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. 67631

District Court Case No. A-14-701633-C

District Court Dept. No. XVI

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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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: November 19, 2015

Respectfully submitted,

/s/ Montgomery Y. Paek, Esq.

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I. INTRODUCTION

In their Answer, Real Parties in Interest ask this Court to discard its holding in *Thomas v. Nevada Yellow Cab Corp*., 130 Nev. Adv. Op. 52 (2014) and announce a new standard – that all new laws "stand alone" or are *sui generis* from any existing laws. Although both NRS 608 and Article XV, Section 16 of the Nevada Constitution (the "Minimum Wage Amendment" or "MWA") govern Nevada's "minimum wage", Real Parties in Interest insist that the MWA's minimum wage should be treated as a "self-contained, self-executing" law and should not be harmonized with NRS 608. Thus, Real Parties in Interest retreat as far as possible from the analysis *Thomas* which directly addressed how the MWA should be reconciled with the existing minimum wage statutes in NRS 608.

In *Thomas*, this Court already provided the framework by which a court can analyze conflicting laws in general as well as whether the MWA impliedly repealed NRS 608.250(2) in specific. *Thomas* at 520-522. This Court made clear that to construe existing minimum wage law, such as the exceptions in NRS 608.250(2), with the MWA, the "presumption is *against* implied repeal *unless the enactment conflicts* with existing law to the extent that both cannot logically coexist." *Thomas* at 521. (Emphasis added). Thus, only when there is an expression of a term, such as the "very specific exemptions" to the definition of

employee in the MWA, which conflicts to the extent of being "irreconcilably repugnant" with NRS 608.250(2), will a Constitutional Amendment be held to impliedly repeal that statute. Instead of *expression unuius est exclusion alterious*, however, Real Parties in Interest demand that *silence* in the MWA is the equivalent of a conflicting term. Due to this silence, Real Parties in Interest demand ignorance of all existing minimum wage statutes in NRS 608 in favor of more generalized statutes in NRS 11. However, this Court has already held that a silent term in a Constitutional Amendment does not arise to the level of irreconcilable repugnancy and does not abolish existing statutes that provides laws on the same subject matter. *Mengelkamp v. List*, 88 Nev. 542, 545-546 (1972). Accordingly, this Court should grant Petitioners' Petition for Writ of Mandamus or Prohibition ("Petition").[1]

II. FACTS

Like *Thomas*, the issue before the Court is a purely legal one: is the statute of limitations for Nevada minimum wage claims under the MWA two years? Real Parties in Interest do not deny that the language of the MWA is completely silent as to a statute of limitations and makes no statement regarding the existing 2-year statute of limitations in NRS 608.260. **Real Parties in Interest's Answer to**

[1] Petitioners originally also requested alternative relief in the form of a Motion to Consolidate, however, that Motion was denied and is now moot pursuant to this Court's order on September 16, 2015.

Petition for Writ of Mandamus or Prohibition ("Answer") on file herein and incorporated by this reference at 4-6. Instead, Real Parties in Interest point this Court to the MWA's provision of *remedies* in a desperate attempt to manufacture a conflict where one does not exist. An honest review of the MWA and NRS 608.250 reveals quite simply that there is no conflicting language regarding the *statute of limitations*. ***Id.* at 4:8-18.**

While the district court held that the "most plausible applicable limitations provision shall be the four-year catch-all limitations period for civil actions pursuant to NRS 11.220." Real Parties in Interest do not dispute that the district court performed no analysis under this Court's holding in *Thomas*. ***Id.* at 6:3-11.** Thus, the district court did not make any finding that the statute of limitations in NRS 608.260 conflicted with or was irreconcilably repugnant with the MWA's silence on the statute of limitations. ***Id.***

As to the procedural history, Real Parties in Interest do correctly note that this matter is in a different procedural posture from the recent matter of *Williams, et al., v. Claim Jumper Acquisition Co. LLC*, Case No. 66629, which arose from a denial of plaintiffs' motion for summary judgment as to the statute of limitations as Petitioner's Petition involves both a denial of defendants' motion for summary judgment and a granting of plaintiffs' countermotion for summary judgment. ***Id.* at 6:17-7:1.** As with Real Parties in Interest, Petitioners agree that the statute of

limitations under the MWA is an important issue of law requiring clarification and thus, appropriate for review through a petition for writ of mandamus or prohibition. ***Id*. at 6:13-16.**

III. LEGAL ARGUMENT

A. Writ Of Mandamus Or Prohibition Should Be Granted.

The parties do not dispute that a writ of mandamus and writ of prohibition may be granted when an important issue of law requires clarification. *Smith v. District Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997); *Walters v. Eighth Judicial Dist. Court*, 2011 Nev. LEXIS 82, 7-8, 263 P.3d 231, 233-234 (2011). Further, this Court has interpreted statute of limitations issues under a writ of mandamus. *State ex rel. DOT v. Public Emples. Ret. Sys. of Nev.*, 120 Nev. 19, 21, 83 P.3d 815, 816 (2004). Accordingly, this Court can clarify the statute of limitations through a grant of Petitioners' Petition.

B. The MWA's *Silence* On The Statute Of Limitations Is Not The Same As A *Conflicting* Term That Would Be Irreconcilably Repugnant With NRS 608.260's 2-Year Statute Of Limitations.

The catch-all limitation in NRS 11.220 urged by the Real Parties in Interest applies only when the limitation period has not been "expressly furnished." **Answer at 3:7-10.** Thus, unlike in *Thomas*, the MWA here is *silent*, not *conflicting* with the statute of limitations provided in NRS 608.260. Accordingly this Court's decision in *Mengelkamp v. List*, 88 Nev. 542, 545-46, 501 P.2d 1032,

1034 (1972), cited in *Thomas*, holding that a *silent* term in the Nevada Constitution does not create conflict with existing statutes is dispositive.

In *Mengelkamp*, the petitioners Mengelkamps were a 19-year old and 18-year old who asked the Court to place their name on election ballots for State Senator and Assemblyman despite a requirement under NRS 218.010 that candidates be 21-years old at the time of election. *Mengelkamp* at 544. The Court found that the Nevada Constitution was "silent as to age qualifications" of candidates and the petitioners contended that the Constitution provided "not merely the minimum but the maximum qualifications for the offices thereby created." *Id*. at 544-545. Specifically, the petitioners relied on an Amendment to the Nevada Constitution which expanded voting rights to 18-year olds as follows:

> Section 1. *Right to vote; qualifications of electors; qualifications of nonelectors to vote for President, Vice President of United States.* All citizens of the United States (not laboring under the disabilities named in this constitution) of the age of eighteen years and upwards, who shall have actually, and not constructively, resided in the state six months, and in the district or county thirty days next preceding any election, shall be entitled to vote for all officers that now or hereafter may be elected by the people, and upon all questions submitted to the electors at such election; provided, that no person who has been or may be convicted of treason or felony in any state or territory of the United States, unless restored to civil rights, and no idiot or insane person shall be entitled to the privilege of an elector. There shall be no denial of the elective franchise at any election on account of sex. The legislature may provide by law the conditions under which a citizen of the United States who does not have the status of an elector in another state and who does not meet the residence requirements of this section may vote in this state for President and Vice President of the United States.

Id. at 545 *citing* Art. 2, § 1, of the Nevada Constitution. Thus, the petitioners urged the Court to hold NRS 218.010 unconstitutional because the legislature could "not add to or subtract from" the requirements in the Amendment which were silent as to the age. *Id.* Further, like in the present matter, the petitioners also suggested that NRS 218.010 was repealed by implication when the people of Nevada voted to amend the Nevada Constitution in 1971 and expand voting rights to include 18-year-olds. *Mengelkamp* at 546.

The Court in *Mengelkamp* was not persuaded by these arguments. The Court held that "[t]he constitution defines the qualifications of an elector, but the legislature may prescribe reasonable qualifications for an elector who may desire to become a candidate, providing such qualifications *are not in conflict* with some constitutional provisions." *Id*. citing *Riter v. Douglass*, 32 Nev. 400, 435, 109 P. 444, 455-456 (1910). (Emphasis added). Thus, consistent with the analysis in *Thomas*, this Court held that a "silent" term in a Constitutional Amendment can be governed by other statutes as long as they are not in "conflict" with the Constitution. *Id.* Additionally, the Court found that the 1971 Amendment's expansion of voting rights did not repeal the existing NRS 218.010 because "[i]mplied repeal of one law through enactment of another does not occur, *save when one is irreconcilably repugnant to the other*, or by some other means intent to abrogate the earlier law is made evident." *Id*. at 545-546. (Emphasis added).

In this matter, Real Parties in Interest ask this Court to abrogate NRS 608.260 based on the silence of the MWA and the expansive remedies provided therein. However, as in *Mengelkamp*, new expansive rights, such as expanding the voter age to 18-years old does not, in and of itself, abolish existing statutes regarding elector age qualifications. Again, the analysis focused on conflict and, like in *Thomas*, whether or not those laws could be harmonized.

Real Parties in Interest also argue for two different minimum wages in Nevada – the NRS 608.250 minimum wage and the MWA minimum wage. New laws do not, however, automatically stand-alone from existing laws. Again, *Mengelkamp* is analogous. Under Real Parties in Interest's analysis, although the Nevada Constitution was silent as to the age of candidates, when the voters of Nevada mandated that 18-year olds could now vote, it created an expansive and stand-alone right that would make leave "nothing remaining" of NRS 218.010's 21-year old age requirement for candidates. After all, even NRS 218.010 required that a candidate must first be a "qualified elector" or voter to be a candidate and the Amendment had now expanded an "elector" to include younger voters. Since the MWA expanded that right to 18-year olds, NRS 218.010's additional requirement that a candidate for state senator or assemblyman must also "[a]t the time of election has not attained the age of 21 years" was surely meaningless in the wake of expanding the right to vote down to 18-year olds who should be able to

run for the very office they could now vote for. This is not what the Court found in *Mengelkamp* and it is not what the Court should find here.

This example shows why the *Thomas* method of harmonizing laws unless there is irreconcilable repugnancy is superior to such a bootstrapping analysis. To hold otherwise is absurd as there is nearly limitless potential to argue that new laws should always be treated as stand-alone. Accordingly, the MWA's silence on the statute of limitations does not abrogate the 2-year statute of limitations in NRS 608.260.

C. The MWA Is Not *Sui Generis* As There Is An Existing Statutory Scheme Governing Minimum Wage in NRS 608.

To avoid the impossibility of reconciling a different statute of limitations with the standard in *Thomas*, Real Parties in Interest ask this Court to join them on several alternative jaunts that would make all new laws irreconcilable with existing laws. Real Parties in Interest argue that the MWA's silence on statute of limitations cannot be reconciled with NRS 608.260's 2-year statute of limitations because the MWA's additional remedies mean that a claim for minimum wage under the MWA is no longer governed by any provision of NRS 608. **Answer at 7:10-20.** In support of this argument, Real Parties in Interest argue that NRS 608.260 is only exclusive to "608.250 actions" while "[c]laim under the Amendment [MWA] are self-contained, self-executing, and stand-alone" or *sui generis*. **Answer at 9:15-16 and 8:3-5.**

Real Parties in Interest cite no applicable Nevada case law for their *sui generis* argument. Instead, Real Parties in Interest completely rely on a United States District Court for the Eastern District of Pennsylvania , *Woody v. State Farm Fire & Cas. Co.*, 965 F. Supp. 691, 693 (E.D. Pa. 1997), in which the court found that the Pennsylvania bad faith statute was *sui generis* requiring a 6-year catchall rather than the 2-year tort statute of limitations. However, a quick shepardizing of this case shows that the *Woody* court noted that its 6-year statute of limitations was overruled when the Pennsylvania Superior Court held that a 2-year statute of limitations applied. *Jodek Charitable Trust, R.A. v. Vertical Net Inc.*, 412 F. Supp. 2d 469, 482 and n21 (E.D. Pa. 2006) citing *Ash v. Cont'l Ins. Co.*, 2004 PA Super 424, 861 A.2d 979 (Pa. Super. Ct. 2004). Moreover, the underlying *Gabriel v. O'Hara* case upon which *Woody* relies is not on point here because Pennsylvania did not have any existing statutory scheme for unfair trade similar to the Unfair Trade Practices and Consumer Protection Law (UTPCPL). *Gabriel v. O'Hara*, 368 Pa. Super. 383, 394 (Pa. Super. Ct. 1987). Thus, Real Parties in Interest present no applicable law that would compel this Court to overturn the holding in *Thomas*.

Here, unlike in *Thomas*, the MWA provides no conflicting terms with NRS 608. Instead, the MWA is silent as to any statute of limitations. Unlike in *Gabriel*, which was relied upon for the overturned ruling in *Woody*, the "Minimum Wage" in Nevada has an existing statutory scheme in NRS 608.250 *et seq*. The statutes in

NRS 608.250, 608.260, 608.270, 608.280 and NRS 608.290 have governed the minimum wage in Nevada since 1965, some 41 years prior to the enactment of the MWA. NRS 608.260's 2-year statute of limitations applies to "a civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage." NRS 608.260. Under the Nevada Labor Commissioner's regulations in NAC 608.140, the Nevada Labor Commissioner requires an employer to keep 2-years of records of wages as required by NRS 608.115. Employers have relied on this 2-year record keeping requirement since the enactment of NRS 608.115 in 1975. Thus, there are ample examples of still-existing minimum wage statutes and regulations that support a 2-year statute of limitations on minimum wage which employers have relied on for decades.

In reviewing the exemptions to the MWA, the Court in *Thomas* had to determine whether or not the MWA's exemptions conflicted with those found in NRS 608.250(2). If the MWA was *sui generis* – which it was not due to the existence of minimum wage laws in NRS 608.250 *et seq*. – the Court would not have had to attempt any harmonization. This view, however, would lead to absurd results, as it would stand for the proposition that all new laws are *sui generis* unless they specifically cite all potential existing laws that they could intersect with. Accordingly, Real Parties in Interest's argument for a *sui generis* MWA is not supported by the circumstances of this case, the case law cited or logic.

D. The MWA Is Not Irreconcilably Repugnant With NRS 608.260 And Can Be Harmonized Despite The MWA's Remedies.

Real Parties in Interest do not want to engage in the *Thomas* analysis because they do not have any language to cite from the MWA that conflicts with the 2-year statute of limitations in NRS 608.260. Instead, Real Parties in Interest try to present a conflicting remedies argument. Real Parties in Interest correctly note that the MWA's provision of "back pay, damages, reinstatement or injunctive relief" is more expansive that that found in NRS 608.260. **Answer at 7:28-8:3.** In support of their argument for implied repeal of remedies, Real Parties in Interest also cite the Nevada Attorney General Opinion No. 2005-04. ***Id*. at 10:17-11:5.**

Again, Real Parties in Interest provide this Court with authority that is not on point or dispositive. As a preliminary matter, the issue of conflicting remedies is not the subject of the Petition. Further, the Nevada Attorney General never addressed the statute of limitations under NRS 608.260. His opinion was strictly limited to the subject of the existing civil remedy in NRS 608.260. ***Id*. at 11:1-5.**

As to the subject of remedies, the Nevada Attorney General's analysis is not entirely correct. Although the MWA's remedies include additional categories of relief not specifically listed in NRS 608.260, the existing remedy in NRS 608.260 is consistent, not conflicting, with the remedies in the MWA. NRS 608.260 provides that an employee may "recover the difference between the amount paid to the employee and the amount of the minimum wage." NRS 608.260. This

"difference" is the same as the "back pay" remedy in the MWA which applies to the vast majority of minimum wage actions. As back pay is undefined in the MWA, NRS 608.260 provides a still-valid definition that is instructive on calculating this form of damages for minimum wage.

The remaining "damages, reinstatement or injunctive relief" are not inconsistent with NRS 608.260 but are logically applicable to whistleblower cases in which injunctive relief may be sought. In such a case, there was nothing in the language of NRS 608.260 that would prevent a plaintiff from bringing a Nevada Rule of Civil Procedure 65 injunctive relief claim along with their NRS 608.260 claim for back pay. An injunctive relief action could provide the additional remedies of "damages" in the form of front pay, as well as "reinstatement or injunctive relief" for the whistleblower to regain their employment. Thus, although the MWA does express additional remedies, those new remedies are not necessarily in conflict with what existed in NRS 608.260.

In reality, any such injunctive relief whistleblower cases are rare. Most modern wage and hour cases do not arise from a case where an employee is being paid under the published minimum wage rate and then is fired for complaining about the wrong rate on the first received paycheck. Instead, most modern minimum wage suits arise out of a legal theory of unpaid time after the fact that is developed by legal counsel such as off-the-clock work, donning and doffing, or, as

it is here, offering health insurance to pay a lower rate. These suits are sometimes brought long after an employee has separated from the company as was the case here with Real Party in Interest Diaz and the plaintiffs' understanding of their claims arise completely from consultation with counsel, not any inherent knowledge, as was the case for all of the Real Parties in Interest in this matter. Thus, the applicable remedy here, as is the case with most non-whistleblower scenarios, is money damages in the form of back pay which would be calculated in the manner described in NRS 608.260.

Real Parties in Interest's twisted contortion of the MWA's remedies is a smokescreen for what they are lacking – any MWA language regarding the statute of limitations. In fact, if the MWA expressly stated that the statute of limitations was 4 years - which it does not – the Real Parties in Interest would whole-heartedly agree that *Thomas* is on point. Instead, Real Parties in Interest bootstrap the remedies which would make the irreconcilably repugnant analysis meaningless as any differences in new laws could always be used to argue that old laws are supplanted. There is no reason to ignore NRS 608.260's statute of limitations because of additional remedies in the MWA. Accordingly, the remedies argument does not make the MWA irreconcilable with the 2-year statute of limitations.

E. There Is No "Borrowing" Analysis As The Statute Of Limitations For The Minimum Wage Is In NRS 608.260 And Utilizing NRS 11.220 Would Also Be "Borrowing" Under That Analysis.

As with the *sui generis* argument above, Real Parties in Interest's cite of federal "borrowing" is out of context and used to mislead. In the effort to scramble as far as they can from the concept of harmonizing laws, Real Parties in Interest reach out to the passage of federal statutes which is not applicable here.

Real Parties in Interest rely upon the case of *Jones v. R. R. Donnelley & Sons Co.* for its "borrowing" argument. In *Jones*, the United State Supreme Court examined what statute of limitations should apply to 42 USC § 1981 which did not contain a statute of limitations. *Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369, 371 (2004). In that matter, however, it was "undisputed" that the only claims were for violations found in 42 USC § 1981. *Id*. at 373. As such, there was no other laws that also governed violations of 42 USC § 1981 claims. Further, in *Jones*, the Court discussed the problem of "borrowing" for *federal* law claims due to the Congress' failure to enact a uniform statute of limitations applicable to federal causes of action. *Id*. at 377. Thus, "borrowing" is a federal law concept that is unique to federal statutes.

Here, unlike in *Jones*, no federal claims are at issue. Further, unlike 42 USC § 1981 in *Jones*, there are existing laws governing the minimum wage in NRS 608.250 *et seq*. Thus, the "borrowing" analysis is inapplicable by the facts of this matter.

Further, the Real Parties in Interest's arguments are very disingenuous and circular as any application of NRS 11.220 would be just as much "borrowing" outside the MWA as the application of NRS 608.260. Real Parties in Interest are not truly arguing that the MWA is a stand-alone law for which no other laws are required. Instead, they are asking this Court to ignore existing minimum wage laws in NRS 608 in favor of more general laws such as those governing limitations in NRS 11. This argument, however, is prevented by the plain language of NRS 11.220 which states that it applies to "[a]n action for relief, not hereinbefore provided for. . ." NRS 11.220. "Not hereinbefore provided for" references the "periods of limitation" in NRS 11.190 et seq. NRS 11.190 begins that it provides statute of limitations "unless further limited by specific statute." Thus, NRS 11.220 cannot apply to an action that is "limited by specific statute" as it is here by NRS 608.260.

IV. CONCLUSION

For all of the reasons stated in their Petition and above, this Court should grant the Petition and compel the district court to apply a two-year statute of limitations.

Dated: November 19, 2015

Respectfully submitted,

/s/ Montgomery Y. Paek, Esq.

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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:

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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.

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Dated: November 19, 2015

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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 November 19, 2015, I served the within document:

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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/s/ Erin J. Melwak
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