court's decision in *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014), *reh'g denied* (Sept. 24, 2014), announced a "test" under which all provisions of the statutes concerning the minimum wage not only survived the Minimum Wage Amendment but now apply to all claims made directly under the Amendment itself, in the absence of direct conflict between the constitutional and statutory terms. Because the Amendment contains no express statute of limitations, the argument goes, the two-year limitation in N.R.S. 608.260 applies to claims made under the Amendment's express right of action.

As an initial matter, Petitioners imagine that *Thomas* went much further than it did. *Thomas* answered a single question: Did the statutory exceptions to the minimum wage found in N.R.S. 608.250(2) survive the enactment of the Amendment, which provided more expansive minimum wage coverage for a broader range of employees than had the Labor Code, and had very limited exceptions which were far narrower than those found in 608.250(2). *Thomas*, 327 P.3d at 520. It was at its core a very simple inquiry and, therefore, its central analysis was also fairly simple. Previous statutory exceptions to the minimum wage were superseded on grounds of the longstanding interpretive canon of *inclusio unius exclusio alterius. Id.* at 520-21.[1] The instant case presents nothing like the appeal in *Thomas*; here, the issue is not simply whether the

[1] "Does the Minimum Wage Amendment … override the exception for taxicab drivers provided in Nevada's minimum wage statute? … We hold that the district court erred because the text of the Minimum Wage Amendment, by clearly setting out some exceptions to the minimum wage law and not others, supplants the exceptions listed in N.R.S. 608.250(2)." *Thomas*, 327 P.3d at 520.

Amendment has supplanted the remedial portions of 608.250 by way of 608.260—though it has, to a near-total degree—but rather whether 608.250 (and, consequently, 608.260) can apply to claims under the Amendment at all. *Thomas* does not have much to say on that subject, and certainly establishes no test under which that inquiry can be resolved.

Even if one grants Petitioners' premise, for the sake of argument, and allows that portions of N.R.S. 608.250 and/or 608.260 survived the enactment of the Amendment without being supplanted, superseded, or repealed, they cannot answer why remnant portions of the Labor Code govern claims brought pursuant to the express right of action contained in the Minimum Wage Amendment. Even conceding, for argument, that claims made under N.R.S. 608.250—such as those at issue in *Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951 (2014), *reh'g denied* (Jan. 22, 2015)—remain subject to N.R.S. 608.260's two-year limitation, this does nothing to establish why claims made under the Amendment are, therefore, N.R.S. 608.250 claims subject to 608.260's limitation. Plaintiffs below did not make 608.250 claims.

Amendment-based claims, such as those brought by Plaintiffs below, are not 608.250 claims. Plaintiffs below are not claiming a simple wage deficiency; instead they are claiming that Petitioners failed their obligations to provide qualifying health insurance to employees such as themselves that were paid below the upper-tier wage established under the Amendment. Petitioners' Appendix ("Petr. Appx.") 17-27. These are claims created—*sui generis*—by the enactment of the Minimum Wage Amendment in 2006, and could not have existed under 608.250. They could only have been made pursuant to the Minimum Wage Amendment itself. As such, N.R.S. 608.260—the statute that shapes actions brought pursuant to 608.250—cannot apply to Plaintiffs' claims below.

Petitioners' solution to this interpretive cul-de-sac is to ignore it. They do not, in their writ petition, attempt any version of the argument that claims under the Amendment "arise under" statute, something they did raise below but which failed to

persuade the district court. Petr. Appx. 48. This approach is not promising in any event, because it is not plausible that constitutional claims—brought under the fundamental, organic law of the state—"arise under" statute. The argument immediately strikes a false note. Neither do Petitioners mount a "borrowing" analysis, the argument that because the Amendment does not include an express limitation for its claims one should be borrowed from an analogous statute.[2]

Petitioners offer no principled reason why, for example, the catch-all limitation of four years found in N.R.S. 11.220 does not supply the appropriate period for a Minimum Wage Amendment claim. This is the very reason 11.220 exists, to provide a limitation where none has been expressly furnished. There are, in fact, numerous avenues to arrive at a four-year limitation,[3] if a limitation is to be applied at all to these claims, while the only way to reach 608.260's two-year period is through a tortured and inapt application of 608.250 to Plaintiffs' causes of action. The approach is not persuasive textually, and fails the more once any notion of the Amendment's remedial nature is taken into account. If a limitation is to be imposed upon the claims at issue here, the only plausible period is four years.

I. STATEMENT OF ISSUES

There is one issue before the Court: What is the appropriate period of limitation for Plaintiffs' claims, which were brought pursuant to the Minimum Wage Amendment.

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[2] To be fair and comprehensive, Petitioners' argument does have some elements of a "borrowing" analysis, even if they never lay out the analysis expressly, and so Real Parties in Interest do treat the concept below, *infra* at Section IV(E), and demonstrate why it is not a viable manner of determining the appropriate limitations period for Minimum Wage Amendment claims and that, even if applied, it results in a four-year limitations period anyway.

[3] *See* the discussion below, *infra* at Section IV(E)(2), regarding why Plaintiffs' claims are arguably understood and characterized as constituting an "action upon a contract, obligation or liability not founded upon an instrument in writing," and subject to N.R.S. 11.190(2)(c)'s four-year limitation period.

II. FACTS AND PROCEDURE

A. Factual Background

At the 2006 General Election, the people of Nevada approved the constitutional amendment denominated as Question 6 by a two-to-one margin regarding the minimum wage to be paid to all Nevada employees.[4] The Minimum Wage Amendment became effective in November 28, 2006, and was codified as new Article XV, Section 16 of the Nevada Constitution. *See* Nev. Const. art. XV, § 16.

The Minimum Wage Amendment guaranteed to each Nevada employee, with very few exceptions, a particular hourly wage: "Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits."[5] Nev. Const. art. XV, § 16(A).

The text of the Amendment provides civil remedies for violations of its mandates:

> An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all 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.

Nev. Const. art. XV, § 16(B).

Petitioners have paid Plaintiffs, and members of the putative Class, below the upper-tier minimum wage pursuant to the Amendment since at least July 1, 2010. Petr.

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[4] This represented the second passage of Question 6 by the people. It had been approved by a similarly wide margin at the 2004 General Election.

[5] The Minimum Wage Amendment contained an indexing mechanism, and since July 1, 2010, the Nevada minimum wage levels have been $7.25 per hour if the employer provides qualifying health benefits, and $8.25 per hour if the employer does not provide such benefits. *See* Nev. Const. art. XV, § 16; Nevada Minimum Wage Announcement, Office of the Nevada Labor Commissioner, 2010-2015. The upper-tier and lower-tier rates have remained unchanged since that July 1, 2010. *Id*.

Appx. 19-20, 34-35. The claims made below are that Petitioners failed to qualify for the privilege of paying employees less than $8.25 per hour during that period by not providing qualifying health insurance and by offering substandard benefits that do not meet legal requirements as health insurance under state and federal law, and that they are thus liable to Plaintiffs and the Class for back pay, damages, and all other associated relief flowing from their violations of the Minimum Wage Amendment. Petr. Appx. 17-24, 26.

B. Procedural Background

On May 30, 2014, Real Parties in Interest, on behalf of themselves and all similarly-situated individuals, filed a Class Action Complaint against Petitioners for alleged underpayment of the Nevada minimum wage pursuant to the Minimum Wage Amendment. Petr. Appx. 1-16. On June 5, 2015, Real Parties in Interest amended their complaint, adding new plaintiffs. Petr. Appx. 17-31.

Real Parties in Interest, current and former employees of Petitioners, allege that pursuant to the Minimum Wage Amendment, they were allegedly underpaid because Petitioners did not provide the qualifying health insurance necessary for paying Real Parties in Interest less than the upper-tier minimum wage set by the Minimum Wage Amendment. Petr. Appx. 17-24. On June 22, 2014, Petitioners answered the Amended Class Action Complaint. Petr. Appx. 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. Petr. Appx. 43-68. Real Parties in Interest filed an Opposition and Countermotion for Partial Summary Judgment on the same issue. Petr. Appx. 71-105. Both parties replied in support of their respective motions. Petr. Appx. 106-119, 122-128. On December 4, 2014, a hearing was held, and on February 3, 2015, the district court issued a minute order containing its ruling. Real Parties in Interest's Appendix ("RPII Appx.") 1-2. On February 24, 2015, a formal order of the district court was entered, holding, essentially, that because the claims and remedies available to a

claimant under the Amendment were of a different—and significantly more expansive—nature than those previously available under statute, the claims made here could not be shoehorned into the former statutory provision found in 608.250 and 608.260. RPII Appx. 3-9. Concluding, the district court wrote,

> 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.
>
> 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.

RPII Appx. 8. Petitioners filed this petition for writ on March 25, 2015.

III. PROPRIETY OF WRIT RELIEF

It would be disingenuous for Real Parties in Interest to claim they do not want the question here answered by the Court; they do. They concur with Petitioners, therefore, that resolution of the issue is proper and necessary, as it is a question of law with statewide importance in need of final determination.

There are also noteworthy differences between the posture of the present writ and that recently heard by the Court in *Williams, et al., v. Claim Jumper Acquisition Co. LLC*, Case No. 66629. There, petitioners had, as plaintiffs, moved for partial summary judgment regarding the appropriate statute of limitations. Here, Petitioners moved as Defendants for partial summary judgment as to all claims made prior to two years preceding the filing of the complaint. Petr. Appx. 43-68. Real Parties in Interest counter-moved, arguing for the four-year limitation. Petr. Appx. 71-105. The district court denied Petitioners' motion and granted that of Real Parties in Interest. RPII Appx. 9. Petitioners here seek an extraordinary writ of this Court vacating the Order, and while the Order contained a grant of Plaintiffs' counter-motion, a denial of the request to vacate the denial of Petitioners' motion combined with analysis of the central question will function to provide clarity on the issue while avoiding any procedural concerns the

Court may have had regarding the writ petition at issue in *Williams*.

IV. THE PETITION SHOULD BE DENIED

Petitioners hang everything on their no-conflict theory of the case. In fact, their brief is really a long series of expressions of disbelief that the district court did not agree with their application of *Thomas*. But there are plenty of good reasons why claims under the Minimum Wage Amendment are not subject to, do not arise under, and should not borrow from N.R.S. 608.250 and 608.260, and not much persuasive weight on Petitioners' side of the ledger.

A. Causes Of Action Under The Minimum Wage Amendment

A cause of action for violating the Minimum Wage Amendment is authorized by—and arises under—the clear text of the Amendment itself:

> An employee claiming violation of this section may bring an action against his or her employer in the courts of this State *to enforce the provisions of this* section and shall be entitled to all 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 to enforce this section shall be awarded his or her reasonable attorney's fees and costs.

Nev. Const. art. XV, § 16(B) (emphasis supplied). No reference to any other statutory provision appears in the constitutional text. *Id*. ("This section"; "an action"; "in any action to enforce this section."). The Amendment first creates certain express rights and then provides an explicit right of action for aggrieved employees to enforce those rights in the courts of Nevada. *Id*.

After enactment of the Amendment, workers could sue if employers paid less than (currently) $8.25 per hour and provided no health insurance benefits, or if they paid below $7.25 per hour in any circumstance. They could sue if their employer paid below $8.25 and failed to provide qualified health insurance to the employee, and all of the employee's dependents, at a rate below ten percent of the employee's wage from the employer. They could sue if the employer did not abide by the Amendment's expanded definitions of "employee" and its significantly-narrowed exceptions, or if the Labor Commissioner failed the duty to set the wage properly on an annual basis. Additionally,

aggrieved employees now can seek highly-expansive remedies: back pay, damages, reinstatement, and injunctive relief against a violating employer, as well as any other remedy at law or in equity. *Id*. These claims were wholly new; none of them were actionable under the previously-existing statutory regime. Claims under the Amendment thus are self-contained, self-executing, and stand-alone—the Amendment is *sui generis* in this respect.[6]

Below, Plaintiffs made claims that Petitioners paid them less than $8.25 per hour, but did not provide qualifying health benefits. Petr. Appx. 17-24. There was no way to assert such claims under the previous statutory regime. These claims were not even actionable at law previously. As the district court recognized in its Order, "review of Plaintiffs' Amended Complaint clearly indicates that Plaintiffs' action is primarily based on Defendants' alleged violations of Nev. Const. art. XV, 16." RPII Appx. 8. Furthermore, the prayer for relief in the action below set it apart from any possible N.R.S. 608.250 of 608.260 claims: "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." RPII Appx. 8. The court got it precisely correct: Plaintiffs' claims arise from alleged violations of the Amendment itself, and the relief requested comes straight from its text. There was no need, contrary to Petitioners' position, to look elsewhere to characterize these claims or their associated relief, and no need to borrow a limitations period from elsewhere. The Minimum Wage Amendment includes no express limitation and, therefore, if a limitation is to apply it is proper to employ N.R.S. 11.220 for the

[6] See *Woody v. State Farm Fire and Cas. Co.*, 965 F. Supp. 691, 693 (E.D. Pa. 1997) (citing *Gabriel v. O'Hara*, 368 Pa. Super. 383, 534 A.2d 488 (1987)) ("[W]here the court applied the six (6) year 'catchall' limitations period to actions arising under Pennsylvania's Unfair Trade Practices and Consumer Protection Law … which it described as a *sui generis* statute.").

very purpose it was designed to accomplish—providing a limitation for an "action for relief, not hereinbefore provided for …" *See* N.R.S. 11.220.

B. Causes Of Action Under N.R.S. 608.250 And 608.260 Compared

Causes of action brought under N.R.S. 608.260 must, by the very terms of that statute, be 608.250 claims:

> If any employer pays any employee a lesser amount than the minimum wage prescribed by regulation of the Labor Commissioner *pursuant to the provisions of NRS 608.250*, the 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 amount of the minimum wage. A contract between the employer and the employee or any acceptance of a lesser wage by the employee is not a bar to the action.

N.R.S. 608.260 (emphasis supplied). There is no language in the statute to the effect that any other claims touching in some way upon any other minimum wage law are also brought pursuant to 608.260. There is certainly nothing in the Amendment pointing that direction. *See* Nev. Const. art. XV, § 16. There is not even any language in 608.260 governing any type of claim that might be brought under the other minimum wage statutes in the Labor Code, 608.255 or 608.270-290. Instead, 608.260 is expressly and exclusively concerned with 608.250 actions. *See* N.R.S. 608.260.

Even if the Court were inclined to analyze the state of 608.250 in the wake of the enactment of the Minimum Wage Amendment, for whatever reason, it would find that not much remains of its terms. If N.R.S. 608.250 and 608.260 were not impliedly repealed by the Minimum Wage Amendment, at the very least they were left with very little to do. The Nevada Labor Commissioner no longer prescribes Nevada's minimum wage pursuant to N.R.S. 608.250's calculations mechanism; that has been supplanted by the mechanisms contained in the Amendment. *See* Nev. Const. art. XV, § 16(A). The Labor Commissioner certainly no longer exercises the discretion vested by N.R.S. 608.250(1) to determine whether wage increases are "contrary to the public interest;" there can be no argument that increases under the Amendment are not now mandatory. *Compare* N.R.S. 608.250(1) *with* Nev. Const. art. XV, § 16(A). The exceptions contained in 608.250(2) are now repealed, as confirmed in *Thomas*. *Thomas*,

327 P.3d at 522. Even 608.250(3), which makes it "unlawful for any person to employ, cause to be employed or permit to be employed, or to contract with, cause to be contracted with or permit to be contracted with, any person for a wage less than that established by the Labor Commissioner pursuant to the provisions of this section" is now unneeded, as 1) the Commissioner does not set the wages pursuant to that statutory section, and 2) the Amendment contains its own prohibition on such practices, subject only to a bona fide collective bargaining agreement. *Compare* N.R.S. 608.250(3) *with* Nev. Const. art. XV, § 16(B).

There is nothing remaining, essentially, of 608.250. If 608.250 is the provision to which 608.260 points, providing a right of action for violation of its terms, any cursory inquiry into the terms of 608.260 further reveals the difference in nature and scope of 608.250 claims and those made under the Amendment. N.R.S. 608.260 limits remedies under its terms to simple back pay, and directs that any such case must be brought within two years. *See* N.R.S. 608.260. The Amendment, in contrast, authorizes a much broader range of remedies, without limitation, as the district court noted in its Order. *See* Nev. Const. art. XV, § 16(B); RPII Appx. 7-8.

Then-Nevada Attorney General Brian Sandoval, in his Attorney General Opinion No. 2005-04, put it appropriately in analyzing the difference between the Amendment and the previous statutory scheme: "Thus it unmistakably appears that the voters intended for the proposed amendment to transform the existing statutory framework for minimum wages." RPII Appx. 12.

As to 608.250:

> Based on this overlapping and contradictory coverage, the existing statutory provisions would not survive the proposed amendment. Instead, the proposed amendment would supplant and repeal by implication the provisions of NRS 608.250 for wage calculation and the responsibility therefor.

RPII Appx. 13.

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As to 608.260:

> As the proposed amendment has completely covered the topic of a civil court remedy, providing for even greater relief, its remedy would supplant and repeal by implication the existing civil remedy provision at NRS 608.260.

RPII Appx. 14.

This Court can, but does not need to, determine that N.R.S. 608.250 and 608.260 have been impliedly repealed in order to decide the question before it. It can simply determine that those provisions are not applicable to Plaintiffs' claims. Whether those provisions are repealed or not, however, it is certain that Plaintiffs here made no 608.250 claims, and that the allegations they make and the relief they seek arise entirely out of the Minimum Wage Amendment itself. Petr. Appx. 17-24, 26; RPII Appx. 7-8.

C. *Thomas* And *Terry* Do Not Support Petitioners' Positions

Ultimately, neither *Thomas* nor *Terry* advance Petitioners' position. Regarding *Terry*, the plaintiffs there—unlike the Real Parties in Interest here—made no claims under the Amendment, nor did their claims involve health insurance benefits or anything of the like. *Terry*, 336 P.3d at 953-54. Petitioners even concede this expressly: "The issue before the Court in *Terry* was whether appellants … were employees within the meaning of NRS 608.010[.]" Petition at 14.

This Court in *Terry* stated that the Amendment's definition of "employee" may be instructive "because of the overlap between [it] and N.R.S. Chapter 608," but did not control the analysis for the basic reason that the claims were not made under its right of action or its terms. *Terry*, 336 P.3d at 955. It merely looked to the Amendment's definition of "employee" to discern if it aided in resolving the particular question before the Court, while recognizing the difference between claims brought under the Amendment and claims brought otherwise. *Id.*

As for *Thomas*, this Court was asked to determine whether the statutory exceptions to the required minimum wage (in that instance, for taxi drivers) found in N.R.S. 608.250(2) survived the enactment of the Minimum Wage Amendment, which

expanded the classes of workers afforded minimum wage protections. *Thomas*, 327 P.3d at 520. The Court understandably ruled the statutory exceptions invalid on the clearest available basis: the Amendment made no such exceptions—in fact, provided for different and narrower exceptions—and therefore it repealed the previous, statutory exceptions. *Id.* at 522.

There was no announced "rule" there routing all Minimum Wage Amendment claims through 608.250 absent express conflict. The rule in *Thomas*, rather, was the one it applied: *inclusio unius exclusio alterius.* That, plus a good dose of constitutional supremacy, is what determined the result in that appeal, and Petitioners have far overshot the mark in their conception of *Thomas*' reach and meaning.

D. Claims Made Pursuant To The Minimum Wage Amendment Do Not "Arise Under" Statute

In plain terms, a suit "arises under the law that creates the cause of action." *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 8-9, 103 S. Ct. 2841, 2846 (1983) (quoting *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S. Ct. 585, 586 (1916)). Moreover, any notion that claims under the Minimum Wage Amendment "arise under" anything other than its own terms are defeated, more or less *ab initio*, by the simple precept of constitutional supremacy. It is the constitutional text which forms the backbone of all state law, not the statutes which precede or succeed enactment of constitutional provisions. If *Thomas* sheds little light on whether Minimum Wage Amendment-based claims should look to N.R.S. 608.250 and 608.260 at all, it had plenty to say about the tenet of constitutional supremacy. As this Court made clear there, "[i]t is fundamental to our federal, constitutional system of government that a state legislature 'has not the power to enact any law conflicting with the federal constitution, the laws of congress, or the constitution of its particular State.'" *Thomas*, 327 P.3d at 520-21 (citing *State v. Rhodes*, 3 Nev. 240, 250 (1867)). Further, "[t]he Nevada Constitution is the supreme law of the state, which controls over any conflicting statutory provisions." *Clean Water*

Coal. v. The M Resort, LLC, 255 P.3d 247, 253 (Nev. 2011) (citing *Goldman v. Bryan*, 106 Nev. 30, 37, 787 P.2d 372, 377 (1990)).

It is, unquestionably, therefore, statutes that give way and yield, interpretively, to the state constitution, not the other way around. Constitutional rights, provisions, and measures do not "arise under" statutes. Just as the Court in *Thomas* was clear that attempting to make "the Minimum Wage Amendment compatible with N.R.S. 608.250, despite the plain language of the Amendment, would run afoul of the principle of constitutional supremacy," the same is true of Petitioners' argument that the Court should shoehorn the Amendment into 608.260. *Thomas*, 327 P.3d at 521. Although this Court "will construe statutes, if reasonably possible, so as to be in harmony with the constitution," Petitioners reverse that charge and ask this Court not simply to harmonize but to *subordinate* the Amendment to the statutory scheme. *State v. Glusman*, 98 Nev. 412, 419, 651 P.2d 639, 644 (1982) (internal quotations omitted). That cannot be an appropriate method of construing and applying the constitutional text.

E. "Borrowing" A Limitation Period Is Not Appropriate

Every form of Petitioners' argument—even where unspoken and undeveloped—is a form of a *borrowing* analysis. It attempts to answer the question, what should courts do where no express limitation appears in the text of the Minimum Wage Amendment? But the answer to that question, in Nevada, is either to employ N.R.S. 11.220's catch-all provision or, failing that, to characterize the claims at issue as best the Court can and to designate into which of N.R.S. Chapter 11's myriad provisions the action falls. Neither of those approaches results in application of 608.260's two-year limitation for 608.250 claims to the causes of action asserted by Plaintiffs.

1. Borrowing is unnecessary where the Legislature has provided a catch-all limitations period

Limitations-borrowing is a particularly *federal* jurisprudential mechanism, not found in state law. It arose because of gaps left in federal statutes by Congress, where no express limitation was provided in a particular statute and no federal version of a catch-

all limitation had been enacted. It was a manner of gap-filling, but particularly for filling gaps between federal and state law, not *within* state law itself. There is no interpretive analog in Nevada state law jurisprudence.

The practice of borrowing limitations periods from supposedly analogous statutes was long fraught with difficulties—inconsistent, checkerboard interpretations, and burdensome litigation and re-litigation—and eventually the federal judiciary prevailed upon Congress to enact a federal catch-all limitation for statutes without their own express period of limitation. *See Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369, 377-83, 124 S. Ct. 1836, 1842-45 (2004) (discussing the history of the federal borrowing analysis, the problems it created, and the steps taken by the judiciary to alert Congress to the issue, and analysis of the resulting legislation). Congress thereafter enacted 28 U.S.C. § 1658, "a retroactive, uniform federal statute of limitations" applicable to all "federal claims arising under statutes enacted after December 1, 1990" that lacked express limitations under their own terms.[7] *Id.* at 380, 124 S. Ct. at 1844. In other words, Congress did away with the process of limitations-borrowing (at least for post-1990 claims) by enacting a catch-all statute, a provision Nevada has had on its statute books since 1911. As the United States Supreme Court stated in *Jones*, "[t]he House Report accompanying the final bill confirms that Congress was keenly aware of the problems associated with the practice of borrowing state statutes of limitations, and that a central purpose of § 1658 was to minimize the occasions for that practice." *Id*.

Since enactment of the federal catch-all, limitations gaps left by Congress are presumed to be intentional, and to subject federal laws without express limitations to the four-year catch-all found in 28 U.S.C. § 1658. For more than a century, Nevada has had

[7] 28 U.S.C. § 1658 states in pertinent part, "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658(a).

the same catch-all for laws where no express limitation is provided for, like the Minimum Wage Amendment. The drafters of the Amendment are presumed to know the law; this presumption is not even rebuttable. *See Sengel v. IGT*, 116 Nev. 565, 573, 2 P.3d 258, 262-63 (2000) (quoting *Smith v. State*, 38 Nev. 477, 481, 151 P. 512, 513 (1915)). There is no principled reason why it should not, therefore, be presumed that the failure to include an express limitation in the text of the Amendment—even as it created wholly new causes of action—would subject claims arising under its provisions to N.R.S. 11.220 for its limitations period.

2. Even if "borrowing" were appropriate, the proper limitation to consider is that contained in N.R.S. 11.190(2)(c), which is still four years

Petitioners likely believe that if this Court were, in fact, to borrow a statutory limitation for claims made under the Amendment, it would do so with reference to N.R.S. 608.250 and 608.260. But this is not correct in any event.

In deciding to pay Plaintiffs below the upper-tier constitutional hourly wage, Petitioners took on an obligation to provide qualifying health insurance to those employees so paid. Plaintiffs are claiming that Petitioners failed in that obligation: Petitioners did not provide health insurance, and the benefits they offered failed to meet legal requirements of health insurance. Petr. Appx. 17-24. Even if this Court looks for a limitation where none has been provided, and avoids application of the catch-all in N.R.S. 11.220, the appropriate characterization of the claims made below is as an action on an obligation they failed to meet under the Amendment. This is a type of unjust enrichment, sounding in *quantum meruit* or "what it is worth," here measured by the dollar Petitioners retained at the expense of Plaintiffs for every hour worked. N.R.S. 11.190(2)(c), regarding an "action upon a contract, obligation or liability not founded upon an instrument in writing," sets a limitation period on such claims at four years. *See* N.R.S. 11.190(2)(c); *see also Sorenson v. Pavlikowski*, 94 Nev. 440, 444, 581 P.2d 851, 854 (1978) ("In Nevada, since we have no statute of limitations expressly governing actions to redress wrongs to this type intangible property interest [i.e., interference with

intangible property interests], we are relegated to N.R.S. 11.190(2)(c) …").

F. The Remedial Nature of the Amendment

The Minimum Wage Amendment altered Nevada's fundamental law on minimum wages in Nevada, and was designed to function (and be interpreted) in a remedial manner.[8] *See Thomas*, 327 P.3d at 522 ("Respondents also argue that, despite the intent expressed by the text of the Amendment, the voters actually intended to merely raise the minimum wage, not to create a new minimum wage scheme. But respondents do not adequately explain their basis for deriving such intent.").

Now, "voter intent" in matters of ballot initiatives, beyond a certain point, is never much more than a projection of what one wants to see. "To seek the intent of the provision's drafters or to attempt to aggregate the intentions of Nevada's voters into some abstract general purpose underlying the Amendment, contrary to the intent expressed by the provision's clear textual meaning, is not the proper way to perform constitutional interpretation." *Thomas*, 327 P.3d at 522. That does not mean that the Court cannot make obvious judgments about the purposes of the Amendment. In the case of the Nevada Clean Indoor Air Act of 2006, passed by voter initiative, the Court did not need to gather the opinions of hundreds of thousands of individual voters to recognize that the purpose of the measure was to protect Nevadans from the deleterious effects of second-hand smoke. *See Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 507, 521-22, 217 P.3d 546, 550, 559 (2008). Here, the clear intent of the Minimum Wage Amendment was to raise the wages of Nevada's lowest-paid workers, to encourage the provision of low-cost, comprehensive health insurance benefits to those

[8] This Court, in *Terry*, described N.R.S. 608.250 as a "remedial statute," in a manner that indicated it would liberally interpret and enforce the rights and protections such statutes provided. *Terry*, 336 P.3d at 954. There is no reason, therefore, to think that where a popularly-enacted constitutional amendment providing even greater protections for the same beneficiaries—minimum wage workers—the Court's vigilance in this regard would not be substantially increased.

workers, and, obviously, to make minimum wage rights constitutional rights in this state.

It goes almost without saying that the "object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it." *State v. Hallock*, 16 Nev. 373, 380 (1882). As this Court put it in *Thomas*, "[t]he goal of constitutional interpretation is to determine the public understanding of a legal text leading up to and in the period after its enactment or ratification." *Thomas*, 327 P.3d at 522 (quoting *Strickland v. Waymire*, 126 Nev. Adv. Op. 25, 235 P.3d 605, 608-09 (2010)). In interpreting the Amendment, it is not plausible that the public understanding of its terms and intent was that the beneficiaries of this remedial act would not receive the benefit of an expansive interpretation both of their rights under the Amendment and in the opportunities for seeking relief for its violation.

In other words, if the Court has any doubts regarding how to divine the appropriate period of limitations for claims made under the Minimum Wage Amendment, it is necessary to consider the fundamental object of the provision and the equities it seeks to establish. In such instances, in order to effectuate the purpose and intent of the Amendment, "where there is doubt as to which statute of limitations should apply, the longer statute should be chosen." *Gabriel*, 368 Pa. Super. at 397 (citing *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 240-241, 259 S.E.2d 1, 8 (1979); 51 Am. Jur. 2d Limitation of Actions § 63). This approach is also in keeping with the consideration of equity inherent in this Court's statute of limitations decisions in *Alper v. Clark County*, 93 Nev. 569, 571 P.2d 810 (1977), and *White Pine Lumber Co. v. City of Reno*, 106 Nev. 778, 801 P.2d 1370 (1990), where the Court understood its limitations analysis to take aspects of fairness to the beneficiaries of the legal provision in question.

G. N.R.S. 11.220's Four-Year Catch-All Limitations Provision

N.R.S. 11.220 prescribes the period when no other limitation appears either in the legal provision authorizing suit or is otherwise expressed specifically in N.R.S. Chapter 11. N.R.S. 11.220; *see also Hanneman v. Downer*, 110 Nev. 167, 180, 871 P.2d 279

(1994) (applying catch-all limitation provisions where no specific period has been enacted by legislature); *Nevada Land & Mortgage Co. v. Lamb*, 90 Nev. 247, 249, 524 P.2d 326, 327 n. 2 (1974) (same). This is, in fact, the precise situation for which 11.220 exists—a *sui generis* legal provision, with claims that cannot be made under any other law, but for which no limitation is expressly provided. If a limitation is to be applied to Plaintiffs' claims, it should be four years.

V. CONCLUSION

For the reasons set out herein, the Petition should be denied and the Court should determine that if claims brought under the Minimum Wage Amendment are subject to limitation, the four year period pursuant to N.R.S. 11.220 is the most appropriate under law.

Respectfully submitted, this 21st day of October, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager, Esq.*

DON SPRINGMEYER, ESQ. (NV Bar No. 1021)
dspringmeyer@wrslawyers.com
BRADLEY SCHRAGER, ESQ. (NV Bar No. 10217)
bschrager@wrslawyers.com
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120-2234
(702) 341-5200 / Fax: (702) 341-5300

Attorneys for Real Parties in Interest

CERTIFICATE OF COMPLIANCE

1. I certify that this Answer complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, size 14, Times New Roman.

2. I further certify that this Answer complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Petition exempted by N.R.A.P. 32(a)(7)(C), it contains 6,575 words.

3. Finally, I hereby certify that I have read this Answer, 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 Answer complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the Answer 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 Answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 21st day of October, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager, Esq.*

DON SPRINGMEYER, ESQ. (NV Bar No. 1021)
dspringmeyer@wrslawyers.com
BRADLEY SCHRAGER, ESQ. (NV Bar No. 10217)
bschrager@wrslawyers.com
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120-2234
(702) 341-5200 / Fax: (702) 341-5300

Attorneys for Real Parties in Interest

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2015, a true and correct copy of the foregoing **REAL PARTIES IN INTEREST'S ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

By: */s/ Christie Rehfeld*
Christie Rehfeld, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP